

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**July 26, 2016 at 3:00 p.m.**

- 
1. **16-21305-E-13      RODERICK/ROSEMARIE TAPNIO MOTION TO CONFIRM PLAN**  
**PGM-1                      Peter Macaluso                      6-9-16 [50]**

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 6, 2016. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

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

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

Roderick A. And Rosemarie A. Tapnio ("Debtor") filed the instant Motion to Confirm the First Amended Plan on June 9, 2016. Dckt. 50.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 21, 2016.

**July 26, 2016 at 3:00 p.m.**

**- Page 1 of 91 -**

Dckt. 69. The Trustee objects to the plan on the following grounds.

- 1) The Debtor's plan relies on a Motion to Value Collateral of FCI Lenders. The court denied the motion on July 19, 2016.
- 2) The Trustee believes that the Debtor intended to file a Supplemental Schedule D rather than an Amended Schedule D, but the form does not have such a provision. The Debtor filed an Amended Schedule D and listed only one creditor, Charles Lomeli, Tax Collector. Dckt. 48, page 12. Therefore, the plan may not comply with 11 U.S.C. §1325(a)(1).
- 3) The Debtor has failed to file a Rights and Responsibilities.
- 4) The Plan is not the Debtor's best effort.
  - A. The Debtor is over the median income and proposes plan payments of \$450.00 for 2 months, then \$270.00 for 58 months, with a 0% dividend to unsecured creditors. Debtor has disposable income of \$160.47 for 60 months, so \$9,628.00 should be paid to unsecured claims.
  - B. The Debtor's 2015 tax return reflects a refund of \$6,621.00. The Debtor has failed to propose to pay any future tax refunds into the Plan.
  - C. The Debtor's Schedule I lists VA benefits in the amounts of \$731.00 for Debtor #1 and \$2,067.00 for Debtor #2. The Debtors fail to list this income on Official Form 122C-1.
  - D. The Debtor lists a Household of 7 on Form 122C-1, however according to amended Schedule J, Debtor's wife's mother and Debtor's husband's mother do not live with the Debtors. Therefore, the Household should be 5 and more income should be available to unsecured creditors.
  - E. The Debtor's expenses on amended Schedule J appear to be excessive and not reasonably necessary for the maintenance and support of the Debtor or the Debtor's dependents
    - I. \$1,800.00 for food for a family of 5
    - ii. \$720.00 for childcare and children's education costs (ages 13, 17, and 23).
    - iii. \$515.23 for medical and dental, although the Debtor lists a deduction on Schedule I for insurance.
    - iv. \$900.00 for transportation, the Debtors both commute from Travis, California to Vacaville, California.

- v. \$757.00 for life insurance.
  - vi. \$578.00 for retirement taxes for Debtor #1 (42% of retirement income).
  - vii. \$991.00 for retirement taxes for Debtor #2 (33% of retirement income).
  - viii. \$600.00 for support of the Debtor's mother and Debtor husband's mother and Debtor wife's mother.
- F. The Debtor's monthly disposable income listed on Amended Schedule J is \$235.00, however based on Debtor's income on amended Schedule I and expenses on Amended Schedule J, the actual monthly disposable income is \$424.50.
- G. The Debtor lists a deduction of \$2,500.00 on Schedule I as "Required repayments of retirement fund loans." Based on Debtor Rosemarie Tapnio's pay advice, Debtor actually has a deduction for a TSP loan in the amount of \$1,300.00 per month and a TSP savings in the amount of \$1,300.00. The Debtor has not disclosed the amount of the loan or when it will be repaid. The plan payments do not increase after the retirement loan is repaid, and Debtor has not furnished evidence to show why the repayment of this loan is reasonably necessary.
- H. The Debtor's previous Schedule F lists Military Star Program and Capitol One as unsecured creditors. The Debtor's amended Schedule F lists only Orkin as an unsecured creditor.

## **PARTNERS FOR PAYMENT RELIEF DE II, LLC'S OBJECTION**

Partner's for Payment Relief, DE II, LLC ("Respondent") filed an Objection on July 7, 2016. Dckt. 83. Respondent objects to the Plan on the following grounds:

1. The property is not property of the estate and cannot be reorganized pursuant to 11 U.S.C. §359(b)(3). Under the plain language of the Bankruptcy Code the automatic stay continues in effect only until the time the case is dismissed. *Matter of Solar Equip. Corp.*, I.D. 19 B.R. 1010, 1011 (W.D. LA 1982). The instant Petition was dismissed on March 31, 2016. Movant acquired title to the Property by foreclosure sale on April 4, 2016 while the property was not property of the estate and while the stay was terminated. The Order vacating the dismissal of the Property was not entered until April 5, 2016. Respondent is the owner of the Property.

Additionally, that notwithstanding when the Trustee's Deed was recorded, Respondent asserts that title was transferred before the dismissal was vacated and perfected under California law as provided in California Civil Code § 2924.1 et seq.

2. Debtors' Plan does not comply with Chapter 13 of Title 11 of the United States Bankruptcy Code.

A. If the Sale is invalidated, then the Plan modifies the rights of a creditor whose claim is secured only by a security interest in real property that is Debtors' principal residence in violation of 11 U.S.C. §1322(b)(2). Respondent has not yet had an opportunity to conduct an appraisal of the Property. Until the value of the Property is determined, or an adversary proceeding is brought forth, the Debtors' Chapter 13 Plan must provide for ongoing monthly mortgage payments to Respondent.

B. The Debtors' Plan does not provide for cure of the pre-petition arrears owed to Respondent. The Plan does not meet the full value requirement and fails to satisfy 11 U.S.C. §1325(a)(5)(B)(ii). The pre-petition arrears owed to Creditor are no less than approximately \$114,060.54 which will be reflected on Respondent's Proof of Claim. Accordingly, Debtors will be required to amend their Plan to fully provide for the pre-petition arrears owed to Creditor.

C. Debtors' Plan does not provide for the prompt cure of pre-petition arrears required under 11 U.S.C. §1322(d). In order to cure the Respondent's pre-petition arrears in sixty (60) months as proposed, Debtors' monthly plan payment to Respondent must total no less than \$1,901.09.

D. The Debtors' Plan is not feasible because the Debtors' monthly income does not support the required Plan payment. Pursuant to Debtors' Schedule J, Debtors have - \$2,177.00 in net income each month to contribute to their Plan. Additionally, Debtors provide for a monthly mortgage payment of \$1,673.00, which is likely only sufficient to include the post-petition monthly mortgage payment of \$1,673.00, which is likely only sufficient to include the post-petition monthly mortgage payment owed to the senior lien holder.

E. Debtors' Plan was not filed in good faith. Bad faith within the Chapter 13 context is measured by the totality of circumstances. *In re Leavitt*, 171 F.3d 1219, 1224(9th Circ. 1999); see also *In re Eisen*, 14 F.3d 469,470 (9<sup>th</sup> Circ. 1994). The absence of sufficient income to fund a feasible plan strongly suggests bad faith. *In re Kollar*, 356 B.R. 657 (Bankr. M.D. Fla. 2006); *In re Nealen*, 407 B.R. 194, 201. Thus the Plan should not be confirmed.

## **DEBTORS' REPLY TO TRUSTEE'S OPPOSITION**

The Debtor filed a Reply to both Trustee's Opposition to Debtors' Motion to Confirm First Amended Plan and Payment Relief DE II, LLC's Opposition on July 19, 2016. Dckt. 87. The Debtors also filed Exhibits in Support of the Reply. Dckt. 88. The Debtors reply as follows:

1. The Debtors' Disposable Income of \$424.00 per month, for the term of (60) sixty months, will provide a 2.20% plan, which the Debtor requests be placed in the Order Confirming Plan. Here, the Debtor's corrected plan (as highlighted by the Trustee in this opposition) paying \$424.00 per month, less the \$29.00 Trustee fee, the \$65.00 Attorney fee, less the \$115.00 for the Americredit Class 2 automobile, \$65.00 for property taxes, allows for \$215 per month for

unsecured claims which will provide no less than a 2.20% plan.

2. The balance due to the first deed of trust is \$461,553.77 according to the proof of claim #3. See exhibit "A." The Creditor, to which the motion has been directed, has not opposed the Motion to Value directly, having filed a Motion for Relief From stay, and this Respondent's Objection to Confirmation of Debtors' Chapter 13 Plan.

3. The Debtor has corrected the "clerical error" which only listed the amended creditor in Schedule D.

4. The Debtor has filed the Rights & Responsibilities which provide for fees through the Local Rule.

5. Best Efforts

A. The Debtors have no opposition with paying all income tax refunds into the plan.

B. The Official Form Exemptions VA Benefits

C. The Official form allows for the non-filing spouse to exempt the actual persons that they are supporting in that amount.

D. The expenses that are deducted for food, childcare, education, medical and dental, transportation, life insurance, retirement, and support of the dependant elders are reasonable and necessary.

E. The Debtors have no opposition to increasing the plan payments by the amount of the TSP loan, when the payment is completed, however, the Debtors owe \$15,000, and estimate the payoff will be in (6) six years.

F. The previous Military Star Program and Capitol One are both unsecured claims that were discharged in the prior Chapter 7 case. As such, there are no claims by these creditors.

6. Debtors' Counsel has reason to believe, based on Doc #20160027180, as Recorded on "4/6/2016" at "3:27 PM," as recorded in Solano County. Dckt. 88 Exhibit B. The Creditor provided Exhibit A in support of the Relief from stay, however, the exhibit was not recorded with Solano County. Based on the document, obtained directly from the Solano County Recorder's Office, the April 6, 2016 recording was after the vacating of the dismissal, and in violation of 11 U.S.C. § 362(a), as no court order has yet to have expired, not been granted. Additionally, after obtaining such information, counsel for the Debtor personally called counsel for the Creditor, informed her that her representation to the Court was not candid, and that both her and her client are on notice that such a filing during the term of the automatic stay was, and is a violation of 11 U.S.C. § 362(a), and hereafter section (k).

## **DISCUSSION**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

While the Debtor has made some necessary changes to the Plan in response to the Trustee's objections, the current plan cannot be confirmed..

The Debtor did file the "Rights and Responsibilities" on July 12, 2016. Dckt. 85. The Debtor also corrected the "clerical error" which only listed the only the amended creditor in schedule D. In the Debtors' Response, their attorney clarified that the Debtors would pay \$424.00 per month for the term of (60) months of which \$215.00 of each months payment will be paid towards unsecured claims, which will be paid no less than 2.20% of the plan. The Debtors also state in their response that they have no opposition to paying all income tax refunds into the plan.

However, these changes are more than just mere "scrivener's errors" that can be corrected in the order confirming – the Debtor must file an amended plan that reflects these changes. At this time the plan the Debtor filed states that unsecured claims will be paid no less than 0% and provides for monthly plan payments of \$450.00 for the first (2) two months and \$270.00 for the following (58) fifty-eight months. The plan does not provide for any tax refunds. In total, there are too many corrections to be made in the order confirming.

The Debtors claim that they did not list VA benefits in the amounts of \$731.00 for Debtor #1 and \$2,067.00 for Debtor #2 on Schedule I because the Official Form Exemptions VA Benefits and allows for the non-filing spouse to exempt the actual persons that they are supporting that amount. In the Debtors Schedule C, the Debtors listed these exemptions under CCP 703.140(11)(D)-(E).

CCP 703.140 states:

(A) In a case under Title 11 of the united States Code, all of the exemptions provided by this chapter, including the homestead exemption, other than the provisions of subdivision (b) are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter as follows:

(11) The Debtor's right to receive , or property that is traceable to any of the following:

...(D) A payment, not to exceed twenty-four thousand sixty dollars (\$24,060), on account of personal bodily injury of the debtor or an individual of whom the debtor is a dependent.

(E) A payment for compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

However, the Debtor calls this exemption "Retirement" in Schedule C. Dckt. 20. The Debtor has failed to provide facts or evidence that this income qualifies as exempt under CCP 703.140(11). The

Debtor responded by merely providing a conclusion that it is exempt.

There is also still a dispute as to whether the expenses stated in Schedule J are reasonable and how many individuals are living in the household. According to amended Schedule J, Debtor's wife's mother and Debtor's husband's mother do not live with the Debtors. Therefore, the Household should be 5 and more income should be available to unsecured creditors. Additionally, \$1,800 in food expenses for a family of 5 seems very overinflated. The Debtor provides no explanation as to why and how these expenses are reasonable and necessary. Furthermore, the Debtor makes a mere conclusion that the 7 person household is accurate based on a non-filing spouse. However, this is a joint case. The Debtor fails to provide evidence that these numbers are an accurate depiction of the Debtor's finances.

### **Fundamental Issues of Ownership of Property**

#### **Effect of Foreclosure During Dismissal and Recording of Trustee's Deed After Entry of Order Vacating Dismissal**

Furthermore, there are multiple issues with regard to the Debtor's right to the property which was sold in a non-judicial foreclosure on April 4, 2016. The Debtors' plan relied on the Motion to Value Collateral of FCI Lenders, however, this Motion was denied without prejudice on July 19, 2016. The Debtors need to make changes to the plan to address the effect of this court's ruling on the Motion to Value as well as the Motion for Relief From Automatic Stay filed on June 20, 2016. Dckt. 63.

This court issued an order terminating and vacating the automatic stay to allow Payment Relief DE II, LLC, and its agents, representatives and successors, to exercise its right to obtain possession and control of the real property commonly known as 518 Kinsale Ct., Vacaville, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof. While the Debtors make the argument that the Trustee's Deed Upon Sale was not recorded until this court entered an order vacating the dismissal, the failure of the plan to provide for the Creditor properly while the parties adjudicate the underlying issue makes this plan unconfirmable.

As addressed at the hearing on the Motion to Value and in granting relief from the stay, the court has noted that Respondent is/was the holder of a note secured by the junior deed of trust on the Property. By Debtor's calculations the claim secured by the senior lien exhausts the value of the Property, creating a substantial negative equity for the Debtor – even without considering the obligation that was/is asserted to be owed to Respondent.

For Respondent, it's best case scenario is that it owes overencumbered Property, now has to insure it, secure it, pay the property taxes, service the secured debt, and "ride the market" until the value of the Property exceeds the value of the senior lien by a sufficient amount to warrant the investment.

It appears that Debtor and Respondent have continue to dig a deeper financial hole for each other, increasing legal fees and expenses – which are real costs they are paying out of pocket now. While the situation is tailored made for a solution whereby Debtor can pay a premium for the property because of non-economic attachment to the Property and Respondent can get something now, rather than having to invest further in the overencumbered Property.

Possibly, a rational economic discussion is ongoing after the July 19, 2016 hearing on the Motion

for Relief From the Stay.

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

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

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

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

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

2. [11-23908](#)-E-13 JAMES/LAURA KELLER AMENDED MOTION TO AVOID LIEN OF  
RLG-8 Robert Goldstein BAC HOME LOAN SERVICING, LP  
6-28-16 [\[138\]](#)

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on June 23, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Avoid Judicial Lien is denied without prejudice.**

James and Laura Keller, the Chapter 13 Debtors, ("Debtor") filed a pleading titled "Amended Application to Enter Judgment Voiding Lien of BAC Home Loans Serving LP, and/or Any Servicers or Successors." Dckt. 138. This motion (Fed. R. Bankr. P. 9014) states with particularity the following grounds upon which the requested relief is based:

- A. BAC Home Loans Servicing, LP has a second lien pursuant to a deed of trust recorded on or about March 18, 2008.
- B. The real property subject to the lien is commonly known as 9298 Hallmark Place, Vallejo, California (the "Property").
- C. Debtor confirmed a Chapter 13 Plan on September 3, 2011.

- D. The court granted Debtor's motion to value the secured claim of BAC Home Loans Servicing LP, valuing the secured claim at \$0.00. Order, Dckt. 100.
- E. Debtor's completed their plan and received their discharge on June 6, 2016.
- F. Thereon, Debtor requests the court enter a judgment voiding the lien of BAC Home Loans Servicing LP.

Motion, Dckt. 138.

No Points and Authorities is filed in support of the Motion and no legal basis is asserted for: (1) the court to enter a judgment based on a motion, or (2) the court "voiding" the lien of BAC Home Loans Servicing, LP. Possibly, Debtor believes that it is "obvious" and the court can just fill in the blanks. It is not the court's responsibility to provide pleadings, legal authorities, and documents for parties in their legal battles.

## **ORDER VALUING SECURED CLAIM**

This court has written on several occasions concerning the concept of "lien stripping" in Chapter 13 cases. See *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case); and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013). The process is something more than "debtor valued a secured claim, lien is voided."

On August 29, 2011, the court entered it's order valuing the secured claim of BAC Home Loans Servicing, LP to be \$0.00. The present Motion has been served on both BAC Home Loans Servicing, LP and Bank of America, N.A. BAC Home Loans Servicing, LP was merged into Bank of America, N.A. in July 2011 and no longer exists. Texas Secretary of State Certificate of Merger, dated June 28, 2011. While not named in the Motion as the party against whom relief is requested, Bank of America, N.A. was served with the pleadings. FN.1.

-----  
 FN.1. Proof of Claim No. 16 was filed on May 12, 2011 in this case. The creditor is identified as Bank of America, N.A., not BAH Home Loans Servicing, LP. The name of the entity to which notices and payments are to be sent is listed as BAC Home Loans Servicing, LP on Proof of Claim No. 16. While providing services as a loan servicer, it does not appear that BAC Home Loans Servicing, LP was the creditor having a claim in this bankruptcy case. 11 U.S.C. § 101(10).  
 -----

## **PROCESS FOR OBTAINING A JUDGMENT**

The first issue which arises is that the relief requested by Debtor, the court issuing a judgment voiding the lien of BAC Home Loans Servicing, LP cannot be request by motion. Federal Rule of Bankruptcy Procedure 7001(2) requires that such relief determining the extent, validity, or priority of a lien or other interest in property must be by adversary proceeding. As this court has discussed in *Frazier* and *Martin*, it is not the court "voiding" a lien (as it would pursuant to 11 U.S.C. §§ 544, 547 or 548), but

determining that upon completion of the Chapter 13 plan the full amount of the claim secured by the deed of trust (all \$0.00 of it) has been paid, the completion of the Chapter 13 Plan makes the “contract” therein between the parties final, and by operation of California law a lien for which there is no debt to secure is void.

As this court further discussed in *Martin*, when consumer debtors are left with commencing such a proceeding because the creditor, after reasonable demand, fails or refuses to reconvey the deed of trust, it is not unexpected that the consumer will assert the right to recover attorneys’ fees arising under the note, deed of trust, and California Civil Code § 1717.

## **RELIEF NOT REQUESTED AGAINST IDENTIFIED PARTIES**

The Motion seeks relief against “BAC Home Loans Servicing, LP and/or any servicers or successor.” Motion, Dckt. 138. No basis has been provided for the court to enter a “judgment” with any legal force and effect against anonymous “servicers or successor.” In effect, Debtor is requesting an *in rem* “judgment” against the world, without notice of the motion, without notice that relief is sought against that specific person, and without allowing the “world” with any opportunity to defend against the relief sought.

This appears to run afoul of basic Due Process requirements and the fundamental actual case or controversy between real parties in interest mandated in Article III, Section 2, of the United States Constitution.

## **RULING**

The court denies without prejudice the Motion. Debtor may commence an adversary proceeding to have the court determine the extent, validity, and priority of the lien created by the deed of trust (essentially a quiet title action) – if the Creditor fails or refuses to reconvey the deed of trust. If Debtor has not already tried, a demand to Bank of America, N.A. (assuming that the research by Debtor does not indicate that the note and deed of trust have been transferred) with a reminder that Debtor will seek to recover all of the attorneys’ fees, costs, and expenses (in addition to any statutory damages for the failure to reconvey a deed of trust when there is no remaining obligation for it to secure) may result in the prompt clearing of the title for Debtor.

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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 6, 2016. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

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

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

Ralph Turner Haskell ("The Debtor") filed the instant Motion to Confirm Plan on June 6, 2016. Dckt. 48.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 21, 2016. Dckt. 54. The Trustee objects to the Plan on the ground that the plan may not be in the Debtor's best efforts. The Debtor is over the median income and proposed plan payments of \$275.00 for 20 months with a 12% dividend to unsecured creditors. Debtor's Form Amended Form 122C-2 filed June 6, 2016 reflects a monthly disposable income of <\$29.01>. However, the Trustee's calculations show disposable income of \$1,179.99 for 60 months, which totals \$70,799.40 that unsecured creditors are entitled to. The following revisions were made by the Trustee:

- a. The Trustee removed the net mortgage or rent expense because the debtor has a reverse mortgage and has not listed a mortgage expense on Schedule J.
- b. The Debtor adds \$155.00 for business cell phone expense, however the Debtor has failed to file any independent documentation for this expense as requested by the Trustee. Normal cell phone service is included in housing and utilities.
- c. The Debtor deducted \$1,054.17 for income taxes, however the Debtor has only listed an expense for taxes of \$188.20 on Schedule I.
- d. The Debtor lists an expense on Schedule J in the amount of \$213.00 per month for storage. The Debtor admitted that he is storing his motorcycles and household goods in storage.

### **TRUSTEE'S STATUS REPORT**

The Trustee has provided the court with a status report of the case. The Debtor has provided the Trustee with 2015 State and Federal Tax Returns, 2nd quarter 2016 tax payments, AT&T Wireless statement, Wells Fargo Bank Statements for non-filing spouse, Susan B. Tracy from January 2016 through May 2016, and First US Credit Union statements of Debtor from January 2016 through May 2016. After reviewing the evidence, the trustee argues against the following deductions of Form 122C-2:

1. \$155.00 for business cell phone expense on line #23
2. \$1,054.00 for taxes on line #16.

The Trustee also asserts that the costs for storing Debtor's motorcycles and household goods is unreasonable.

The Debtor's AT&T Wireless statement shows three separate wireless numbers with different charges totaling \$157.13. The Debtor has claimed a deduction for optional telephone services, such as a business cell phone for the non-filing spouse, in the amount of \$155.00. The Debtor has failed to prove that he is eligible for this deduction as there appears to be three phone numbers and it is not clear which phone is used for the business.

The 2015 Federal Tax Return reflects that Debtor's total tax was \$7,721.00, or \$643.41 per month. The Debtor's 2015 State Tax Return reflects that Debtor's total tax was \$736.00, or \$61.33 per month. Combined, the monthly tax is \$704.74. However, has an expense for on-going taxes on Amended Schedule J of \$856.00 per month.

The Debtor has provided a copy of a 2016 Form 1040-ES Payment Voucher in the amount of \$6,000 as well as a copy of two personal checks made out to United States Treasury each in the amount of \$3,000.00. If the Debtor owes only \$6,000.00 in taxes per year, or \$500.00 per month, the monthly on-going payment is less than the amount of \$856.00 listed on Amended Schedule J.

Finally, the Trustee states that the Debtor is paying more for storage than the actual contents being stored. The Debtor is storing his motorcycles and household goods in storage. Schedule B accounts for four motorcycles with a combined value of \$9,250.00. The Debtor is proposing to pay \$213.00 for 60 months, totaling \$12,780.00. The Debtor is paying \$3,530.00 more than the value of the property to store it over the course of the Plan.

## **DEBTOR'S RESPONSE**

The Debtor filed a Response to the Trustee's Opposition addressing the Trustee's arguments on July 18, 2016. Dckt. 61.

### **Business Cell Phone Expense**

The Debtor states that Debtor had previously explained that he and his wife both use their cell phones regularly in the course of business. Line 23 of Form 122C-2 provides for "optional telephone and telephone services," which may include "business cell phone service, to the extent necessary for your health and welfare or that of your dependents, or for the production of income." The Debtor's number costs, \$48.40 per month, his wife's costs \$97.22 per month, both Debtor and his wife use their cell phones regularly in the course of their work. Their home based phone line costs \$11.51 per month and is used by Debtor in his work as a sales associate.

### **Taxes**

The Debtor states that Debtor appropriately and accurately listed his tax obligations. The Debtor and his wife have paid an average of \$1,000 per month, consistent with the estimated monthly tax payments on Debtor's Schedules I & J and the Means Test.

The Debtor's 2015 taxes show payments of \$7,721.00 and \$736.00. However, Debtor was out of work from January to March. The taxes reflected on the 2015 returns are because the Debtor was out of work for three months.

The amount of \$1,054.00 listed on Form 122C-2 for taxes is consistent with the Schedule J tax deduction of \$856.00. Debtor's Amended Schedule I shows Debtor's work income of \$1,534.00, with tax deductions of \$188.00 in addition to the ongoing tax payment of \$856.00 on Schedule J. Additionally, the petition was filed prior to the filing of 2015 taxes. The available taxes at the time showed Debtor and his wife paying \$10,287.00 to the Internal Revenue Service for the 2014 tax year, which is fully consistent with the Schedules I & J and the Means Test estimate of \$1,054.00 per month.

### **Storage**

The garage at Debtor's residence is used to keep cars, and most of the remaining garage space is used by Debtor's wife to store her many samples for her business. The rental storage is the only place available to keep motorcycles and other household items that cannot be kept at Debtor's residence because of lack of space.

## **DISCUSSION**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

The Trustee's objections are well-taken. The trustee argues that the plan is not feasible not the Debtor's best efforts. As discussed by the Trustee, the Debtor's proposed disposable income includes expenses that would not otherwise be accounted for. The Debtor attempts to include rent/mortgage payments when stating that he holds a reverse mortgage. The Debtor also attempts to deduct \$155.00 for business cell phone expenses. It seems the Debtor is trying to get the best of both worlds by deducting the full cost of his cell and home phone lines because they have a partial business use. While the Debtor may be using these phone lines for business, sufficient evidence has not been provided to support a complete deduction for the three phone lines.

Additionally, the amounts claimed for taxes varies throughout Debtor's Forms and Schedules. Debtor's Schedule I lists an taxes of \$188.20 deducted from his pay; Debtor's Schedule J lists ongoing Income taxes of \$865.00; Debtor's Form 122C-2 lists monthly income tax as \$1,054.17; and Debtor filed a 2016 Form 1040-ES Payment Voucher 2 which indicates taxes of \$6,000.00. There is a dispute between the Trustee and the Debtor as to whether this is an estimate of what Debtor will pay in taxes for 2016 or what Debtor owes to date for 2016. According to the Debtor, it means an average of \$1,000 per month is being paid in taxes, but the Trustee claims this means that an average of \$500 per month is being paid in taxes.

For the 2014 tax year, Debtor paid \$10,287.00 to the Internal Revenue service totaling 857.25 per month. Debtor's 2015 income taxes show a total of 8,457.00 paid to the Internal revenue Service and Franchise Tax Board totaling 704.75 per month. This decrease is due to the Debtor being out of work from January through February. The Debtor is currently attempting to deduct \$1,054.00 per month, which is roughly the sum of the monthly amount withheld from Debtor's pay plus the ongoing.

Lastly, the Trustee objects to the Debtor's proposal to pay \$213.00 per month for 60 months to store four motorcycles with a value of \$9,250.00 along with household goods in storage. Over the course of the plan, it would cost a total of \$12,780.00 for the storage, which exceeds the value of the property being stored. While the Debtor states that he is paying \$1,800.00 of social security income per month to fund the plan, Debtor has not provided any evidence outside a declaration that this expense is being paid by social security, yet Debtor's Amended Schedule J reflects that \$1,190.00 of social security income is being retained.

The excessive expenses and the discrepancies in information provided by Debtor's Form's and Schedules combined with the lack of sufficient evidence supporting Debtor's deductions makes it impossible to determine the viability or feasibility 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

**Final Ruling:** No appearance at the July 26, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 25, 2016. By the court's calculation, 62 days' notice was provided. 35 days' notice is required.

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

<b>The Motion to Confirm the Modified Plan is continued to 3:00 p.m. on August 16, 2016.</b>
--

Shawn H. Jackson filed the instant Motion to Modify Plan on May 23, 2016. Dckt. 50.

#### **TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to Debtor's Motion to Modify Plan on July 11, 2016. Dckt. 61. The Trustee opposes confirmation on the following grounds:

1. Section 2.13 of Debtor's modified plan proposes to add California State Disbursement Unit as Class 5 creditor and indicates the claim amount is \$0.00.

Section 6 states, "Class 5 Creditor California State Disbursement Unit ongoing claim is being paid via wage assignment. Arrears that existed [sic] at time of filing have been paid in full through wage assignment paid directly to creditor."

Debtor's declaration states California State Disbursement Unit filed a claim for arrears, but Debtor's wages were garnished and the arrears have been satisfied. Debtor also files a DCSS printout as an exhibit which reflects past due support of \$0.00.

Sacramento County Dept. Child Support Services filed a priority claim for \$1,644.74 on July 8, 2014 for a domestic support obligation. The creditor has not withdrawn or amended the claim, and the Debtor has not filed an objection to the claim. The Trustee

calculates that including this creditors priority claim, Debtor's proposed modified plan will not complete within the 60 months proposed.

2. Section 6 of the Debtor's modified plan proposes a plan payment of \$3,489.00 total paid in through May 23, 2015 (month 15 where Debtor's petition was filed February 12, 2014, then \$117.00 commencing June 25<sup>th</sup> for the balance of the plan. Under the confirmed plan Debtor's plan payments are \$116.91 for 28 months, then \$216.91 for 32 months.

The Trustee believes Debtor's proposed plan payment contains an error in that \$3,489.00 total paid in should actually be through May 23, 2016, not 2015 as stated. This could be corrected in the order confirming.

Additionally, Debtor's plan payments under the confirmed plan increase by \$100.00 in month 29 (July 2016) due to payoff of a retirement loan. Debtor's proposed modified plan no longer includes this increase, provides no explanation, and is not Debtor's best efforts.

3. The Debtor has not filed amended [supplemental] Schedules I and J reflecting his current income and expenses

Debtor's last amended Schedules I and J were filed April 1, 2015 as an exhibit in conjunction with a Motion to Incur Debt and reflects a monthly net income of \$150.43. Prior to that, Debtor filed an amended Schedule J on July 14, 2014, which also reflects a monthly net income of \$150.43.

Where Debtor is proposing a plan payment in an amount that is less than his monthly net income, and where Debtor is no longer proposing a step up payment due to a retirement loan payoff, and the fact that Debtor's last Schedules were filed more than a year ago, Debtor should file updated Schedules I and J representing his current income and expenses.

## **JULY 22, 2016 STIPULATION**

On July 22, 2016, the Debtor and Trustee filed a stipulation to continue the hearing to 3:00 p.m. on August 16, 2016 due to Debtor's counsel's unfortunate family emergencies.

## **DISCUSSION**

In light of the stipulation, the court continues the instant Motion to 3:00 p.m. on August 16, 2016.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is continued to 3:00 p.m. on August 19, 2016.

**Final Ruling:** No appearance at the July 26, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 15, 2016. By the court's calculation, 33 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). The Debtor filed opposition. 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).

<b>The Motion to Dismiss is continued to 3:00 p.m. on August 16, 2016.</b>
--

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on April 15, 2016. Dckt. 45. The Trustee seeks default due to the Debtor being in material default under the plan.

The Trustee seeks dismissal on the ground that the Debtor is in material default under the plan. Namely, the Trustee asserts that the Debtor failed to provide for the priority claims of Sacramento County Dept. Child Support Services (Proof of Claim No. 11) in the amount of \$1,644.74 and the Internal Revenue Service (Proof of Claim No. 2) in the amount of \$298.00. Pursuant to § 2.13 of the plan, this failure to provide is a material default under the plan.

### **MAY 18, 2016 HEARING**

At the May 18, 2016 hearing, the court continued the hearing to allow the Debtor the opportunity to file and serve a modified plan. Civil Minutes, Dckt. 49. The Debtor having filed a modified plan, motion to confirm, and supporting evidence, the hearing on the Motion to Dismiss was further continued to 3:00 p.m. on July 26, 2016. Civil Minutes, Dckt. 58.

### **JULY 22, 2016 STIPULATION**

On July 22, 2016, the Debtor and Trustee filed a stipulation to continue the hearing to 3:00 p.m. on August 16, 2016 due to Debtor's counsel's unfortunate family emergencies.

### **DISCUSSION**

In light of the stipulation, the court continues the instant Motion to 3:00 p.m. on August 16, 2016.

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 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 continued to 3:00 p.m. on August 16, 2016.

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 28, 2016. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

**The court's decision is to sustain the Objection.**

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

1. Debtor failed to appear at the First Meeting of Creditors held on June 23, 2016. The Meeting has been continued to August 18, 2016.
2. Debtor has failed to provide the Trustee with a tax transcript or a copy of the Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists.
3. Debtor has failed to provide the Trustee with 60 days of employer payment advices received prior to the filing of the petition pursuant.

4. Debtor has failed to file all pre-petition tax returns required for the four years preceding the filing of the petition.
5. Debtor is \$4,965.00 delinquent in plan payments. The Debtor has paid \$0.00 into the plan to date.
6. § 2.08 of Debtor's Plan lists a second mortgage payable to Wells Fargo Home Mortgage in Class. The Plan fails to list the ongoing payment for this debt and only lists arrears of \$24,680.00. The Trustee is unaware of the amount of this monthly payment.
7. The Plan fails the Chapter 7 Liquidation Analysis. Debtor has non exempt assets, yet proposes to pay a 0% dividend to unsecured creditors.
8. The plan fails to provide for the Internal Revenue Service's priority claim.
9. The Plan may not be in the Debtor's best effort.
  - a. Debtor's Form 122C-2 lists a life insurance expense of \$151.00. This expense is not listed on Schedule J.
  - b. Debtor's Form 122C-2 lists Court ordered payments of \$922.00 per month, Debtor's Schedules I & J do not disclose any support obligations.

The Trustee's objections are well-taken.

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

The Trustee asserts that the Debtor did not provide either a tax transcript or a Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the tax transcript. This is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee also Objects on grounds that Debtor did not provide the Trustee with his Employer Payment Advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the Employer Payment Advices. This is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor has failed to file federal income tax return for all required pre-petition years. Filing of the return is required. 11 U.S.C. § 1308. Debtor's failure to file the return is grounds to deny confirmation. 11 U.S.C. § 1325(a)(9).

The basis for the Trustee's objection is that the Debtor is \$4,965.00 delinquent in plan payments,. The Debtor has failed to make any plan payments to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). Trustee states that, while Debtor has failed to exempt any property, the Debtor is proposing a 0% dividend to unsecured creditors. The Debtor has not explained how, under the proposed plan and the schedules filed under the penalty of perjury, that the unsecured claimants are entitled to a 0% dividend when there are non-exempt equity and assets.

The Debtor's plan fails to provide for the priority claim of the Internal Revenue Service. 11 U.S.C. § 1322(a)(2) requires that the plan provide for the payment of the priority claim. Failure to do such is ground to deny confirmation. 11 U.S.C. 1325(a)(1).

Lastly, the Debtor's plan does not appear to be the Debtor's best efforts. As noted by the Trustee, the Debtor has failed provide accurate information as to expenses, namely support and insurance expenses, on both Schedule I and J and Form 122C-2. The court nor any party in interest can determine the viability and feasibility of a plan when the Debtor does not accurately report his or her finances. Here, the Debtor is offering conflicting information which raises concerns about the best efforts.

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

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

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

The Objection to the Chapter 13 Plan filed by the 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 Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 2, 2016. By the court's calculation, 54 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The hearing on the Motion to Approve Loan Modification is continued to 3:00 p.m. on August 16, 2016.**

The Motion to Approve Loan Modification filed by William Jr. And Terry Shouse ("Debtor") seeks court approval for Debtor to incur post-petition credit.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. "The debtors hereby requests that the Court allow them to accept a trial loan modification offer being offered by Nationstar Mortgage, LLC and secured by a first position deed of trust on the debtor's residence at 3111 Stonebrook Court, Auburn, CA 95603 as follows:

1. First payment: \$2,305.51 by 7/1/2016
  2. Second Payment: \$2,305.51 by 8/1/2016
  3. Third Payment: \$2,305.51 by 9/1/2016
- B. After the debtors make all of the payments under this offer and if the debtors are offered a final permanent loan modification, the debtors will ask the court to approve the final modification agreement.
- C. Wherefore, the applicants request that the Court grant the motion and allow the debtors to accept the trial loan modification offer.”

### **TRUSTEE’S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 12, 2016. Dckt. 60. The Trustee states that the Creditor is included in Class 1 of the confirmed plan. The Trustee believes the trial payments should be made through the plan. The Trustee notes that Proof of Claim No. 8 indicates the name of the creditor is U.S. Bank, N.A., as Trustee for Structured Adjustable Rate Mortgage Loan Trust, Mortgage Pass-Through Certificates, Series 2006-4. Nationstar Mortgage, LLC is listed as the name and address for notices and payments.

The Trustee filed an opposition to the Motion to Modify.

### **DEBTOR’S RESPONSE**

The Debtor filed a response to the Trustee’s response on July 19, 2016. Dckt. 65. The Debtor responds as follows:

1. The loan modification states that if the balance of the delinquent (arrearage) after the modification is more than 115% of the value of the home, it will be put at the back end of the loan with no interest added. The only time it would be due is if the home is sold, refinances, or at maturity.
2. The Debtor asserts that they contacted Nationstar inquiring as the arrearage on the mortgage. The Debtor claims that they were informed that the arrearage is going to be put at the back end of the loan once the final loan modification is prepared.
3. Debtors would rather make the trial loan modification payments directly than through the Trustee because they would not have to make a monthly payment on the mortgage arrearage which will be rolled in the loan modification. That would free up the disputed amount in their budget. The Debtor argues that if they have to pay the mortgage through the Trustee, the monthly mortgage part of the plan payment would only be going down from \$2,631.92 to \$2,305.51. The Debtors would still be paying on the arrearage.
4. It would not be fair to the Debtors to deny them the opportunity to lower their house payments without having to cure the arrearages.

## DISCUSSION

As outlined above, Debtor provides minimal grounds (which must be stated with particularity, Fed. R. Bankr. P. 9013) upon which the requested relief is based. Motion, Dckt. 50. Other than three payments to be made and there being some possible final modification for some unstated terms, the court is given nothing.

Viewed most charitably, the court in “interpreting” the motion for Debtor could view this as stating:

- A. Debtor current has an existing mortgage with Nationstar Mortgage, LLC for which the monthly payment is \$XXX.
- B. Under Debtor’s confirmed Chapter 13 Plan (Dckt. XX), Debtor is making a Class 1 payment through the Plan to Nationstar Mortgage, LLC to cure the pre-petition arrearage and current post-petition mortgage payment.
- C. Debtor is actively pursuing a loan modification with Nationstar Mortgage, LLC which is intended to ultimately cure the pre-petition defaults and restructure this debt.
- D. Debtor has obtained a trial loan modification proposal from Nationstar Mortgage, LLC as a pre-condition to Nationstar Mortgage, LLC considering offering Debtor a final loan modification.
- E. Under the proposed trial loan modification Debtor must make at least three months of trial loan modification payments of \$2,305.51 each for the months of July, August, and September 2016.
- F. The current Class 1 Plan distribution to Nationstar Mortgage, LLC for the current monthly payment and arrearage is \$3,492.58. Plan, Dckt. 5.
- G. Because the trial loan modification payments are due on the first of the month and are critical to consideration of the final loan modification, Debtor further requests that Debtor be authorized to make the monthly payments of \$2,305.51 each for the months of July through November 2016 directly to Nationstar Mortgage, LLC than through the plan. This direct payment is necessary to insure that it is received by National Star Mortgage, LLC by that date and not put the Chapter 13 Trustee to the burden and risk of having to schedule a special distribution or assertion of failure to make a timely payment.
- H. The Debtor shall make the timely \$2,305.51 payments directly to Nationstar Mortgage, LLC. for the months of July -November 2016, and thereby requests that the court reduce the monthly payment to the Trustee to \$2,164.49 for those months and authorize the Chapter 13 Trustee to suspend any distributions from the Trustee for those months to Nationstar Mortgage, LLC.

- I. Upon the Debtor obtaining a final loan modification offer from Nationstar Mortgage, LLC, Debtor shall promptly file a motion for approval of that modification and motion to modify the Chapter 13 Plan to take into account such permanent modification of the obligation owed to Nationstar Mortgage, LLC.

Other Debtors and their counsel have made such requests, which have been approved by this court.

### **Trustee's Opposition**

The Debtors explanation as to why the Creditor is listed in Class 4 rather than Class 1 is not sufficient. The Debtor claims that the nature and amount of the arrears qualify them for the arrears to be put on the "back end." However, as the loan modification and e-mail states, this will not be determined until a final loan modification is offered. The Debtors are assuming that they will be able to qualify for the final modification and therefore should ignore the obligation of arrears. Unfortunately, this is not proper.

The Trustee is correct, and if the court interpreted the proposed loan modification as summarily, cryptically stated, the motion would be denied. Debtor might then well lose any ability to obtain a loan modification, the creditor concluding that Debtor is not requesting and prosecuting such request in good faith.

The court would save the Debtor from such possible loss by a more expansive reading of the Motion. Of course, the court will take into account the actual motion and level of legal services provided in ultimately determining any additional legal fees sought by counsel relating to the present motion.

However, there is a fundamental flaw in the present motion as addressed below.

### **Debtor's Reply**

Debtor filed a Reply to the Trustee's Opposition. No evidence is provided for the various arguments made in the Reply by Debtor's Counsel. The Reply, which appears to be a cookie cutter reply used also in response to the Trustee's objection to the Debtor's motion to confirm a modified plan which is based on the alleged temporary loan modification. Dckt. 62. The Reply attempts to submit unauthenticated documents as exhibits.

The Reply appears to be based on the incorrect assertion that if the court does not do what is asked/demanded/order by Debtor in the present Motion, Debtor will be denied the opportunity to lower their house payments. That is patently incorrect. Debtor merely need to comply with the Bankruptcy Code and properly obtain authorization for the trial loan modification, then get terms for a final loan modification, get the final modification approved, and then modify the plan when the actual final loan modification terms are set. As show in this ruling, the order approving (or even continuing the hearing for) the trial loan modification can prevent there from being an overpayment to the creditor.

### **FAILURE TO SEEK AUTHORIZATION TO ENTER INTO A LOAN MODIFICATION WITH THE CREDITOR WHOSE RIGHTS ARE TO BE MODIFIED**

Debtor, with the assistance of counsel and subject to the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011, affirmatively states that Debtor wants to accept a trial loan modification with Nationstar Mortgage, LLC. Debtor does use some ambiguous language saying that the trial loan modification is being “offered by” Nationstar Mortgage, LLC. However, the Motion does not address anyone else with whom Debtor intends to enter into the contract.

The court is directed to Exhibit A for the terms of the trial loan modification. Exhibit A, Dckt. 53. No trial loan modification agreement is attached. Rather, Exhibit A is merely a single page notice saying that Scott D. Hughes’ unidentified client has been approved for a loan modification under the HAMP Program. While only one page is provided as exhibit A, Mr. Hughes is directed to “Please read this letter and the attachments So that you and your client [who is not identified] understand the steps needed to successfully complete the trial period plan and permanently modify the mortgage payments.” Clearly, there are attachments which contain relevant, substantive information, which has not been provided.

No indication of who the parties are to the modification, or if it even relates to the Debtor in this case is provided to the court.

On January 15, 2015, U.S. Bank, N.A., Trustee, filed Proof of Claim No. 8. U.S. Bank, N.A., Trustee, states that it is a creditor of the Debtor which a claim secured by the 2111 Stonebrook Court Property. Proof of Claim No. 8 lists Nationstar Mortgage, LLC as the address for where notices and payments sent. It does not list Nationstar Mortgage, LLC as the creditor. The amount of the claim is \$465,115.51, with an arrearage of \$54,854.53.

The 211 Stonebrook Court is listed as the only real property listed on Schedule A owned by Debtor. Dckt. 1 at 10. On Schedule D Debtor lists Nationstar Mortgage, Quality Loan Service Company, and HSBC as having secured claims in the case. For Nationstar Mortgage, the claim is stated to be \$4372,000.00 and secured by a first deed of trust. *Id.* at 15.

It appears that the real party in interest having a claim or controversy with the Debtor (U.S. Const. Art. III, Sec. 2) is U.S. bank, N.A., Trustee. Little good would come from the court authorizing the Debtor to enter into a loan modification to modify the loan of “creditor” Nationstar Mortgage, LLC.

## **CONTINUING THE HEARING AND GRANTING INTERIM RELIEF**

The court will not issue orders purporting to effect the rights or authorization action to be taken with fictitious or placeholder entities. Possibly Nationstar Mortgage, LLC is the loan servicer and authorized agent for U.S. Bank, N.A., Trustee. If so, then it can disclose the identity of its principal and clearly identify that it is acting as the agent to bind its principal. It cannot be made to appear by the Debtor to be the principal.

Rather than denying the Motion and putting at risk Debtor’s ability to obtain the loan modification, the court continues the hearing. Additionally, the court authorizes the Debtor to make the \$2,305.51 monthly payments thereunder to Nationwide Mortgage, LLC directly for the months of July, August, September, October, and November 2016. Further, the court authorizes the Debtor to reduce the monthly plan payments under the confirmed plan to \$2,164.49 for the months of July through November

2016 and authorizes the Trustee to suspend all payments on the Class 1 Claim of Nationstar Mortgage, LLC through the Plan for those same months. FN.1.

-----  
FN.1. While fiduciaries of the Debtor might ultimately be responsible for the loss of the loan modification if the motion was just denied, judicial proceedings should not be ones that foment further litigation if it can be avoided. Here, the court infers, implies, and surmises that the motion is actually seeking authority to enter into a loan modification with U.S. Bank, N.A., Trustee, acting through its agent Nationstar Mortgage, LLC. While doing such in this case, consumer attorneys should not expect the court to stretch so far in other cases when incomplete motions are filed and clear documents of who the actual creditor is can readily be found in the record.  
-----

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 Approve the Loan Modification filed by William and Terry Shouse, 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 hearing on the Motion For Authorization to Enter into a Trial Loan Modification is continued to 3:00 p.m. on August 16, 2016. On or before August 9, 2016, Debtor shall file supplemental pleadings identifying the actual creditor with whom Debtor seeks to enter into the Trial Loan Modification, the actual terms of the modification, a copy of the modification agreement, and such other evidence (properly authenticated and admissible) which Debtor wants the court to consider.

**IT IS FURTHER ORDERED** Debtor to make the \$2,305.51 monthly payments thereunder to Nationwide Mortgage, LLC directly for the months of July, August, September, October, and November 2016. Further, the court authorizes the Debtor to reduce the monthly plan payments to the Chapter 13 Trustee under the confirmed plan to \$2,164.49 for the months of July through November 2016 and authorizes the Trustee to suspend all payments on the Class 1 Claim of Nationstar Mortgage, LLC through the Plan for those same months.

**Final Ruling:** No appearance at the July 26, 2106 hearing is required.

-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 2, 2016. By the court's calculation, 54 days' notice was provided. 35 days' notice is required.

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

<b>The court's decision is to deny without prejudice the Motion to Confirm the Modified Plan.</b>
---

William Jr. And Terry Shouse filed the instant Motion to Confirm the Modified Plan on June 2, 2016. Dckt. 44

#### **TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 12, 2016. Dckt. 57. The Trustee opposes confirmation on the following grounds:

1. The Debtor's plan is not in compliance with Section 2.08 of the plan.
  - a. The Debtor is proposing to change Creditor Nationstar Mortgage from Class 1 to Class 4 based on a trial loan modification letter. No details are provided other than payment amount and due date. The creditor is currently owed pre-petition arrears. No information is provided in the trial loan letter regarding the arrears claim filed by the creditor or if the proposed payment amount includes escrow. Section 2.08 requires that all arrears on Class 1 claims shall be paid in full. The Trustee states it is unknown if the Debtor will receive a permanent loan modification and what the terms might be.

2. The Debtor's Motion to Confirm does not comply with applicable law. The Motion fails to cite applicable code section such as 11 U.S.C. § 1325 or 1329.
3. The Proof of Service does not indicate the proposed plan has been served on all parties.
4. The Trustee is uncertain if the proposed plan is the Debtor's best efforts. The Trustee argues that the Debtor failed to use the correct form with their amended Schedules. The declaration filed does not address the changes in expense, which have increased from \$2,505.90 at the time of filing to \$6,235.21. After adjusting for the mortgage payment of \$2,305.31, this represents a \$1,424.00 increase in expenses without any explanation. The following are examples of major increases
  - a. Home Maintenance.....+\$250.00
  - b. Electricity, gas, heat.....+\$100.00
  - c. Food.....+\$115.00
  - d. Clothing, laundry, dry cleaning.....+\$200.00
  - e. Medical dental.....+\$150.00
  - f. Transportation.....+\$ 50.00
  - g. Entertainment recreation.....+\$ 59.00
  - h. Anticipated additional taxes.....+\$500.00

The only testimony is by Debtor Terry Shouse, who provides little support for these changes. Declaration, Dckt. 46. She states that the new plan will be feasible because Debtor will now have more money for expenses, rather than the "tight budget" they have been on.

In discussing Debtor's ability to fund a plan, Debtor Terry Shouse states that Mr. Shouse is receiving Social Security but she is "informed and believes" that Social Security should not be considered in determining plan payments. Debtor offers no reason why a statement made on information and belief is proper personal knowledge testimony. Fed. R. Evid. 601, 602.

In reviewing the reasonable and necessary expenses listed on Supplemental Schedule J filed by Debtor (Dckt. 55), the court notes some unusual expenses for this family unit of two adults:

- A. Electricity and Natural Gas.....\$450.00

Debtor's home is in Auburn, California, well below the snow line and higher in elevation of the Sacramento Valley during the heat of summer. This expense appears to be significantly higher than that shown by Debtors in other cases. When the new motion and plan are filed, Debtor will be easily able to document their utility expense.

B. Home Maintenance.....\$250.00

With annual expenses of \$3,000.00 for five years of the plan, the \$15,000.00 in “maintenance” expenses appear to be in excess of what is commonly part of a reasonable and necessary budget.

C. Food Expense.....\$865.00

Again, this expense appears to be higher than is usually presented as a reasonable and necessary expense for two adults of a mature age.

D. Clothing.....\$150.00

Debtor states under penalty of perjury that the reasonable and necessary clothing expense is \$1,800.00 a year, or \$9,000.00 over the five years of the Plan. This appears to be abnormally high and not an actual, reasonable expense.

E. Laundry and Dry Cleaning.....\$150.00

As with other “goosed up” expenses, this does not appear reasonable.

F. Recreation and Clubs.....\$159.00

Though the \$159.00 might not appear outrageous and even Chapter 13 debtors need some recreation and diversion, this odd number, as with several other odd numbers in the budget, makes it appear that the expense numbers are made up from hole cloth to achieve a predetermined result guaranteed to make a 0.00% to creditors holding general unsecured claims. This concern is further heightened by Debtor throwing in a “Misc Expenses” of \$8.00. This clearly is a manufactured expense just to keep from properly funding the plan.

G. Anticipated additional taxes.....\$500

Debtor offers no explanation as to why Debtor has an additional \$6,000.00 a year in taxes. On Supplemental Schedule I Debtor lists Gross Income of \$4,853.33 and tax and Social Security withholding of \$1,016.23 (21%). One Debtor is already receiving Social Security benefits.

Possibly the higher taxes are due to the existing Social Security benefits being receive being taxable. If so, then those taxes, relating to those benefits, taxed at the incremental rate when pyramided on the other income, should properly be paid from the Social Security benefits themselves.

H. Personal Care Products and Services.....\$100

This additional \$1,200 annual expense is on top of the “food” expense of \$10,380, Clothing of \$1,800, and Laundry of \$1,800. Possibly the “personal care products” are purchased at the grocery store and are included in the “food” amount.

At this juncture, one would have to question whether Debtor was honest in the expenses listed, had filed this bankruptcy case in good faith, and is proposing a plan in good faith. Possibly the Debtor's post-bankruptcy filing lifestyle expectations and reasonable budget are not consistent with those of a good faith debtor. When the new motion to confirm a plan, after there is a final loan modification, Debtor can carefully document the reasonable and necessary expenses.

## **DEBTOR'S RESPONSE**

The Debtor filed a response to the Trustee's response on July 19, 2016. Dckt. 65. The Debtor responds as follows:

1. The loan modification states that if the balance of the delinquent (arrear) after the modification is more than 115% of the value of the home, it will be put at the back end of the loan with no interest added. The only time it would be due is if the home is sold, refinances, or at maturity.
2. The Debtor asserts that they contacted Nationstar inquiring as to the arrears on the mortgage. The Debtor claims that they were informed that the arrears are going to be put at the back end of the loan once the final loan modification is prepared.
3. Debtors would rather make the trial loan modification payments directly than through the Trustee because they would not have to make a monthly payment on the mortgage arrears which will be rolled in the loan modification. That would free up the disputed amount in their budget. The Debtor argues that if they have to pay the mortgage through the Trustee, the monthly mortgage part of the plan payment would only be going down from \$2,631.92 to \$2,305.51. The Debtors would still be paying on the arrears.
4. It would not be fair to the Debtors to deny them the opportunity to lower their house payments without having to cure the arrearages.
5. The plan was proposed in good faith and have provided tax returns and bank statements. Due to medical issues, they have been struggling to make the payments. The Debtor was planning to sell the property until a loan modification was offered. The Debtor also included taxes because they were behind. The Debtor argues that the increases are reasonable and that the Debtors should not have to live with bare minimum.
6. Although the Motion does not cite the law, the creditors are receiving adequate notice and counsel will provide such citation in the future.
7. The Debtors will serve all parties and request a continuance of the hearing to accomplish servicing any party who was not served.

## **DISCUSSION**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Trustee's objections are well-taken.

First, the Motion to Approve Loan Modification was not approved at the July 26, 2016. As such, the Trustee is correct that the Debtor's classification of the secured mortgage holder is improper. As required by the Section 2.08 of the standard plan, the creditors arrears are to be paid. Here, the Debtor is attempting to use the non-binding terms of a loan modification and a non-existent final loan modification to state the proposed plan is proper and in the best interest of the parties. Unfortunately, failure to comply with the plan and the Code make it impossible to confirm the plan.

With respect to a trial loan modification, it is just that – a temporary, trial payment plan. It cannot be made a permanent plan term. This court has, in approving trial loan modification, authorized payments to be made directly by a debtor to the court for four or five months to allow the trial period be completed and approval of the final modification approved. Then the Debtor could seek to modify the existing plan.

In responding to the Opposition, Debtor offers no testimony, but just the arguments of counsel. The court does not know whether Debtor acknowledges that no such evidence exists, was unwilling to provide such testimony, or that Debtor and Debtor's counsel felt that evidence supporting arguments was not required.

As addressed above, Debtor fails, or is unwilling, to provide testimony as to the budget or why now reasonable and necessary expenses need to be increased. Merely saying that expenses are what Debtor says they are (to the extent that any such testimony exists) does not carry the day.

The court denies without prejudice the Motion to Confirm.

The court DOES NOT CONTINUE the hearing as the Debtor needs to substantially revise the pleadings and not bring a motion for a modified plan until there is a final loan modification in the works. Though a debtor could file a motion to confirm and have it set in conjunction with a motion to approve the final loan modification, this Debtor cannot have a plan confirmed that says, "we'll stop paying what we actually owe, we guess what a possible modification might be, and the court and creditors don't need to know what the actual debt and payments terms will be."

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

**IT IS ORDERED** that Motion to Confirm the Plan is denied without prejudice and the proposed Chapter 13 Plan is not confirmed.

9. [16-22530](#)-E-13      **MARCIA CLARK**  
BLG-2                      **Paul Bains**

**CONTINUED MOTION TO VALUE  
COLLATERAL OF GATEWAY ONE  
LENDING AND FINANCE  
5-13-16 [\[27\]](#)**

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

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

**Below is the court's tentative ruling.**  
-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 13, 2016. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Value secured claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Value secured claim of Gateway One Lending & Finance ("Creditor") is granted, and the court determines that the vehicle has a value of \$10,775.00.**

The Motion filed by Marcia Clark ("Debtor") to value the secured claim of Gateway One Lending & Finance ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2004

Porsche Cayenne (“Vehicle”). The Debtor seeks to value the Vehicle at a replacement value of \$6,058.00 as of the petition filing date. As the owner, the Debtor’s opinion of value is evidence of the asset’s value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle’s title secures a purchase-money loan incurred in June, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$14,090.00.

## **CREDITOR’S OPPOSITION**

The Creditor filed an opposition on June 2, 2016. Dckt. 37. The Creditor objects to the \$6,058.00 valuation allocated to its secured collateral under Debtor’s Motion to Value. Creditor claims the property is in Clean Retail condition and has a replacement value of \$10,775.00 based upon information derived from the automated NADA guide, which was properly authenticated by Nina Storey’s declaration. Dckt. 39.

The Creditor requests that the Motion either be denied or its secured claim be valued at \$10,775.00. If not, the Creditor requests that the matter be set for an evidentiary hearing.

## **JUNE 14, 2016 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on July 26, 2016. Dckt. 47.

## **DISCUSSION**

No supplemental papers have been filed in connection with the instant Motion.

While Debtor has provided her opinion as to value, she provides no information about the condition of the vehicle or required maintenance. Debtor fails to provide the court with any basis for reducing the value as stated in the NADA.

Therefore, the Creditor’s claim secured by a lien on the asset’s title is under-collateralized. The creditor’s secured claim is determined to be in the amount of \$10,775.00. *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 for Valuation of Collateral filed by Marcia Clark (“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 Gateway One Lending & Finance (“Creditor”) secured by an asset described as 2004 Porsche Cayenne (“Vehicle”) is determined to be a secured claim in the amount of \$10,775.00, 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 \$10,775.00 and is encumbered by liens securing claims which exceed the value of the asset.

<b>10.</b>	<a href="#"><u>16-22530-E-13</u></a> <b>APN-1</b>	<b>MARCIA CLARK</b> <b>Paul Bains</b>	<b>CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY GATEWAY ONE LENDING &amp; FINANCE 6-3-16 [42]</b>
------------	--	--	---

**Final Ruling:** No appearance at the July 26, 2016 hearing is required.

-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 3, 2016. By the court’s calculation, 46 days’ notice was provided. 14 days’ notice is required.

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

<b>The court’s decision is to sustain the Objection to Confirmation.</b>
--

Gateway One Lending & Finance (“Secured Creditor”) opposes confirmation of the Plan on the basis that:

1. The value allocated to Secured Creditor’s collateral under Debtor’s proposed Plan is substantially below the value given in the NADA Guide. In the absence of further evidence explaining the valuation discrepancy, Secured creditor contends that Debtor has not satisfied the burden under 11 U.S.C. 506(a)

**JULY 19, 2016 HEARING**

The hearing on the Motion to Value Collateral of Gateway one Lending and Finance was continued to July 26, 2016. Therefore, this court continued this motion to be heard concurrently with the Motion to Value.

## **DISCUSSION**

No supplemental papers have been filed in connection with the instant Motion.

On July 26, 2016, the court valued the Creditor's secured claim at \$10,775.00

The Debtor's Plan states the Secured Creditor has a \$6,058.00 interest in the collateral (Porsche).

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 the Debtor adequately fund the plan with future earnings or other future income that is paid over to the 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). But, nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim.

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:

- (1) provide a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A),
- (2) 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
- (3) surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

However, these three possibilities are relevant only if the plan provides for the secured claim.

Here, the plan provides for the Creditor's claim but not in the full amount of its secured claim as determined by the court in the Motion to Value Collateral of Creditor.

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

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

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

The Objection to the Chapter 13 Plan filed by the Gateway One lending & Finance 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 hearing on the Objection to Confirmation the Plan is continued to 3:00 p.m. on July 26, 2016.

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 16, 2016. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

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

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

Janelle Gilmore ("Debtor") filed the instant Motion to Confirm the Modified Plan on June 16, 2106. Dckt. 129.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 11, 2016. Dckt. 135. The Trustee opposes confirmation on the following grounds:

1. The Debtor fails to explain changes listed on amended Schedules I and J. Dckt. 132. According to the last filed Schedule I, the Debtor's income has increased to \$3,697.41

from \$3,077.83. The Debtor's expenses has also increased to \$3,127.41 from \$2,507.68. The supporting declaration provides no explanation for any changes.

2. The Debtor is delinquent \$570.00 under the proposed plan.

## **DEBTOR'S REPLY**

The Debtor filed a reply on July 19, 2016. Dckt. 138. The Debtor states that the Debtor's most recent Schedules I and J are correct and the statement in Debtor's supporting declaration was a typographical error.

Additionally, the Debtor states that she will be current by the time of hearing.

## **DISCUSSION**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Trustee's objections are well-taken.

First, the Trustee is correct that the Debtor fails to explain the change in income and expenses. The Trustee's calculations determined that there has been an increase to Debtor's income and expenses of \$619.00. Rather than addressing why there has been a significant income, the Debtor's reply merely addresses the line in the Debtor's declaration. The concern is that the Debtor has failed to explain how there have been these changes rather than just the Debtor inaccurately stating that her income and expenses have not changed. The court and other parties in interest cannot determine the viability and feasibility of the plan when the Debtor has not provided any testimony or evidence that the budget is correct and accurate. FN.1.

-----  
FN.1. Adding to the Debtor's lack of credibility is that the updated Schedule I and J filed as Exhibits are stated to be both "Amended" and "Supplemental" Schedules. As "Amended Schedules, these changes date back to the commencement of this case back in 2013. However, stating that they are "Supplemental" Schedules, Debtor states under penalty of perjury that they represent the changed finances as of May 2016. The court is left in a quandary as to which statement under penalty of perjury to believe.  
-----

The basis for the Trustee's second objection is that the Debtor is \$570.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

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

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 20, 2016. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

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

David W. and Shellie J. Fischer ("Debtor") filed the instant Motion to Confirm Debtor's Third Modified Plan on June 20, 2016. Dckt. 103.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 8, 2016. Dckt. 113. The Trustee opposes confirmation on the following grounds.

1. There are unexplained changes listed on the Debtor's amended Schedules I & J filed June 21, 2016. Dckt. 102.
2. Debtor's two Schedule I's, filed approximately 3 ½ years apart, contain information that mirrors the other.

3. There is an attachment for additional employment information that lists Debtor as “blank” with an occupation of Realtor with Re/Max Reality Today for 7 years.

## **DISCUSSION**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Trustee’s objection is well-taken.

The basis for the Trustee’s objection is that there are unexplained changes on the Debtor’s amended Schedules I & J. Additionally, the two Schedule I’s filed about 3 ½ years apart contain information that mirrors the other (both contain a statement that reads, “Property management income listed above assumes 75% occupancy on \$1,839.50 = \$1,379.62).” Lastly, there is an attachment for additional employment information that lists Debtor as “blank” with an occupation of Realtor with Re/Max Reality Today for 7 years. The Trustee is uncertain what if any income from this occupation the Debtor is receiving, and if no income is being received from this occupation, when the last time Debtor received any income from said occupation.

In total, the concern of the Trustee as well as the court is that court nor any other parties in interest can determine the viability and feasibility of the plan when the Debtor has failed to provide updated and accurate information as to the Debtor’s finances. The court finds it hard to believe that in the past 3.5 years, the Debtor’s expenses and income has not changed. Without this information, the court is unable to confirm the plan.

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

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

13. [12-40834](#)-E-13      DAVID/SHELLIE FISCHER      CONTINUED MOTION TO MODIFY  
DPC-1      Michael Croddy      PLAN  
6-15-16 [\[94\]](#)

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 14, 2016. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

<b>The Trustee's Motion to Confirm the Modified Plan is granted.</b>
--

David Cusick, the Chapter 13 Trustee, filed a Motion to Confirm the Modified Plan on June 15, 2016. Dckt. 94. The Trustee states that he seeks to modify the plan to eliminate an ongoing mortgage payment to a second deed of trust to JP Morgan Chase where the claim has been satisfied and to reduce the plan payment by the amount that an ongoing Class 4 mortgage payment to Wells Fargo has increased.

The Trustee states that the Debtor's attorney has failed to file a timely modified plan.

The Debtor filed a proposed modified plan and Motion to Confirm on June 21, 2016. Dckt. 103 and 105. The hearing on the Motion is set for 3:00 p.m. on July 26, 2016.

**JULY 19, 2016 HEARING**

In light of the interconnectedness of the instant Motion and the Motion to Confirm, the court continued the instant hearing to 3:00 p.m. on July 26, 2016.

## **DISCUSSION**

On July 26, 2016, the court denied the Debtor's Motion to Confirm Amended Plan. In denying confirmation, the increase in Debtor's projected disposable income has not been addressed by the Debtor.

Debtor has not opposed the current Plan.

No supplemental papers have been filed in connection with the instant matter.

11 U.S.C. § 1323 permits a Trustee to amend a plan any time before confirmation. The Trustee have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Debtor or creditors. 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, Trustee's Chapter 13 Plan filed on June 15, 2016 is confirmed. Counsel for the Trustee shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Debtor for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**Final Ruling:** No appearance at the July 26, 2016 hearing is required.

-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 25, 2016. By the court's calculation, 62 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<b>The Motion to Confirm the Amended Plan is granted.</b>
---

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on May 23, 2016 is confirmed. Counsel for the 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.

15. [13-20939-E-13](#)      **TIMOTHY/TAMARA MENE BROKER**      **CONTINUED      MOTION TO**  
**PGM-2**      **Peter Macaluso**      **MODIFY PLAN**  
5-12-16 [50]

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 12, 2016. By the court's calculation, 75 days' notice was provided. 35 days' notice is required.

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

<b>The court's decision is to deny the Motion to Confirm the Modified Plan.</b>
---

Debtor Tamara Menebroker filed the instant Motion to Modify Plan on May 12, 2016. Dckt. 50.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 13, 2016. The Trustee opposes confirmation on the following grounds:

1. The Debtor Tamara Menebroker may not have authority to file a proposed modified plan where Debtor has signed as successor in interest for Timothy Menebroker.
2. The Debtor's plan indicates additional provisions are appended but there are none.

### **ORDER RESETTING HEARING**

On June 15, 2016, the court issued an order resetting the hearing for 3:00 p.m. on July 26, 2016. Dckt. 64.

### **DEBTOR'S REPLY**

The Debtor filed a reply on June 21, 2016. Dckt. 69. The Debtor states that "[t]he Notice of Death and Motion for Omnibus Relief upon Death of Debtor was continued to July 26, 2016, and this motion is recommended to be continued to that date to insure proper authority to modify this plan." Dckt. 69.

### **DISCUSSION**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Trustee's objections are well-taken.

First, the Debtor inaccurately states the status of her Motion for Omnibus Relief upon Death of Debtor. The court denied the Motion without prejudice on June 14, 2016. Dckt. 66.

As such, there is no person substituted in as a personal representative for deceased Debtor Timothy Menebroker. Until the parties are authorized to act as the personal representative, the Debtor Tamara Menebroker can not sign on behalf of the deceased Debtor.

Additionally, the Debtor's failure to attach additional provisions when indicating that there should be raises concerns over whether the court and other parties in interest have the full terms of the proposed plan. The court will not just "rubber stamp" plans without analyzing the entirety of the plans terms to ensure their compliance with the Bankruptcy Code.

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

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

16. [12-34546](#)-E-13      **KEITH/ZANETTA ROBINSON**      **MOTION FOR COMPENSATION FOR**  
PGM-10      **Peter Macaluso**      **PETER G. MACALUSO, DEBTORS'**  
           **ATTORNEY**  
           **6-23-16 [[221](#)]**

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on June 23, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. 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 for Allowance of Professional Fees is granted.**

Peter Macaluso, the Attorney ("Applicant") for Keith U. and Zanetta D. Robinson, the Chapter 13 Debtor ("Client"), makes a Substantial and Unanticipated Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period November 2, 2012 through April 14, 2016. Applicant requests fees in the amount of \$6,525.00.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 7, 2016. Dckt. 227. The Trustee opposes the additional pre-confirmation fees of \$885.00 in connection with evidentiary work involving creditor Big Valley Credit Union. The Trustee does not oppose the \$5,640.00 in post confirmation fees Applicant seeks.

## **DISCUSSION**

### **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). 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.

### **Benefit to the Estate**

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' Committee 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 as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

*Id.* at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including evidentiary work on Motions to Value Collateral of Big Valley Federal Credit Union; Objection to Claim of Bank of America; Motions to Modify Plan; and Motion to Approve Loan Modifications. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

### **“No-Look” Fees**

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

“(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys

representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$3,000.00 in attorneys fees. Applicant prepared the order confirming the Plan.

If Applicant believes that there has been substantial and unanticipated legal services which have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). He 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. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "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 County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of 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.

## **FEES REQUESTED**

## **Fees**

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

Evidentiary Work on Motion to Value Collateral: Applicant spent 2.95 hours in this category. Applicant assisted Client with preparing and sending letters, reviewing and responding to E-mail, preparing evidentiary binders for Motion to Value Collateral, preparing and lodging documents with Department E in support of Motion to Value Collateral, and preparing and filing stipulations for Motion to Value Collateral.

Objection to Claim of Bank of America: Applicant spent 3.4 hours in this category. Applicant assisted Client with preparing and filing Objection to Claim of Bank of America, reviewing Opposition to Objection to Claim, preparing and filing Response to Opposition to Objection to Claim, appearing for hearing and continued hearing on Objection to Claim.

Motion to Modify Plan: Applicant spent 5.4 hours in this category. Applicant assisted Client with reviewing Motion to Dismiss Case, preparing and sending letters, preparing and filing Response to Motion to Dismiss, reviewing the case, meeting with Client, preparing and filing Motion to Modify, reviewing and calendaring Notice of Withdrawal of Motion to Dismiss, reviewing Opposition to Motion to Modify, filing Response to Opposition to Motion to Modify, appearing for hearing on Motion to Modify, filing Response to Opposition to Motion to Modify, reviewing Response to Motion to Modify, and appearing for continued hearing on Motion to Modify.

Motion to Approve Loan Modification: Applicant spent 1.2 hours in this category. Applicant assisted Client with preparing and filing Motion to Approve Loan Modification and reviewing rulings for Motion to Approve Loan Modification.

Motions to Modify Plan: Applicant spent 3.65 hours in this category. Applicant assisted Client with reviewing Motion to Dismiss Case, preparing and sending letters, meeting with Client, preparing and filing Response to Motion to Dismiss, preparing and filing Motion to Modify, reviewing and calendaring Notice of Withdrawal of Motion to Dismiss, reviewing Opposition to Motion to Modify, preparing and filing Response to Opposition to Motion to Modify, appearing for hearing on Motion to Modify.

Motions to Modify Plan: Applicant spent 5.15 hours in this category. Applicant assisted Client with reviewing letter from Trustee, meeting with Client, reviewing the case, preparing and filing Motion to Modify, reviewing Opposition to Motion to Modify, preparing and filing Response to Opposition to Motion to Modify, reviewing Amended Opposition to Motion to Modify, appearing for hearing on Motion to Modify, preparing and sending letters, preparing and sending Order to Modify.

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:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Peter G. Macaluso	21.75	\$300.00	\$6,525.00
<b>Total Fees For Period of Application</b>			\$6,525.00

## **FEES AND COSTS & EXPENSES ALLOWED**

### **Fees**

Applicant seeks to be paid a single sum of \$6,525.00 for its fees incurred for the Client. The Applicant asserts that the additional post-confirmation work was actual, reasonable, necessary and unanticipated. Namely, the Applicant's evidentiary work on Motions to Value Collateral of Big Valley Federal Credit Union; Objection to Claim of Bank of America; Motions to Modify Plan; and Motion to Approve Loan Modification.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. However, because the evidentiary work on Motion to Value Collateral of Big Valley Federal Credit Union occurred pre-confirmation, no fees for such work may be approved. Local Bankruptcy Rule 2016-1 provides:

Only in instances where substantial and unanticipated *post-confirmation* work is necessary should counsel request additional compensation. (Emphasis added).

Therefore, \$885.00 in fees are not allowed due to the work being pre-confirmation work, included as part of counsel's no-look flat fee, and not substantial nor unanticipated post-confirmation work. On May 30, 2013, counsel for the Debtor, in the confirmation order he prepared, documented that he accepted and was allowed \$4,000.00 for all of the work necessary to get the plan to confirmation and the related post-confirmation matters relating to the completion of that plan. Counsel cannot now tack on the additional fees relating to Big Valley Federal Credit Union. If counsel did not want to accept the flat fee allowed in May 2013, then he should have elected to submit detailed time records and sought approval of his fees as any other professional in a bankruptcy case. FN.1.

-----  
 FN.1. The court finds it very concerning that an experienced consumer bankruptcy attorney, well versed in the rules and law concerning the no-look fee and additional fees that may be requested when the consumer attorney elects to receive a flat fee would "slip" this extra \$850.00 into the application. The court will presume that this was caused by an less than adequately supervised employee and a less than thorough review of the motion, supporting pleadings, and declaration by counsel.  
 -----

Unanticipated and Substantial fees in the amount of \$5,640.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee under the confirmed plan from the available funds

of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	\$5,640.00
------	------------

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 Applicant (“Applicant”), Attorney for the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

Applicant, Professional Employed by Chapter 13 Debtor

Fees in the amount of \$5,640.00

**IT IS FURTHER ORDERED** that the fees of \$885.00 are not allowed by the court.

The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.

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

17. [13-35754](#)-E-13      MATTHEW/ARIANA VICKERS      MOTION TO RECONSIDER DISMISSAL  
WSS-6      W. Steven Shumway      OF CASE  
6-28-16 [[101](#)]

DEBTOR DISMISSED:

06/27/2016

JOINT DEBTOR DISMISSED:

06/27/2016

## **TENTATIVE RULING DUE TO CONDITION OF VACATING DISMISSAL**

**No Tentative Ruling:** The Motion Vacate Dismissal of Bankruptcy Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.**

-----  
Correct 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 June 28, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Vacate has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

<p><b>The Motion to Vacate is <del>granted and the order dismissing the case (Dckt. 99)</del> is vacated.</b></p>
---

Matthew and Ariana Vickers (“Debtor”) filed the instant Motion to Vacate Dismissal on June 28, 2016. Dckt. 101.

The instant case was filed on December 16, 2013. Dckt. 1. A plan was confirmed on March 4, 2015, and an order confirming the plan was entered on March 12, 2015. Dckt. 76 and 77.

On May 24, 2016, the Chapter 13 Trustee filed a Motion to Dismiss the Case due to Debtor’s delinquency in plan payments. Dckt. 90.

On June 22, 2016, a hearing on the Motion to Dismiss was held and the Motion was granted. Dckt. 99. The ruling was final, as the Debtor had filed no timely opposition.

On June 28, 2016, Debtor filed this instant Motion to Vacate claiming that the delinquency was an inadvertence due to a confusion in payment back in September 2015. The Debtor at that time believed they were paying the delinquency and the September payment. However, the Debtor was only curing the delinquency. Therefore, come May, the Debtor was delinquent by two months when the Debtor believed it was only one. The Debtor mistakenly believed that the payment they sent in would cure the delinquency and that the Trustee would withdraw the Motion. The Debtor claims that the Debtor’s counsel had misread the Trustee’s report on payments which led to the delinquency. The Debtor are 14 months away from completing the plan.

The Debtor seeks to have the order dismissing the case vacated, per Rule 60(b).

## **TRUSTEE’S RESPONSE**

The Trustee filed a response to the instant Motion on July 7, 2016. Dckt. 109. The Trustee states that there does not appear to be dispute over the delinquency or that one existed at the time of the hearing.

The Trustee argues that there the Debtor made a reasonable mistake, based on the Debtor appearing to have become delinquent in March 2015 and never curing the amount.

The case was delinquent \$13,750.00 when the case was dismissed on June 27, 2016 and the next payment of \$6,880.00 is due July 25, 2016. Provided the Debtor is curing this default, the Trustee does not oppose the Motion.

## **APPLICABLE LAW**

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

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is “a grand reservoir of equitable power to do justice in a particular case.” *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

## DISCUSSION

First, the court has reviewed the Motion to Dismiss and Debtor’s response. The Motion states, in pertinent part:

- A. Debtors have paid \$170,708.00 into the Plan.
- B. The last payment was received on May 20, 2016.
- C. Debtor is delinquent \$6,880.00 as of the filing of the Motion on March 24, 2016.
- D. Prior to the hearing on the Motion to Dismiss (set for June 22, 2016), another payment of \$6,880.00 will become due.

E. The Trustee included in the motion a chart of payments showing a patter of defaults, with Debtor missing payments in:

1. February 2014,
2. June 2014,
3. August 2014,
4. October 2014,
5. December, 2014,
6. January 2015,
7. March 2015,
8. April 2015,
9. July 2015,
10. August 2015,
11. October 2015,
12. November 2015,
13. January 2016,
14. February 2016,
15. April 2016.

Motion, p. 2:4-10; Dckt. 90.

Debtor “cured” many of these defaults, sometimes making the equivalent of three payments in one month. No explanation is provided for: (1) why Debtor repeated defaulted and (2) why Debtor had sufficient “extra” money in a month to make multiple payments, including one month as high as \$18,600.00. See December 2015 payments.

Debtor’s untimely response to the Motion merely stated that Debtor made two payments in May 2016 (without providing any information how Debtor had \$13,760.00 of moneys to make a double payment) and that Debtor believed that this would make them current. Debtor requested a thirty-day continuance to give them time to “bring the account current.” Debtor’s counsel did not alleged how or why Debtor would have “extra” monies in a month to make a double payment.

Conspicuously missing from the Late Response was any evidence opposing the Motion. Debtor failed, or refused, to provide any testimony under penalty of perjury.

Though the court had posted a “final ruling” dismissing the case on June 21, 2016, for the June 22, 2016 hearing, neither Debtor nor Debtor’s counsel chose to appear at the court’s June 22, 2016 hearing date to advise the court that there had been a terrible mistake and Debtor actually opposed the motion. As all attorneys’ know, though posted as final rulings, they can always speak with the trustee at court the day of the dismissal calendar and then request the court to hear a matter posted as a final ruling. No attempt was made to appear at the hearing or communicate with the trustee at the hearing.

### **Motion to Vacate**

The Motion asserts that Debtor was mistaken as to the amounts paid and Debtor’s counsel misread the Chapter 13 Trustee’s statement of the account. The allegation of misreading the statement rings

hollow, in that it states that when reviewing the statement in May 2016, Debtor's counsel saw that it stated that Debtor was delinquent for \$6,870.00. The Motion alleges that counsel thought that the statement of a \$6,870.00 delinquency in May 2016 was a statement that Debtor's obligation of \$6,870.00 due on June 25, 2016 was showing as due in May 2016.

With respect to the multiple defaults, the Motion to Vacate asserts, "Due to the nature of their business, they would become delinquent and then send in several payments which they thought was bringing them current." No explanation is provided for how Debtor can have such an unpredictable business or why and in some months Debtor has multiples of the monthly plan payment available.

Under the Confirmed Modified Plan Debtor is required to make monthly plan payments of \$6,880.00 for the last forty-eight months (commencing January 2015) of the sixty month plan. The Plan term runs from January 2014-December 2018. There remains thirty months of the plan to perform (not the fourteen months stated in the Motion to Vacate). Modified Plan, Dckt. 67.

Under the Confirmed Modified Plan Debtor makes the current monthly mortgage payment and arrearage payment on the debt secured by Debtor's residence, payments on two debts secured by Debtor's vehicles, and almost \$200,000.00 of nondischageable taxes. No payments are made to any creditors whose debts would be discharged or would not have collateral to take away from Debtor.

Debtor's counsel provides his declaration in support of the Motion to Vacate. Dckt. 104. He states that in reliance on Debtor telling him that the payment had been made, he intentionally did not file an opposition. Thus, counsel knew that a motion to dismiss was pending, that his clients had continually defaulted in the bankruptcy case, and that the case was facing dismissal due to a default. Notwithstanding such conduct and the potential dismissal of the case, counsel intentionally chose not to oppose the Motion to Dismiss.

Counsel further testifies that he did nothing further, notwithstanding the potential dismissal of the case, until June 21, 2016 - the eve of the hearing on the Motion to Dismiss. At that time (more than two weeks after he says that the Debtor told him the payments had been made), he first checked the accounting for payments made in the case on the Trustee's website. Counsel now testifies that in looking at the website in June 2016, he assumed that since it should a delinquency, it must be referring to the future payment in June 2016 which was not yet due. As Counsel admits, this assumption was incorrect.

Only on June 21, 2016, did counsel try to act to file an opposition. Counsel did not contact the court to advise that an untimely Response was filed. Counsel did not file an ex parte motion for leave to file an untimely opposition. Instead, he merely filed an untimely document based on his first reviewing the Trustee's account statement the day before the hearing, after consciously deciding that it was unnecessary to file an opposition.

Debtor Matthew Vickers filed his declaration in support of the Motion to Vacate. Dckt. 103. His testimony is that he "assumed" that he had cured the payments. While he testifies that he was speaking to his attorney in early June 2016, there is nothing in his declaration of taking any action to make sure that he had properly responded to the Motion to Dismiss.

Mr. Vickers does testify that it was not until June 21, 2016, the day before June 22, 2016 hearing date on the motion to dismiss, that his attorney first contacted him about being delinquent and not have cured the defaults.

## **Ruling**

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers “the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.” *Gravatt v. Paul Revere Life Ins. Co.*, 101 Fed. Appx. 194, 196-197 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

Though the Trustee may consider this as a possible reasonable mistake, the court views this as a lack of prosecution by Debtor and counsel. Clearly counsel and Debtor were aware that the case was pending dismissal. Debtor and Debtor’s counsel chose, for whatever reason, to rely on Debtor’s thought that the delinquency had been cured and that the Motion to Dismiss could be ignored. It was not until June 21, 2016, the eve of the hearing date on the Motion to Dismiss that Debtor and Debtor’s Counsel even considered checking to see if their assumption that they could ignore the Motion to Dismiss was incorrect. Then, they discovered that it was a flawed assumption, and counsel threw at the court an untimely Response. Counsel did not notify the court that an untimely Response was being filed. Counsel for Debtor did not file an ex parte motion for leave to file an untimely opposition. Counsel for Debtor did not appear at the court’s dismissal calendar to advise the Trustee of the mistake of Debtor and Debtor’s Counsel in assuming that they did not need to respond to a motion. Debtor and Debtor’s Counsel did not appear at the court’s June 22, 2016 dismissal calendar to advise the court of their gross error and try to rectify the situation.

Instead, as with deciding that the Motion to Dismiss could be ignored, Debtor and Debtor’s Counsel decided that the court’s dismissal calendar could be ignored. Instead, Debtor and Debtor’s counsel waited a week to file the present Motion to Dismiss, creating unnecessary work for not only the court, but the Chapter 13 Trustee.

Thus, it does not appear that the dismissal occurred because of a bona fide mistake or excusable neglect, but an intentional strategy decision to ignore the Motion to Dismiss.

With respect to the impact on Debtor caused by the dismissal, there is little. Debtor is barely halfway through the Plan. Debtor is only paying the debt which would not otherwise be discharged. Having to file a new case is of no prejudice to Debtor.

Debtor has also show an inconsistent payment ability, and has shown that in some months Debtor has the ability to make payments which are double or triple what is asserted to be Debtor’s projected disposable income.

## **Unnecessary Cost and Expense Caused By Debtor’s Intentional Litigation Strategy**

Debtor and Debtor's counsel admit that they intentionally chose to do nothing to respond to the Trustee's Motion to Dismiss. It was not until the day before the hearing that Debtor's Counsel got around to checking the status of plan payments. Possibly Debtor and Debtor's Counsel decided to do this because it could avoid some legal expenses for Debtor. If Debtor's counsel had just shown up at court on June 22, 2016 to meet with the Trustee and bring this to the attention of the court, it could have been addressed. But due to the inaction of Debtor and Debtor's Counsel, the legal work required of the Trustee has been unnecessarily multiplied.

The court projects that this intentional decision by Debtor and Debtor's counsel has caused the Trustee to waste four hours of time in having to now address the Motion to Vacate the dismissal. Using a conservative hourly rate of \$250.00, this is \$1,000.00 wasted time of Trustee's counsel.

As a condition of vacating the Dismissal, Steven Shumway, counsel for Debtor shall reimburse the Chapter 13 Trustee \$1,000.00 for the wasted attorneys' fees expense. The Trustee shall deposit the monies into the fund maintained for Chapter 13 Trustee costs and expenses, or as otherwise directed by the U.S. Trustee. The monies are not a personal payment to the Chapter 13 Trustee.

The \$1,000.00 reimbursement of the legal expenses, as agreed to by Counsel for Debtor is deemed not to be a "sanction" for purposes of reportable sanctions to the California State Bar. While the improvident choices of Debtor and Debtor's Counsel in the handling of the Motion to Dismiss have caused the Trustee to incur otherwise unnecessary expenses, this is a compensatory payment and not a punitive sanction.

~~Therefore, in light of the foregoing, the Motion is granted and the order dismissing the case (Dckt. 99) is vacated.~~

~~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 Vacate Dismissal of Case filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted and the order dismissing the case (Dckt. 99) is vacated.~~

~~**IT IS ORDERED** that on or before August 15, 2016, W. Steven Shumway, counsel for Debtor, shall pay to David Cusick, the Chapter 13 Trustee, \$1,000.00 as an expense reimbursement caused by the failure to properly respond or address the prior Motion to Dismiss. The Trustee shall deposit the monies into the fund maintained for Chapter 13 Trustee costs and expenses, or as otherwise directed by the U.S. Trustee. The monies are not a personal payment to the Chapter 13 Trustee.~~

---

~~**IT IS FURTHER ORDERED** that if W. Steven Shumway fails to timely pay the \$1,000.00 by August 15, 2016, then the Chapter 13 Trustee shall file a declaration so attesting and lodge with the court an order dismissing this Chapter 13 case pursuant to the Motion to Dismiss, DCN:DPC-4. The Trustee shall serve copies of the proposed order and declaration on the Debtors, Debtors' Counsel, and the U.S. Trustee.~~

---

~~**IT IS FURTHER ORDERED** that if W. Steven Shumway timely pays the \$1,000.00 by August 15, 2016, then the Chapter 13 Trustee shall lodge with the court an order dismissing the Trustee's Motion to Dismiss, DCN:DPC-4.~~

18. [15-28165](#)-E-13      **LEON VICENTE AND ANGELA**      **MOTION TO VALUE COLLATERAL OF**  
**TOG-6**      **XILOJ**      **DITECH FINANCIAL, LLC**  
      **Thomas Gillis**      **6-8-16 [62]**

**Final Ruling:** No appearance at the July 26, 2016 hearing is required.  
-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Value is continued to 3:00 p.m. on August 30, 2016.**

The Motion to Value filed by Leon F Vicente and Angela Xiloj ("Debtor") to value the secured claim of Ditech Financial LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 6828 Blue Duck Way, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of \$134,581.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The valuation of property which 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.

### **Proof of Claim Filed**

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Proof of Claim No. 8 filed by Ditech Financial LLC f/k/a Green Tree Servicing LLC is the claim which may be the subject of the present Motion.

### **OPPOSITION**

Creditor has filed an opposition. Creditor disputes the Debtor's valuation of the subject property of \$134,581.00 and argues that the value of the subject property is greater than \$177,200.00, the balance of the first lienholder's loan. Creditor is currently in the process of obtaining its own appraisal in order to determine the value of the subject property.

### **DISCUSSION**

The Creditor requests additional time to perform an appraisal of the subject property. Therefore, the court will continue the instant Motion to 3:00 p.m. on August 30, 2016. Any supplemental papers shall be filed and served on or before August 16, 2016. Any replies or oppositions shall be filed and served on or before August 23, 2016.

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 Leon F. Vicente and Angela Xiloj ("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 continued to 3:00 p.m. on August 30, 2016. Any supplemental paper shall be filed and served on or before August 16, 2016. Any replies or oppositions shall be filed and served on or before August 23, 2016.

19. [15-28165](#)-E-13      **LEON VICENTE AND ANGELA**      **MOTION TO CONFIRM PLAN**  
**TOG-7**      **XILOJ**      **6-8-16 [67]**  
                 **Thomas Gillis**

**Final Ruling:** No appearance at the July 26, 2016 hearing is required.  
-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 8, 2016. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

<b>The Motion to Confirm the Amended Plan is continued to 3:00 p.m. on August 30, 2016.</b>
---

Leon Vicente and Angela Xiloj ("Debtor") filed the instant Motion to Confirm the Amended Plan on June 8, 2016. Dckt. 67.

#### TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 10, 2016. Dckt. 75. The Trustee opposes confirmation on the ground that the proposed plan relies on a Motion to Value Collateral of Ditech Financial LLC.

#### DEBTOR'S RESPONSE

The Debtor filed a response on July 12, 2016. Dckt. 90. The Debtor concurs that the proposed plan relies on the Motion to Value.

#### DISCUSSION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

On June 8, 2016, the Debtor filed a Motion to Value Collateral of Ditech Financial, LLC. Dckt. 62. The Motion was continued to 3:00 p.m. on August 30, 2016.

Due to the interconnectedness of the instant Motion to Confirm and the Motion to Value, the instant Motion is continued to 3:00 p.m. on August 30, 2016.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is continued to 3:00 p.m. on August 30, 2016.

20. [16-24265](#)-E-13      RICHARD AMUNDSEN  
RWH-1      Ronald Holland

MOTION TO EXTEND AUTOMATIC  
STAY  
7-5-16 [8]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 5, 2016. By the court's calculation, 21 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
-----.

<b>The Motion to Extend the Automatic Stay is granted.</b>
--

Richard Amundsen ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-25329) was dismissed on June 29, 2016, after Debtor filed an ex parte Motion to Dismiss due to the "financial and/or legal situation of the Debtors has unexpectedly changed and the Debtors now desired to dismiss the case." Dckt. 33; *See* Order, Bankr. E.D. Cal. No. 15-25329, Dckt. 34, June 29, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 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, 209-210 (2008). 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:

1. Why was the previous plan filed?
2. What has changed so that the present plan is likely to succeed?

*Elliot-Cook*, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as the Debtor and Debtor's former wife dissolved the marriage. The parties determined that the joint case should be dismissed to allow each to file individual cases. The resulting dismissal and refiling was to achieve this goal..

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

The motion is granted and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

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

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

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

**IT IS ORDERED** that the Motion is granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

21. [16-22871](#)-E-13      **RICHARD MIKEL**  
DPC-1                      Pro Se

**OPPOSITION TO DEBTOR'S MOTION  
TO VACATE ORDER DISMISSING CASE  
6-28-16 [\[24\]](#)**

**DEBTOR DISMISSED: 06/01/2016**

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on June 28, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Vacate has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

<p><b>The Motion to Vacate is denied.</b></p>
---

Richard Mikel ("Debtor") filed the instant Motion to Vacate Dismissal on June 13, 2016. Dckt. 23.

The instant case was filed on May 2, 2016. Dckt. 1. No plan has been filed to date.

On May 4, 2016, the Clerk of the Court issued a Notice of Incomplete Filing or Filing of Outdated Forms and Notice of Intent to Dismiss Case if Documents are Not Timely Filed. Dckt. 15. The Notice states that the Debtor must file all missing documents on May 16, 2016.

On May 16, 2016, the court issued an order extending the deadline to file missing documents to May 31, 2016.

On June 1, 2016, the Clerk of the Court issued an order dismissing the case for failure to timely file documents.

On June 13, 2016, Debtor filed the instant “motion.” The Debtor states that he believed that he had filed all necessary paperwork by the May 31, 2016 deadline. The Debtor claims that someone at the “front desk” told the Debtor that all the paperwork had been turned in. The Debtor states that he wishes that the order dismissing be vacated so that he can save his home.

The Debtor seeks to have the order dismissing the case vacated, per Rule 60(b).

### **TRUSTEE’S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 28, 2016. Dckt. 24. The Trustee states that as of June 28, 2016, the required documents have not been filed.

Additionally, the Debtor did not set the motion for hearing in their opposition.

### **APPLICABLE LAW**

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

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

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is “a grand reservoir of equitable

power to do justice in a particular case.” *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

## DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers “the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.” *Gravatt v. Paul Revere Life Ins. Co.*, 101 Fed. Appx. 194, 196-197 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

The court is aware that the Debtor has filed the instant case in *pro se*. While the court is sympathetic to the Debtor who is trying to navigate the bankruptcy court, the Debtor has failed to file all necessary paperwork. The instant case was filed on May 2, 2016 and no proposed plan has been filed. The Debtor has not made any payments to the Trustee nor has he attempted to file a proposed plan since the dismissal.

There is not a proposed plan which Debtor has filed. In reviewing the Schedules that have been filed, they appear incomplete. The court notes that with respect to the Schedules, Dckt. 20:

- A. Summary of Assets and Liabilities is blank. *Id.* at 1.
- B. Schedule A/B states Debtor:
  - 1. Owns no real property. *Id.* at 2.
  - 2. Has \$1,000 in rent. *Id.* at 4.
  - 3. Owns three vehicles. *Id.* at 8-9.
  - 4. Has no household good. *Id.* at 11.
  - 5. Has no clothes. *Id.*
  - 6. Has no other personal items. *Id.*
- C. No assets are claimed as exempt on Schedule C. *Id.* at 30-31.
- D. Schedule D lists a secured claim for which the collateral is identified as “house,” with the value stated to be \$16,000. *Id.* at 32. No real property asset is listed on Schedule A.

Giving Debtor the benefit of the doubt, which well intentioned, the Schedules are so deficient that they demonstrate a lack of ability to prosecute a bankruptcy case.

There is nothing in the instant case that would justify the vacating of the instant dismissal. The Debtor will need to clear the slate and commence a new case. As with other debtors, seeking the advice and assistance of knowledgeable bankruptcy counsel may be warranted. If a debtor has the ability to fund a Chapter 13 plan, usually the attorney can figure out how to be paid most of his or her fees through the plan. The Debtor may wish to consider hiring bankruptcy counsel in order to avoid future dismissals due to procedural issues.

Therefore, in light of the foregoing, 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 Vacate Dismissal of Case filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied.

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 17, 2016. By the court's calculation, 70 days' notice was provided. 35 days' notice is required.

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

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

Jack G. And Linda M. Ganas filed the instant Motion to Modify Plan on May 17, 2016. Dckt. 123.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 11, 2016. Dckt. 137. The Trustee objects to the confirmation on the following grounds.

1. The Debtors have not provided an amended Schedule J in support of the proposed Modified Plan.
2. The amount of the proposed payments under the Modified Plan is unclear.

3. The Debtors are \$791.00 delinquent under the proposed plan. The Debtor's have paid the Trustee \$59,621.00 to date.

### **JULY 22, 2016 STIPULATION**

On July 22, 2016, the Debtor and Trustee filed a stipulation to continue the hearing to 3:00 p.m. on August 16, 2016 due to Debtor's counsel's unfortunate family emergencies.

### **DISCUSSION**

Therefore, in light of the stipulation and the extenuating circumstances, the court continues the instant hearing to 3:00 p.m. on August 16, 2016.

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

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

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

**IT IS ORDERED** that the Motion to Confirm the Plan is continued to 3:00 p.m. on August 16, 2016.

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 17, 2016. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Troy A. Hardin filed the Instant Motion to Modify Plan on June 17, 2016. Dckt. 73.

**TRUSTEE'S OBJECTION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the Motion on July 11, 2016. Dckt. 83. The Trustee objects to the Motion on the following grounds:

1. The Trustee is uncertain of the treatment of Sacramento County Utilities under the Proposed modified plan; whether the debt is owed to Sacramento County Utilities or the City of Sacramento; whether the debt is secured, priority, or both; and whether the Debtor wants the claim to be paid through the plan.

Under the Confirmed Plan, the City of Sacramento was provided for as a Class 5 claim. Debtor filed a priority claim on behalf of the City of Sacramento for \$1,315.46. Debtor

later amended the claim naming the creditor as City of Sacramento, but also listing Sacramento County Utilities as another name the creditor has used with the Debtor. The amended claim claims both secured and unsecured portions of \$400.04 each and includes a post office box number where payments should be sent. Debtor's modified plan proposes to provide for Sacramento County Utilities as a Class 5 priority claim for \$400.04.

2. The Trustee is uncertain of the treatment of the Internal Revenue Service ("IRS") under the proposed Modified Plan. Under the Confirmed Plan, the IRS is provided for as a Class 5 claim. Debtor filed a priority claim on behalf of the IRS for \$1,493.00. The IRS later amended the claim by filing a secured claim in the amount of \$13,449.01, claiming \$0.00 priority. Debtor's modified plan now proposes to provide for the claim in Class 2 pursuant to the IRS's amended claim, but then also provides for the IRS in Class 5 pursuant to the confirmed plan and Debtor's previously filed priority claim.
3. The Debtor may not have the ability to make the increased plan payment in month 27 as proposed in the Modified Plan.

## **DEBTOR'S REPLY**

The Debtor filed a Reply to the Trustee's Opposition on July 19, 2016. Dckt. 86. Debtor states the following:

1. Debtor requests that the order confirming plan clarify that the class 5 claim in the amount of \$400.04 be paid to Sacramento County Utilities
2. Since there is no priority claim filed by the Internal Revenue Service, the creditor will not be paid on a priority claim. Debtor's modified plan does provide for the secured claim filed by the Internal Revenue Service (Claim 7) paid at 3.00% interest with a monthly dividend of \$310.00.
3. Debtor is current under the terms of the plan which shows that the Debtor has the ability to make the increased plan payment.

## **DISCUSSION**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor may be unable to make the increased plan payment in month 27 as proposed under the Modified Plan. Debtor's Modified Plan proposes that \$26,640.00 be paid for the first 14 months, \$2,180.00 be paid for the next 12 months, and \$3,500.00 be paid for 34 months. Debtor's Supplemental Schedules I & J represent a monthly net income of \$2,180.00.

Debtor's declaration reflects that Debtor is resolving a mortgage issue where Debtor states that he received a loan modification, reducing his mortgage payment from \$1,338.99 to \$1,183.70, but the lender filed a claim for arrears with the pre-loan modification payment amount. Debtor's Declaration also states that part of Debtor's home became uninhabitable due to a now resolved plumbing issue which caused his two roommates to move out, resulting in a loss of \$1,050.00 per month in rental income. It seems Debtor was relying on all of these circumstances when proposing the increased plan payments.

Decrease in Mortgage Payment	\$268.29
Lost Rental Income	\$1,050.00
Total	\$1,318.29

Factoring in the decrease in mortgage payment and additional rental income, it seems that Debtor will be just shy of being able to support a plan payment increase of \$1,320.00. However the Debtor has not indicated that this is how the Debtor will be able to make this increased plan payment. Debtor has not filed Amended Schedules I & J in support of the increased plan payment and Debtor's Supplemental Schedule J already accounts for \$1,025.00 of rental income which was present on Debtor's original Schedule J. This suggests the plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

As to the Trustee's first and second objection, it appears to the court that the information listed on the plan was a mere scrivener's error by the Debtor's counsel. While this is not an independent ground to deny confirmation and could otherwise be corrected in an order confirming, taken together with the concerns regarding the Debtor's ability to make the increased plan payments, the plan cannot be confirmed.

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

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

**Final Ruling:** No appearance at the July 26, 2016 hearing is required.  
-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 20, 2016. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

**The Objection is continued to 3:00 p.m. on August 16, 2016.**

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

1. Debtor is delinquent in plan payments.
2. The Debtor has failed to provide the Trustee with a copy of the tax return.
3. Debtor has failed to provide the Trustee with 60 day pay advices.
4. The plan is not the Debtor's best efforts.
5. The secured claim of Unifund CCR, LLC is not provided for in the plan.
6. The Trustee calculates that the plan could pay all creditors at 100% within 36 months if the plan payment were increased to \$585.00 per month.

#### **TRUSTEE'S SUPPLEMENTAL DECLARATION**

The Trustee filed a supplemental declaration on May 4, 2016. Dckt. 33. The Trustee states that the Debtor has resolved the first three objections. However, the remaining objections still remain.

#### **STIPULATION**

On May 20, 2016, the Debtor and Trustee filed a stipulation to continue the hearing due to allow Debtor's counsel opportunity to resolve the remaining issue and due to a conflict Debtor's counsel has at the time of the scheduled hearing. The parties stipulate to continue the hearing to 3:00 p.m. on July 26, 2016.

### **MAY 24, 2016 HEARING**

The hearing was continued to 3:00 p.m. on July 26, 2016.

### **TRUSTEE'S SUPPLEMENT**

The Trustee filed a supplement on July 6, 2016. Dckt. 39.

The Trustee reports that the following matters have been resolved: (1) tax returns; (2) pay advices; and (3) delinquency.

However, the Trustee reports that the following objections remain unresolved:

1. Debtor's plan is not the Debtor's best efforts. Debtor is over median income according to the Statement of Current Monthly Income, Form 122C-1, Debtors Schedule J shows net monthly income on line 23c of \$2,243.00, while the plan proposes a payment of \$182.83 per month for 60 months.
2. Secured claim of Unifund CCR, LLC not provided for in the plan.
3. Based on the Trustee's calculations the plan could pay all creditors at 100% within 36 months (including the secured Unifund debt at 4.25% interest), if the plan payment were increased to \$585.00 per month.

### **JULY 22, 2016 STIPULATION**

On July 22, 2016, the Debtor and Trustee filed a stipulation to continue the hearing to 3:00 p.m. on August 16, 2016 due to Debtor's counsel's unfortunate family emergencies.

### **DISCUSSION**

Therefore, in light of the stipulation and the extenuating circumstances, the court continues the instant hearing to 3:00 p.m. on August 16, 2016.

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is continued to 3:00 p.m. on August 16, 2016.

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

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

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

-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 29, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

<p><b>The court's decision is to sustain the Objection.</b></p>
---

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

1. The Debtor failed to appear at the First Meeting of Creditors held on June 23, 2016. The Meeting has been continued to July 28, 2016.
2. Debtor is \$2,349.00 delinquent in plan payments to the Trustee. The Debtor has paid \$0.00 into the plan to date.
3. Debtor lists on Schedule D a secured claim for Wells Fargo Dealer Services in the amount of \$13,000.00, secured by a Chevy Volt. Debtor improperly lists the creditor in Class 4 of the plan. Wells Fargo Bank, N.A. filed Court Claim #2, indicating a secured claim of \$12,999.60 and a delinquency of \$596.61. The loan was opened June

27, 2015, with a loan term of 65 months. The debtor has been in contract for 12 months and the term of the contract will expire during the life of the Plan. Thus, the claim should be provided and paid for in Class 2 of the Plan.

4. The Trustee is unable to determine the fees charged for bankruptcy services. Debtor's Plan indicates \$1,700.00 was paid prior to filing. Debtor's Statement of Financial Affairs reports a transfer of \$1,750.00 to Crody & Associates, but fails to report the date of transfer. Debtor's Disclosure of Compensation of Attorney reports no payments were made prior to filing.

The Trustee's objections are well-taken.

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

The Debtor is \$2,349.00 delinquent in plan payments. To date, the Debtor has paid \$0.00 into the plan. The Debtor's delinquency indicates that the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee's remaining objections relate to the inability of the court to confirm a plan when all the information is not properly provided and is improperly provided. The Trustee is correct that the Debtor has misclassified the Wells Fargo Bank, N.A. should be a class 2 of the plan rather than Class 4, given the arrearage amount and the fact that the contract will mature during the life of the plan. The court, like the Trustee, notes the discrepancy of what fees have been made to counsel. The fees allegedly made are not reported which raises concerns of whether the court and other parties in interest have a accurate reflection of the Debtor's finance.

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

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

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

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

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

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 13, 2016. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

<p><b>The court's decision is to deny the Motion to Confirm the Amended Plan.</b></p>
---

Jose Godinez ("Debtor") filed the instant Motion to Confirm the Amended Plan on June 13, 2016. Dckt. 40.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on July 6, 2016. The Trustee objects to the plan on the following basis:

1. Debtor is delinquent \$2,175.00 in plan payments. The Debtor has paid \$0.00 into the plan to date.
2. The Debtor's plan indicates that additional provisions are appended to the plan, yet do not appear to be attached.

## DISCUSSION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is \$2,175.00 delinquent in plan payments. The Debtor has made \$0.00 plan payments to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The concerns over the viability and plausibility of the plan is just further exasperated when the Debtor indicates that the plan has additional provisions but fails to attach them. The court nor any other party in interest can determine if a plan is confirmable without the Debtor fully presenting 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on May 20, 2016. By the court's calculation, 33 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). The Debtor filed opposition. 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).

<b>The Motion to Dismiss is granted and the case is dismissed</b>
---

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on May 20, 2016. Dckt. 28.

Rather than filing a responsive pleading to the instant Motion as required under Local Bankr. R. 9014-1(f)(1), the Debtor and Debtor's counsel filed a Motion to Confirm the Second Amended Plan and a proposed amended plan. Dckt. 40 and 41. The Debtor appears to expect the court to mine through the case docket to piecemeal any opposition or grounds the Debtor may have to oppose the Motion to Dismiss. The court typically grants Motions to Dismiss when the Debtor and Debtor's counsel fails to respond or oppose with evidence to counter the Trustee's claim.

The court continued the hearing to 3:00 p.m. on July 26, 2016 to be heard in conjunction with the Debtor's Motion to Confirm Amended Plan.

The Trustee argues that the Debtor did not commence making plan payments and is \$3,625.00 delinquent in plan payments. 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.

Therefore, cause exists 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 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

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

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

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

-----

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 29, 2016. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to grant the Objection.</b>
--

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

1. The debtor is \$1,699.00 delinquent in plan payments. To date, the Debtor has paid \$0.00 into the plan.
2. The Debtor failed to appear at the first meeting of creditors held on June 23, 2016. The meeting was continued to August 18, 2016.

The Trustee's objections are well-taken.

The basis for the Trustee's objection was that the Debtor is \$1,699.00 delinquent in plan payments. To date, the Debtor has paid \$0.00 into the plan. The Debtor's delinquency indicates that the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

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