

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

**Honorable Ronald H. Sargis**  
Chief Bankruptcy Judge  
Sacramento, California

**Notice**

**The court has reorganized the cases, placing all of the Final Rulings  
in the final part of these Posted Rulings,  
with the Final Rulings beginning with Item 36.**

**The court has also reorganized the items for which the tentative rulings  
are issued, Items 1–35, attempting to first address the items in  
which short argument is anticipated.**

August 21, 2018, at 3:00 p.m.

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1.	<a href="#"><u>18-23401</u></a> -E-13 DPC-1	PAUL/SHERI D'ANGELO Mark Briden	OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-16-18 <a href="#"><u>[21]</u></a>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on July 16, 2018. By the court's calculation, 36 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4).

Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection. At the hearing -----.

<b>The Objection to Confirmation of Plan is Sustained.</b>
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David Cusick (“the Chapter 13 Trustee”) opposes confirmation of the Plan on the basis that:

- A. Trustee believes Debtor is unable to make payments under the Plan. Debtor proposes plan payments of \$2,300.00 for 60 months. Debtor has failed to list an expense for income tax despite being self-employed as a bail bonds agent.
- B. Debtor has failed to provide tax returns for the most recent pre-petition tax year, or a statement that no returns exist as required by 11 U.S.C. § 521(e)(2)(A).
- C. Debtor has outstanding tax return and has not filed tax returns for at least three taxable years. The Internal Revenue Service filed Proof of Claim 4–1 indicating Debtor has not filed income taxes for 2016 and 2017. The Franchise Tax Board filed Proof of Claim 6–1 indicating Debtor has not filed income taxes for 2007, 2008, 2009, 2015, 2016, and 2017. Debtor states Debtor filed taxes for 2015-2017. Debtor is required under 11 U.S.C. §§ 1308 & 1325(a)(9) to have filed all tax returns due during the 4-year period preceding filing of the petition.
- D. Debtor’s Plan would be completed in 115 months as opposed to 60 months proposed and permitted under 11 U.S.C. § 1322(d). The Plan proposes payments of \$2,300.00 for 60 months, which totals \$138,000.00. Debtor proposes to pay \$4,500.00 in attorney’s fees; \$193,899.77 towards Class 2 Creditor Jagusiak; \$10,903 with 5% interest (\$12,345.00) towards the IRS’ secured claim; \$8,141.83 to Class 5 claims based on the Franchise Tax Board’s priority claim; and \$24,529.59 to Class 5 claims based on Internal Revenue Service’s priority claim.
- E. Mark and Mary Jagusiak hold a First deed of Trust in Class 2 of the Plan. Debtor is not proposing to pay the full claim amount of \$193,899.72 with 10% interest, but instead proposes only \$1,600.00 for 60 months (\$96,000.00). Debtor has been delinquent in payments for three months. It appears Jagusiak should be reclassified as a Class 1 creditor.
- F. Debtor has failed to provide the Trustee with necessary business documents. Debtor has failed to provide 6 months of bank statements or 2016 or 2017 tax returns despite Debtor being self-employed as a bail bondsman and listing an income of \$4,479.00.

- G. The Plan is not Debtor's best effort under 11 U.S.C. § 1325(b). Debtor is over the median income and proposes plan payments of \$2,300.00 for 60 months with a dividend of 0% to creditors with unsecured claims. Debtor's 122C-1 reflects disposable income of \$10,513.67 for 60 months (\$630,820.20).
- H. Debtor's unsecured debts include \$347,038.48 to the IRS and \$120,734.79 to the FTB, totaling \$500,422.00. Debtor is ineligible for Chapter 13 relief as Debtor's unsecured debts exceed the debt limit of \$ 383,175.00 provided under 11 U.S.C. § 109(e).

The Chapter 13 Trustee's objections are well-taken.

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's proposed plan provides payments of \$2,300.00 for 60 months without taking income taxes into consideration. Debtor's Schedule I fails to reflect an expense item for income tax. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### **Failure to File and Provide Tax Returns**

Debtor admitted at the Meeting of Creditors that the federal income tax returns for 2007, 2008, and 2009 have not been filed. Debtor states that returns for 2015, 2016, and 2017 have been filed, but such documents have not yet been provided. Filing of the returns is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Failure to Complete Plan Within Allotted Time**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 115 months due to insufficient funds to satisfy the planned debts. Debtor's 60 month plan would total \$130,000.000 wherein the total debts satisfied would be substantially lower. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### **Failure to Provide for a Secured Claim**

Mark and Mary Jagusiak hold a First deed of Trust securing a claim of \$193,899.72 in this case. The Plan provides for treatment of this as a Class 2 claim, but (because Debtor asserts that it is subject to a claims valuation pursuant to 11 U.S.C. § 506(a)), proposes to pay a \$0.00 monthly dividend on account of the claim.

Trustee alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of Jagusiak's matured obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or
- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

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

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

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

#### **Failure to File Documents Related to Business**

Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

- A. Six months of bank account statements, and
- B. Tax returns .

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

### **Not Best Effort**

The Chapter 13 Trustee Creditor alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

The Plan proposes to pay a zero percent dividend to unsecured claims, which total \$0, though Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals \$630,820.20. Furthermore, Debtor has unreported rental income totaling \$1,500.00 monthly. Thus, the court may not approve the Plan.

### **Amount of Debt**

Trustee alleges that Debtor does not qualify for Chapter 13 treatment because the unsecured debt limit in 11 U.S.C. § 109(e) has been exceeded. That section limits Chapter 13 eligibility to individuals with regular income who owe "on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$394,725 and noncontingent, liquidated, secured debts of less than \$1,184,200." Based on Proofs of claim 4-3 and 6-1, Debtor has unsecured debts of \$347,038.48 owing to the IRS and \$120,734.79 to the FTB, totaling \$500,422.00. This exceeds the debt limit for a Chapter 13 case.

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

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

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

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

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

2. [18-23671](#)-E-13 CHANDA RAMSEY-WALLACE OBJECTION TO CONFIRMATION OF  
CAS-1 Mikalah Liviakis PLAN BY CAPITAL ONE AUTO FINANCE  
7-18-18 [\[15\]](#)

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on July 18, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

**The Objection to Confirmation of Plan is overruled.**

Capital One Auto Finance, a division of Capital One, N.A. ("Creditor") opposes confirmation of the Plan on the basis that:

- A. Creditor holds a security interest in the vehicle identified as a 2009 MERCEDES-BENZ C Class Sport Sedan 4D C350, VIN # WDDGF56X39R059461 (the "Collateral"). The balance owed under the Sales Contract for at the time of Petition was \$15,706.96. The Chapter 13 Plan filed proposes to pay Creditor's claim in the amount of \$3,659.00 at 5.50% interest over the term of 60 months.

- B. The Plan fails to pay the full replacement value of the Collateral. In Chapter 13 proceedings, a Debtor may confirm a Plan over a creditor's objection only if the Plan provides the creditor the full value, as of the effective date of the Plan, of the allowed amount of the secured claim. 11 U.S.C. § 1325(a)(5)(B). The allowed amount of the secured claim is determined based on the replacement value a retail merchant would charge for a Collateral of a similar age and condition. 11 U.S.C. § 506(b). The estimated replacement value a retail merchant would charge for the Collateral is \$7,186.00. To the extent that the Plan does not pay the full value of the Collateral pursuant to 11 U.S.C. § 506(b), Creditor objects to the confirmation of the Plan.
- C. The Plan fails to pay the applicable prime plus interest rate. In addition, the Debtor must pay the present value of the secured claim by paying the creditor a discount rate of interest as measured by the Capital One Auto Finance, a division of Capital One, N.A.'s Objection to Chapter 13 Plan formula rate expressed by the United States Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). See, also *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343 (5th Cir. 2008) (applying prime plus rate to vehicle lender's claim). The current prime rate of interest is 5.000%. To the extent that the Plan proposes to pay less than the prime interest rate plus 1.000%, Creditor objects to the confirmation of the Plan.

## **DEBTOR'S RESPONSE TO CREDITOR'S OBJECTION**

Debtor filed a Response to Creditor's Objection on August 12, 2018. Dckt. 19. Debtor states Debtor and Capital One ("The Parties") have reached an agreement, which both seek to incorporate into the order confirming Debtor's Plan. The Parties have agreed:

"that the Plan is amended as follows: CAPITAL ONE AUTO FINANCE, A DIVISION OF CAPITAL ONE, N.A. ("Capital One") shall be paid \$7186 plus 6% interest through class 2 of the Plan via equal monthly installment payments. Capital One shall have a secured claim of \$7186 and an unsecured claim of \$8520.96."

## **DISCUSSION**

Creditor and Debtor having entered into an agreement resolving the issues raised by Creditor's Objection, the Objection is overruled and the Plan is confirmed.

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

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

The Objection to the Chapter 13 Plan filed by Capital One Auto Finance, a division of Capital One, N.A. (“Creditor”) holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection is overruled, and Chanda Yvette Ramsey-Wallace’s (“Debtor”) Chapter 13 Plan filed on June 12, 2018, is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**IT IS FURTHER ORDERED** that:

1. The debtor shall immediately notify, in writing, the Clerk of the United States Bankruptcy Court and the trustee of any change in the debtor’s address;
2. The debtor shall immediately notify the trustee in writing of any termination, reduction of, or other change in the employment of the debtor; and
3. The debtor shall appear in court whenever notified to do so by the court

**IT IS FURTHER ORDERED** that the attorney’s fees for the debtor’s attorney in the full amount of \$3995.00 are approved, \$0.00 of which was paid prior to the filing of the petition. The balance of \$3995.00, provided that the attorney and debtor have complied with Local Bankruptcy Rule 2016-1©), shall be paid by the trustee from plan payments at the rate specified in the confirmed plan.

**IT IS FURTHER ORDERED** that the Plan is amended as follows: Creditor shall be paid \$7186 plus 6% interest through class 2 of the Plan via equal monthly installment payments. Creditor shall have a secured claim of \$7186 and an unsecured claim of \$8520.96.



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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, and parties requesting special notice on July 5, 2018. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

<p><b>The Motion to Confirm the Modified Plan is denied.</b></p>
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Richard Lester Huettner (“Debtor”) seeks confirmation of the Modified Plan to add an 18% interest rate on the property taxes owed to Placer County and increase the monthly payments to the County. . Dckt. 45. The Modified Plan increases the interest rate to secured creditor Placer County Tax Collector to 18.00% in §3.08A.1 and increased the future monthly dividend to be paid thereon, and decreases the amount of priority claims to \$0.00 in §3.12. Dckt. 41. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### **CHAPTER 13 TRUSTEE’S OPPOSITION**

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on August 3, 2018. Dckt. 49. Trustee asserts that Debtor is delinquent \$450.00 under the terms of the proposed Modified Plan.

## **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$450.00 delinquent in proposed plan payments. Delinquency indicates that 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 Modified Chapter 13 Plan filed by Richard Lester Huettner (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's attorney on July 17, 2018. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
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David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that:

- A. Debtor has failed to provide required business documents, including questionnaire, 2 years' tax returns, 6 months' bank statements, 6 months' profit and loss statements, proof of license and insurance, or a written statement that no such documents exist. The First Meeting of Creditors was held July 12, 2018, and was continued to August 16, 2018.
- B. Chapter 13 documents incomplete; despite listing business income of \$5,476.36, Debtor has not filed a statement for each property and business showing gross receipts, ordinary and necessary expenses, and total monthly net income. Debtor has not listed any business assets on Schedule D though being self-employed.

- C. Debtor has failed to provide a Class 1 Checklist and Authorization of Release Information forms to Trustee as required by Local Bankruptcy Rule 3015-1(b)(6).
- D. Section 3.06 lists Administrative Expenses to be \$0.00 despite listing attorney's fees in the amount of \$1,000.00 in Section 3.05.
- E. Debtor is proposing a 0% dividend to unsecured creditors, totaling \$28,188.03. Debtor is married and his spouse is not included in the bankruptcy. Because Debtor has not filed a spousal waiver for use of the California State Exemptions, the Plan does not pay unsecured creditors what they would receive in the event of a Chapter 7 case.
- F. Debtor's Voluntary Petition fails to list the middle name "Nikolaos." Debtor's address in question #5 is listed as "Wesly Drive" but should be "Wesley Drive."

The Chapter 13 Trustee's objections are well-taken.

#### **Failure to File Documents Related to Business**

Debtor has failed to timely provide the Chapter 13 Trustee with business documents including:

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

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

#### **Failure to File Business Documents Required by Schedule I**

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

## **Failure to File Class 1 Checklist**

Debtor has not filed a Class 1 Checklist and Authorization of Release Information forms to Trustee as required by Local Bankruptcy Rule 3015-1(b)(6).

## **Plan is Not Feasible**

Trustee notes Section 3.06 of the Plan lists Administrative Expenses to be \$0.00 despite listing attorney's fees in the amount of \$1,000.00 in Section 3.05. Because the Plan does not provide for the fees, it is not feasible. 11 U.S.C. § 1325(a)(6).

Trustee also notes the Voluntary Petition has inaccurate information, including a missing middle name and inaccurate street address. Failure to correct these deficiencies leaves the court to question the Plan's feasibility as well.

## **Debtor Fails Liquidation Analysis**

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that Debtor is proposing a 0% dividend to unsecured creditors, totaling \$28,188.03, despite being married and not having sought a spousal waiver necessary to claim pertinent exemptions. Therefore, the plan does not likely meet the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4).

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

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

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

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

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

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 11, 2018. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

**The Motion to Confirm the Modified Plan is denied.**

Willie James Morris and Monica Tatney-Morris(“Debtor”) seeks confirmation of the Modified Plan to reflect recent changes in income; changes to rent, utilities, and transportation costs after moving; and increases to life insurance premiums and car insurance payments. Dckt. 33. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### **CHAPTER 13 TRUSTEE’S OPPOSITION**

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on August 3, 2018. Dckt. 41. Trustee Opposes the Motion on the following grounds:

1. Trustee is uncertain the Plan represents Debtors best efforts. The Supplemental Schedule J (Dckt. 36 at 23) reflects an expense of \$428.27 on the line 17c as additional car payments. Debtor also reported \$250.00 as transportation, \$16.00 auto registration, and have increased charitable

contributions and religious donations by \$150.00 since filing. Debtor's Motion for Permission to Purchase New Vehicle was heard and denied. Dckt. 38.

2. Debtor's Motion and Declaration are misleading in that they state the Plan payment is changing to \$610.00 for months 3 through 60, however the proposed Plan states Debtor will pay \$610.00 per month for months 24-36.
3. The Notice provided by Debtor does not meet the requirements of Local Bankruptcy Rule 9014(d)(3)(B)(iii) because it does not contain information regarding pre-hearing disposition.

## **DISCUSSION**

### **Failure to use best efforts**

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor's Supplemental Schedule J provided as Exhibit C shows a new expense of \$428.27 on the line 17c as additional car payments and an increase of \$45.00 in transportation costs. Dckt. 36. Debtor filed a Motion for Permission to Purchase New Vehicle that contemplated monthly car payments of \$428.27. Dckt. 20. The court denied that motion on July 31, 2018, on the grounds that it was unreasonable for Debtor to assume debt for a new vehicle. Dckt. 38. The increased expense on the Supplemental Schedule J clearly contemplates an ability to make payments (on a new vehicle) that Debtor does not otherwise have to make. Therefore, there appears to be disposable income in the amount of \$428.27 not being put towards the Plan. Therefore, the Modified Plan does not meet 11 U.S.C. § 1325(b)(1).

Increases to transportation costs have been explained by Debtor having moved. Dckt. 33. Debtor does not explain the reason for increasing charitable contribution, which also leads the court to believe Debtor is not applying all disposable income towards a Plan.

### **Misleading Declaration**

While Debtors state their plan payment will be increased to \$610.00 from months 3 through 60, their Modified Plan reflects that this increase will only apply for months 24-36. Dckt. 33. As the Modified

Plan takes effect in month 24, it is likely this was merely an error in drafting and the Debtor's intended to state the Plan is being Modified to increase remaining Plan payments.

### **Improper Notice**

Debtor provided notice of the hearing on this Motion that does not inform the parties of the ability to review pre-hearing disposition on the court website. Dckt. 32. This is require by Local Bankruptcy Rule 9014(d)(3)(B)(iii). However, because an Opposition has been filed, it does not appear any party has been materially prejudiced by the failure to provide proper notice.

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by Willie James Morris and Monica Tatney-Morris ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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



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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on June 11, 2018. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

**The Motion to Confirm the Modified Plan is denied.**

Ozniesha Williams ("Debtor") seeks confirmation of the Amended Plan to remove an unsecured claim for Check-n-Go. Additionally, since filing the original plan, Debtor has filed and processed her 2017 Tax Returns, which she states have been provided to David Cusick ("the Chapter 13 Trustee"). Dckt. 29. The Amended Plan provides for a monthly payment of \$3,552.00 and will pay unsecured claims a 100% dividend. Dckt. 31. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### **CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee filed an Opposition on July 12, 2018. Dckt. 36. He argues that Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in seventy-three months unless the monthly payment to Wells Fargo for pre-petition arrears is increased from \$953.50 to \$1,075.60. Dckt. 36. For the Plan to complete in sixty months, the monthly payment must be \$3,774.21. Dckt. 37. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Chapter 13 Trustee Opposition alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

The Chapter 13 Trustee reports that Debtor has a history of receiving large tax refunds, and they have not been proposed to be provided to the Plan.

The Chapter 13 Trustee objects that the Motion was not properly noticed to three creditors who filed claims. Claims 1, 2 and 4. Three claimants—Discover Bank, Capital One Bank, and Cerastes (“Check-n-Go”)—were not served. Dckt. 32. Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 9014-1(f)(1) require that all creditors be served.

Amended Schedules I and J were submitted on June 11, 2018, as exhibits associated with the Motion to Confirm First Amended Chapter 13 Plan. Dckt. 30. Schedules need to be filed as separate documents so that they are actually filed as amended schedules and not merely an exhibit for an isolated matter.

## **JULY 31, 2018 HEARING**

At the July 31, 2018 hearing, the court continued the Motion to August 21, 2018 to allow Debtor to cure the Trustee's Objection. Dckt. 40.

## **SUPPLEMENTAL PLEADINGS**

### **Debtor's Deceleration**

Debtor filed a Declaration in support of the Motion on August 10, 2018. Dckt. 41. Debtor states that since filing her original Plan wherein her brother was paying \$700 monthly for rent, Debtor now is receiving \$925. Debtor believed when filing her First Amended Plan that \$953.50 was adequate payment for Wells Fargo N.A.'s arrears, but now intends to increase that amount to \$1,075.60. Debtor adds that she would like to have her past submitted documents incorporated into the Declaration.

### **Declaration of Cedric Williams**

Cedric Williams, brother of Debtor, filed a Declaration on August 10, 2018. Dckt. 42. Mr. Williams affirms that his rent payment to Debtor has increased from \$700.00 to \$925.00.

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

At the hearing ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

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

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

~~The Motion to Confirm the Amended Chapter 13 Plan filed by Ozniesha Williams ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

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

7.

**18-23420-E-13 HECTOR CAVAZOS**  
**DPC-1 Peter Macaluso**

**OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK**  
**7-16-18 [37]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Hector Cavazos ("Debtor") and Debtor's attorney, Peter Macaluso, on July 16, 2018. By the court's calculation, 36 days' notice was provided. 14 days' notice is required.

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

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
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David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that:

- A. Trustee asserts Debtor cannot make payments under the plan. Debtor proposes plan payments of \$3,700.00 for 24 months, \$4,400.00 for 12 months, and then \$5,100.00 for 24 months. Debtor's Schedule I indicates he is unemployed. Step-ups in payment are dependent on future employment. Furthermore, Debtor admitted at the 341 Meeting of Creditors that he has not yet started receiving rental income of \$1,000.00 he is listing on his Schedule I.
- B. Debtor proposes in "Additional Provisions" of the Plan that Debtor will not start paying Class 1 arrears to Mr. Cooper until month 25 of the Plan. Trustee finds this an unreasonable time to make the creditor with

\$30,806.85 in arrears to wait, and does not provide for equal monthly payments on this secured claim. 11 U.S.C. § 1325(a)(5)(B)(iii)(I).

- C. Trustee asserts the Plan is not Debtor's best efforts. Debtor is under the median income and proposes plan payments of \$3,700.00 for 24 months, \$4,400.00 for 12 months, and then \$5,100.00 for 24 months. Debtor provided Trustee his 2017 tax return which reflected a refund of \$6,783.00. Debtor has not proposed to put any of the refund towards the plan.
- D. Debtor proposes to value the secured claim of "LoanMart" to reduce the secured claim from \$12,000.00 to \$5,000.00. Debtor filed the motion to value. Dckt. 32.

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor personally has insufficient income to support the Plan because Debtor is currently unemployed and has been unemployed since September 2015. Dckt. 15. At outset, the Plan relies on the non-filing spouse's monthly income of \$3,700.00. *Id.* The Plan assumes that Debtor will find employment that will satisfy the gap in net income and payments beginning in month 25. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### **Lack of Adequate Protection Under the Plan**

Trustee alleges that the Plan violates 11 U.S.C. § 1325(a)(5)(B)(iii)(II) because Debtor will not begin payments of his mortgage arrears until month 25 of the Plan. The creditor referenced, "Mr. Cooper," has not filed a response or objection.

### **Failure to Provide Best Effort**

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor provided Trustee his 2017 tax return which reflected a refund of \$6,783.00. Dckt.39. Debtor has not proposed to put any of the refund towards the plan. This is grounds not to confirm the Plan under 11 U.S.C. § 1325(b)(1).

### **Debtor's Reliance on Motion to Value Secured Claim**

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Wheels Financial Group LLC dba 1800LoanMart ("LoanMart"). Has filed a pending Motion to Value. Dckt. 32. However, if the Motion is denied, such is another basis for the court determining that the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

**DEBTOR'S COUNSEL SHALL PRESENT THE ORIGINAL  
MAY 31, 2018 DECLARATION AT ISSUE  
IN OPEN COURT AT THE AUGUST 21, 2018 HEARING**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on July 12, 2018. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value Collateral and Secured Claim of Wheels Financial Group, LLC dba 1-800LoanMart ("Creditor") is granted, and Creditor's secured claim is determined to have a value of \$5,000.00.**

The Motion filed by Hector Arnoldo Cavazos ("Debtor") to value the secured claim of Wheels Financial Group, LLC dba 1-800LoanMart ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2002 Chevrolet Camaro VIN# ending in 1875 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$5,000.00 as of the petition filing date. Debtor also affirms the Vehicle's value on his Schedule B. Dckt. 15. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

## TRUSTEE'S RESPONSE

Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to this Motion on August 3, 2018. Dckt. 41. Trustee notes that the declaration states it was executed May 31, 2018, despite being filed July 12, 2018. Trustee is unsure that Debtor's declaration, signed in "/s/" format, shows Debtor was actually aware of the statements contained therein and therefore is defective under 28 U.S.C. § 1746. Trustee raises the possibility that the court prohibit Debtor's counsel from using the "/s/" signature format with pre-printed dates, and that the court require a motion for fees be submitted in all future cases to prevent a "no-look" procedure.

## DEBTOR'S REPLY

Debtor filed a Reply to Trustee's Opposition on August 13, 2018. Dckt. 52. Debtor's counsel clarifies that their office has a practice of having clients sign a declaration supporting motions to value as they sign other documents (Petition, Schedules, etc.). The office then holds the declaration until after the 341 Meeting of Creditors to allow time to file a proof of claim in the case. Debtor's counsel uses this practice to a motion being denied for failure to provide notice to a creditor after they have filed a proof of claim. Debtor's counsel states: "My clients always review the declaration and we talk extensively about the motion itself. Wet signatures are always obtained, as is the individual research to determine debtors' opinion." Dckt. 52 at ¶ 4.

Debtor also submits with his Reply an Amended Declaration of Hector Cavazos. Dckt. 53. The only actual amendment to Debtor's Declaration is to the date, which now states "August 10, 2018." *Id.*

## DISCUSSION

As the Trustee notes, the Debtor's Declaration was executed shortly over a month before the Motion was filed. To the extent that Debtor's valuation may have been outdated, Debtor republished his prior Declaration as of August 10, 2018. Dckt. 53. Furthermore, Debtor's counsel provides an explanation signed under penalty of perjury that filing is delayed to permit proofs of claims, which might later require notice, to be filed. Dckt. 52. It is unclear whether any of Debtor's declarations are adequate. FN. 1.

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FN.1. There are two issues with Debtor's Reply. First, it seems to be an amalgamation of Debtor's Response and Debtor's Counsel's Declaration attesting to office practices. This is violative of Local Rule 9004-2(c)(1). Second, as an apparent declaration under penalty of perjury, Debtor's Response fails to meet the requirements under 28 U.S.C. § 1746. The "declaration" states "I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief." Dckt. 52. 28 U.S.C. § 1746 requires an affirmation that the "foregoing is true and correct." Counsel's declaration is essentially a statement affirmed with plausible deniability.

Debtor's declarations suffer the same defect in attestation. The court will give Debtor and his counsel the benefit of the doubt and hold them to their statements as having been made pursuant to the requirements of Federal Rules of Evidence 601 and 602.

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Notwithstanding flaws in Debtor's Declarations, it remains that Debtor provided a valuation of the Vehicle within his Schedule B as well. Dckt. 15. The lien on the Vehicle's title secures a purchase-money loan incurred on August 24, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$12,395.78. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$5,000.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by Hector Arnoldo Cavazos ("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 Wheels Financial Group, LLC dba 1-800LoanMart ("Creditor") secured by an asset described as 2002 Chevrolet Camaro VIN# ending in 1875 ("Vehicle") is determined to be a secured claim in the amount of \$5,000.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$5,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 6, 2018. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

**The Motion to Confirm the Amended Plan is denied.**

Donavan Chim Han "Debtor") seeks confirmation of the Amended Plan to pay Class 2 secured and general unsecured debts. Dckt. 24. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on July 18, 2018. Trustee notes that the Plan call for \$198 paid to Navient monthly. Trustee believes this treatment will not pay the \$12,560.38 in full within the 60 month period the plan is paying unsecured claims. Trustee does not oppose adding language in the order confirming plan identifying that Claim#3 is to be paid \$198 monthly by Debtor outside the plan and shall not be paid by the Trustee.

## DISCUSSION

The Trustee's arguments are well-taken. The court notes that the "Navient" claim is actually a debt held by Educational Credit Management Corporation, with Navient Solutions, LLC being a servicing company. Proof of Claim No. 3-1. This student loan is accounted for as a monthly expenses of \$189.00 on Debtor's Amended Schedule J. Dckt. 23.

However, Debtor does not provide for any special treatment for this pre-petition debt – a claim in the bankruptcy case. Debtor and Debtor's counsel just ignore it. Presumably, Debtor could provide the court with an analysis why paying this one creditor outside the plan is not an unfair discrimination to other creditors holding general unsecured claims in the case.

In its current form, Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. 11 U.S.C. § 1322(d).

The Amended Plan does not comply with 11 U.S.C. §§ 1322 and is not confirmed.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Donavan Chim Han ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, interested parties, parties requesting special notice, and Office of the United States Trustee on June 23, 2018. By the court's calculation, 59 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

**The Motion to Confirm the Amended Plan is denied.**

Jose I Aguiar ("Debtor") seeks confirmation of the Amended Plan seeks confirmation of the Amended Plan to deal with mortgage arrears and unsecured debt. Debtor's second Amended Plan has been modified to provide for 100% of the \$5,144.47 in unsecured claims. Dckt. 60; *See, also*, Dckt. 61 at 7. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

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

- A. Trustee is concerned the Debtor's plan is not feasible. Trustee calculates the Plan will be completed in 67 months.
- B. Trustee believes Debtor cannot make the proposed payments. Debtor's projected disposable monthly income listed on Schedule J is \$768.83 and Debtor proposed a plan payment of \$860.32. Dckt. 1 at 20:23.

- C. Tax withholding listed as \$1,425.49 appears high by more than \$100 based on past tax returns. Trustee believes Debtor has tax refunds not applied to the plan. Debtor's Federal (only) taxes resulted in refunds of \$5,345.00 and \$5,513.00 for 2016 and 2015, respectively.

## **DEBTOR'S REPLY**

Debtor filed a Reply to Trustee's Opposition on August 8, 2018. Dckt 70. Debtor proposes the following to resolve the Trustee's objections:

1. Debtor will provide the Trustee with copies of his State and Federal Tax Returns each year beginning with his 2018 Tax Returns. In addition, the Debtor will turn over to the Trustee all tax refunds in an excess of \$2,000 per year combined. These refunds shall be an additional payment to the plan.
2. Plan is amended in Section 3.07(c) to show arrears of \$11,590.93 to Franklin Credit Management, and arrearage dividends of \$194.19 per month.

## **DISCUSSION**

Trustee's objections are well-taken.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 67 months. Thus, the Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). As noted above, Trustee asserts Debtor has insufficient income to comply with the proposed Plan. It is possible income from previously undisclosed tax refunds will be able to fill this gap. However, without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor's proposed Amended Plan does not account for tax refunds Debtor is likely receiving, as indicated by his 2015 and 2016 Federal tax returns. The Amended Plan violates 11 U.S.C. § 1325(b)(1).

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

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Jose I Aguiar (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

11. [18-23358](#)-E-13      **MATTHEW/TARA HANNAH**      **OBJECTION TO CONFIRMATION OF**  
**DPC-1**      **David Foyil**      **PLAN BY DAVID P. CUSICK**  
7-17-18 [[20](#)]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, on July 17, 2018. By the court’s calculation, 35 days’ notice was provided. 14 days’ notice is required.

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

<b>The Objection to Confirmation of Plan is sustained.</b>
------------------------------------------------------------

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

- A. Debtor cannot afford to make plan payments because Debtor’s proposed plan relies on a motion to value collateral of the Franchise Tax Board. Debtor has not filed any such motion to date.

- B. Debtor's proposed plan provides for attorney's fees of \$2,000.00 to be paid through Debtor's Legal Services Plan, and that unpaid administrative fees be paid through Local Bankruptcy Rule 2016-1(c). The Disclosure of Compensation of Attorney for Debtors and Rights and Responsibilities state a balance of \$4,000.00 for Debtor's attorney fees. Dckt. 14. There is no mention of the \$2,000.00 paid by Debtor's Legal Services Plan.
- C. The proposed plan is not Debtor's best efforts. Debtor is above median income and proposed a plan payment of \$430.00 for 60 months with a 0% dividend to unsecured creditors, totaling \$116,273.00. Debtor's disposable income is listed as negative \$70.50 on Form122C-2. Dckt. 14 at 46. Schedule I shows a combined total of \$1,549.98 in taxes. Dckt. 14 at 26. Debtor's disposable income should be at least \$370.53.

Trustee notes that co-debtor Mathew Hannah's pay advices provided for 11/17 through 4/18 list his tax status exempt. The pay advice dated 5/18 listed Mathew's tax status as "M-06" and detailed a withholding of \$458.03. This amount differs from the \$1,082.34 listed on Schedule I.

The Chapter 13 Trustee's objections are well-taken.

#### **Debtor's Reliance on Motion to Value Secured Claim**

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

#### **Failure to Provide Best Effort**

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor is above median income and proposed a plan payment of \$430.00 for 60 months with a 0% dividend to unsecured creditors, totaling \$116,273.00. Debtor's disposable income is listed as negative \$70.50 on Form122C-2. Dckt. 14 at 46. Schedule I shows a combined total of \$1,549.98 in taxes. Dckt. 14 at 26. Debtor's disposable income should be at least \$370.53. Furthermore, Trustee alleges co-debtor Mathew's 5/18 pay advice indicates a withholding of \$458.03, despite \$1,082.34 being listed on Schedule I. Thus, the court may not approve the Plan.

### **Inconsistency between Disclosure of Compensation and Attorney Fees to be Paid**

The Disclosure of Compensation provides for \$4,000.00 in fees for Debtor's counsel through the Plan. Dckt. 14 at 38. The Plan provides for payment of \$2,000.00 through Debtor's Legal Services Benefit Plan, and the rest of administrative costs covered through monthly payments. Dckt. 13 at 7. The Disclosure does not mention \$2,000.00 to be paid in this manner. Dckt 14.

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

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

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

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

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



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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 9, 2018. By the court's calculation, 9 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

**The Motion to Confirm the Modified Plan is denied.**

Nicole C. Mosby ("Debtor") seeks confirmation of the Modified Plan because Debtor has had two leg surgeries (requiring time off) and encountered mechanical problems with her only car. Dckt. 83. The **Modified Plan proposes that all missed payments be forgiven and plan payments of \$1,540.00** begin August 2018 for 46 months. Dckt. 85. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 3, 2018. Dckt. 89. Trustee asserts as follows:

1. That Debtor cannot make Plan payments. Debtor has not filed supplemental Schedules I and J in support of the Plan. Debtor's most recent Schedules reflected an ability to pay \$2,000.00 monthly. Debtor has completed 14 months of the Plan and has paid \$20,000.00 to the Trustee or an average of

\$1,428.57 monthly. Debtor is proposing a payment of \$1,540.00 monthly to pay post-petition monthly payments for Class 1 and attorney's fees. Debtor proposes to defer payment of Class 1 arrears, pre- and post-petition, until Debtor either refinances, obtains a loan modification, or sells the property prior to the 60 month plan. Debtor's Declaration (Dckt. 83.) is inconsistent as to the proposed Plan payment, stating "I cannot afford more than \$1,540.00 per month" and "I can begin remitting payments of \$2,215.00 per month starting August 2018."

2. Debtor is delinquent \$8,491.00 under the confirmed plan. Dckt. 52. The confirmed Plan calls for 3 payments of \$1,400.00 and then 57 payments of \$2,000.00. On November 25, 2017, the Plan payment was adjusted to \$2,289.92 and then was adjusted to \$2,130.83 on June 25, 2018. These adjustments were due to Notices of Mortgage Payment Change.
3. The proposed Plan is dependant on unknown variables. This is unreasonable delay for creditors.

## **DEBTOR'S REPLY**

Debtor filed a Reply to Trustee's Opposition on August 14, 2018. Dckt. 93. Debtor states that she has filed Amended Schedules I and J on August 14, 2018. *See*, Dckt. 92. In so stating, Debtor's counsel has provided "Amended" Schedules which purport to change Debtor's income and expense information effective back to the filing of this case. No explanation has been given for why Debtor's prior statements under penalty of perjury were inaccurate (or false).

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$8,491.00 delinquent in plan payments, which represents multiple months of the \$2000.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See*, 11 U.S.C. § 1325(a)(6).

### **Unexplained Increase in Expenses and Ability to Make Payments**

Debtor has filed Amended Schedules I and J. However, the only change appears to be to expenses. Debtor indicates an increase in food costs of \$300.00, childcare/education costs of \$10.00, Clothing/laundry costs of \$75.00, and personal care products of \$75.00. Debtor does not explain these sudden increases to expenses; Debtor's declaration references mechanical vehicle issues and two leg surgeries as the only changed circumstance, both of which seem inapplicable to the aforementioned increases. Dckt. 55 and 92. It seems possible that the recent amendments to Debtor's Schedules more accurately reflect her expenses and help explain her significant delinquency in payments. However, Debtor does not indicate thus, and without an accurate depiction of Debtor's financial reality the Plan is not appear feasible pursuant to 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 Modified Chapter 13 Plan filed by Nicole C. Mosby (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

13. [18-23464](#)-E-13  
PGM-2

CYNTHIA PAYSINGER  
Peter Macaluso

MOTION TO VALUE COLLATERAL OF  
WELLS FARGO BANK N.A.  
7-12-18 [\[32\]](#)

**DEBTOR'S COUNSEL SHALL PRESENT THE ORIGINAL  
JUNE 1, 2018 DECLARATION AT ISSUE  
IN OPEN COURT AT THE AUGUST 21, 2018 HEARING**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on July 12, 2018. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value Collateral and Secured Claim of Wells Fargo Bank N.A. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of \$0.00.**

The Motion to Value filed by Cynthia J. Paysinger ("Debtor") to value the secured claim of Wells Fargo Bank N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 779 Vintage Avenue, Fairfield, California ("Property"). Debtor seeks to value the Property at a fair market value of \$290,000.00 as of the petition filing date. Declaration of Cynthia J. Paysinger, Dckt. 32. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

## **NO PROOF OF CLAIM FILED**

The court has reviewed the Claims Registry for this bankruptcy case. No proof of claim for the Second deed of trust described by Debtor has been filed.

## **TRUSTEE'S OPPOSITION**

Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to this Motion on August 6, 2018. Dckt. 45. Trustee notes that Debtor's Declaration supporting the Motion indicates it was executed June 1, 2018, despite the format as an "/s/" signature and the filing date being July 12, 2018. Dckt. 45 at ¶ a. Trustee is uncertain whether Debtor formed her opinion of value on July 12, 2018, given the case was filed June 1, 2018, and the Schedules, Means Test Form 122C-1, Statement of Financial Affairs, and proposed Plan were all signed May 28, 2018, and filed June 13, 2018. Trustee posits that the court may desire to prohibit Debtor's counsel from using the "/s/" signature and pre-printed dates.

## **DISCUSSION**

As the Trustee notes, the Debtor's Declaration was executed shortly over a month before the Motion was filed. Debtor's counsel provides an explanation signed under penalty of perjury that filing is delayed to permit proofs of claims, which might later require notice, to be filed. Dckt. 52. FN. 1.

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FN.1. There are two issues with Debtor's Reply. First, it seems to be an amalgamation of Debtor's Response and Debtor's Counsel's Declaration attesting to office practices. This is violative of Local Rule 9004-2(c)(1). Second, as an apparent declaration under penalty of perjury, Debtor's Response fails to meet the requirements under 28 U.S.C. § 1746. The "declaration" states "I declare under penalty of perjury that the forgoing statement is true and correct to the best of my knowledge and belief." Dckt. 52. 28 U.S.C. § 1746 requires an affirmation that the "foregoing is true and correct." Counsel's declaration is essentially a statement affirmed with plausible deniability.  
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Debtor lists the Property at a fair market value of \$290,000.00 on her Schedule A. Dckt. 19. The senior in priority First deed of trust secures a claim with a balance of approximately \$322,948.38. Proof of Claim 1-1. Creditor's Second deed of trust secures a claim with a balance of approximately \$9,965.09. Schedule D, Dckt. 19. Therefore, Creditor's claim secured by a junior deed of trust is completely / partially under-collateralized. Creditor's secured claim is determined to be in the amount of \$0.00, the value of the collateral, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by Cynthia J. Paysinger ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Wells Fargo Bank N.A. ("Creditor") secured by a Second in priority deed of trust recorded against the real property commonly known as 779 Vintage Avenue, Fairfield, California, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$290,000.00 and is encumbered by a senior lien securing a claim in the amount of \$322,948.38, which exceeds the value of the Property that is subject to Creditor's lien.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor on July 13, 2018. By the court’s calculation, 39 days’ notice was provided. 14 days’ notice is required.

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

**The Objection to Confirmation of Plan is sustained.**

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

**A. Failure to Complete Plan Within 60 Months**

The Proof of Claim filed by Wells Fargo Bank, N.A. states that the pre-petition arrearage is \$36,954.42. Proof of Claim No. 1 filed on June 15, 2018. No objection to that claim or the amount of the arrearage has been filed. Trustee objects that Debtor, having provided for only a \$29,000 arrearage and a monthly plan payment of \$2,290.00, the plan is not adequately funded to cure the \$36,954.42 arrearage.

The court calculates the payments required under the Plan to be as follows:

Monthly Plan Payment.....	\$2,290
Debtor’s Counsel.....	(\$ 42)

Chapter 13 Trustee Fees.....(\$ 183)  
Class 1 Current Payment.....(\$1,534.72)  
Class 2 Arrearage Payment.....(\$ 616)

=====

Shortfall in Plan Funding.....(\$ 85.72) [it is likely that the shortfall is greater, Debtor not having yet begun to make cure arrearage payments]

**B. Debtor's Reliance on Motion to Value Secured Claim**

**DEBTOR'S REPLY**

Debtor filed a reply to Trustee's Objection to Confirmation on August 14, 2018. Dckt. 54. Debtor asserts:

1. Local Rule 3007-1 (d)(2) states "Objections to claims shall be filed and served no later than sixty (60) days after service of the Notice of Filed Claims". The Notice of Timely has not yet been filed and served by the Trustee. As such, the time to review and object to claims has not yet run.
2. Debtor's current case was filed on the heels of the dismissal of her previous Chapter 13 proceeding (Case #16-20016). The arrears owed to Wells Fargo Bank provided in the proposed Chapter 13 plan were calculated by adding what was owed in prepetition arrears from the prior case to the total of mortgage payments missed between the dismissal of the previous case and filing of the current Chapter 13 case (6 months). The difference between counsel's calculation and the amount of arrears stated in Wells Fargo Bank's Proof of Claim is significant and may warrant objection.
3. While a higher claim than what is provided for in the Chapter 13 plan may affect the overall feasibility, confirmation should not be denied because of this fact alone.
4. The creditor, Wells Fargo Bank, has not objected to confirmation of the Chapter 13 plan, therefore no creditor is prejudiced by the terms of the proposed plan.
5. Should the claim stand, the remedy available would be a Motion to Dismiss Case is the case is/remains overextended once the claims process has run.

Dckt. 54.



## DISCUSSION

The Chapter 13 Trustee's objections are well-taken.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 68 months due to the Plan listing the Wells Fargo Bank claim with a monthly payment of \$1,534.72 and arrears of \$29,000.00. The secured claim indicates a monthly payment of \$1,549.15 and includes \$36,954.42 of mortgage arrears. In order for Debtor to pay \$36,954.42 in 60 months, the dividend must be no less than \$615.91. Debtor states that inclusion into arrears of payments Debtor missed while in a Chapter 13 "is significant and may warrant objection." To date, no objection to claim has been filed. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The court notes Debtor and Debtor's counsel's cavalier argument that the court should ignore the actual facts (the amount of the arrearage) and the law (requiring the arrearage to be cured during the plan absent the consent of a creditor) to be akin to what the Supreme Court admonished the court for in *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010) – granting relief just because someone asked for it without regard to the facts or any legal entitlement. The court declines Debtor and Debtor's counsel's invitation to be the subject of such admonishment (or more likely excoriation) by an appellate court.

A review of Debtor's Plan shows that it relies on the court valuing the Second deed of trust of Wells Fargo Bank. That motion is currently pending and set for hearing on August 21, 2018.Dckt. 32.

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, interested parties, and Office of the United States Trustee on July 19, 2018. By the court’s calculation, 33 days’ notice was provided. 28 days’ notice is required.

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

**The hearing on the Motion to Value Collateral and Secured Claim of Bosco Credit LLC (“Creditor”) is continued to ~~XXXXXXXXXXXX~~, 2018, to allow Creditor to diligently obtain an appraisal and present to the court expert testimony as to the value of the Property.**

The Motion to Value filed by Tena Robinson (“Debtor”) to value the secured claim of Bosco Credit LLC (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of the subject real property commonly known as 5611 34th Avenue, California (“Property”). Debtor seeks to value the Property at a fair market value of \$237,000.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor offers her own Declaration, stating that after personal research she determined the value of her home to be \$237,000.00.

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

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

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

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

## **TRUSTEE'S RESPONSE**

Chapter 13 Trustee, David Cusick ("Trustee") filed a Response to the Motion on August 3, 2018. Dckt. 51. Trustee states the Property is included on Debtor's Schedule A/B with a value of \$237,000.00; Debtor has claimed an exemption of \$1.00 on Schedule C on the Property; Creditor is included in Debtor's Schedule D with a secured claim of \$153,184.89; and the Creditor is listed in Section 2C item 2 of the proposed Plan to be valued at \$0.00.

## **CREDITOR'S OPPOSITION**

Bosco Credit LLC ("Creditor") filed an Opposition to Debtor's Motion on August 7, 2018. Dckt. 60. Creditor asserts that Debtor has improperly based her valuation on her own research. *Id.* at 2:17-21. Creditor also argues that the Senior mortgage holder entered into a loan modification with Debtor that prejudicially added to the principal of the senior lien in the amount of \$51,000.00, the amount of which should therefore be treated as junior to Creditor's Second Deed of Trust. *Id.* at 3:28-4:13. After the prejudicial amount is treated as a junior lien, there is sufficient equity in the Property such that Creditor's claim should not be wholly unsecured. *Id.* at 4:13-16.

Creditor concludes that Debtor's Motion should be denied in its entirety as the existence of equity prevents valuation or avoidance in any way. *Id.* at 5:13-15. Creditor requests in the alternative that an appraisal should be obtained to ensure an accurate valuation. *Id.* at 5:17-18.

## **DEBTOR'S REPLY TO CREDITOR'S OPPOSITION**

Debtor filed a Reply to Creditor's Opposition on August 16, 2018. Dckt. 64. Debtor asserts that her Declaration is based on her personal knowledge, which she obtained from personal research. *Id.* at 1:23-26. Debtor argues further that the senior lienholder only received through modification what it was entitled to as interest payments that Debtor had not been making. *Id.* at 2:4-8. Debtor adds that the modification reduced the interest rate to 2% for the first 5 years, 3% in year 6, and 3.375% from years 7-22, whereas the original interest rate was and adjustable 5.99% to 12.99% rate. *Id.* at 2:8-12. Debtor concludes that Creditor

is not in a worse position, may be in a better position because the modification prevented a foreclosure that would have left Creditor's claim largely unsecured, and therefore the Motion should be granted. *Id.* at 2:12-17.

## **DISCUSSION**

### **Debtor's Valuation**

Creditor asserts that Debtor has improperly valued her home because she bases her opinion on research. Creditor seems to believe Debtor is using research in place of her own opinion. The court finds that Debtor is merely explaining how she came to possess personal knowledge of the value of her Property. *See* FED. R. EVID. 701. Furthermore, while the Creditor contests the valuation, no alternative valuation is provided. *In re Enewally*, at 368 F.3d at 1173. Therefore, Debtor's valuation is persuasive and the value of the Property is determined to be \$237,000.00.

Creditor also asserts that the senior lienholder prejudicially increased the value of its secured claim in a way that should render the increase as junior to Creditor's Second deed of trust, thereby preventing Debtor's valuation and avoidance of liens.

### **Requirement to File Separate Documents**

The court notes first that there is some confusion in Creditor's Opposition. The Opposition is titled "Opposition to Motion to Value." Dckt. 60. However, it also identifies itself as "supplemental opposition to Debtor's Motion to Avoid Lien." *Id.* at 2:3. Creditor states that Debtor filed "the Motion to Avoid Respondent's lien." *Id.* At 2:8. Creditor also states "Respondent hereby files this Opposition to Motion to Value." Dckt. 60 at 2:14. Creditor is intentionally or unintentionally attempting to respond to Debtor's Motion to Value and Motion to Avoid Judicial Lien (Dckt. 29 & Dckt. 33, respectively) in one document. This is not permitted under Local Rule 9004-2(c)(1).

### **No Evidence of Modification**

No evidence was presented of a modification to Debtor's senior lien. Creditor's Opposition alleges details of a modification, some of the details which are affirmed by Debtor's counsel in Debtor's Response. Unfortunately, without competent evidence presented upon which to rely, the court is essentially blind to this issue. Any discussion of potential prejudice is pure speculation. Therefore, the senior lien of HSBC BANK USA, NATIONAL ASSOCIATION, as Indenture Trustee, for the FBR Securitization Trust 2005-2 Callable Mortgage-Backed Notes, Series 2005-2 ("HSBC") remains valued at \$241,164.68.

### **No Evidence as to Debtor's Primary Residence**

Creditor argues that Debtor cannot bifurcate a claim secured by a deed of trust in Debtor's primary residence, and therefore Creditor's secured claim cannot be valued if there is any equity. *See, Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 327 (1993). Creditor's argument is well-taken.

However, as Creditor states, this proposition requires that the Property is Debtor's primary residence. On Debtor's Petition, she identifies her residence as 3350 Y Street, Sacramento, California (the "Y Street Property"). Dckt. 1. In its own proof of service for its Opposition, Creditor provides notice to Debtor at the Y Street Property. Dckt. 61. Creditor has not offered any evidence to show that the Property and not the Y Street Property is Debtor's primary residence. From the only evidence available to the court, it appears Debtor's principal residence is the Y Street Property. Therefore, Debtor is permitted under 11 U.S.C. § 506(a) to bifurcate the unsecured and unsecured portions of Creditor's claim. However, as noted, there is no evidence of a prejudicial modification and there does not appear to be any secured portion of Creditor's claim.

### **Impaired Exemption Calculation**

While this Motion is not for lien avoidance, Creditor still felt compelled to address the issue. Creditor concludes that the existence of any equity prevents its claims from being valued or avoided in any way. Dckt. 60 at 5:14-15. Creditor's conclusion seems to muddy valuation with avoidance of judicial liens under 11 U.S.C. § 522(f)(1). That formula requires adding all liens, the Debtor's exemptions, and the judicial lien to determine whether the judicial lien impairs the exemption. 11 U.S.C. § 522(f)(2)(A). Proof of Claim 1-1 filed by HSBC indicates a First deed of trust for \$241,164.68, and Proof of Claim 2-1 filed by Bosco Credit LLC Second deed of trust for \$153,184.89. These liens total \$394,349.57. For purposes of an impaired exemption analysis, it is unclear how Creditor is perceiving its judicial lien for \$79,227.45 is not wholly unsecured.

### **Conclusion**

Creditor has requested time to complete its discovery and obtain an appraisal of the Property. It has the right to so obtain and present the evidence of value to the court.

The hearing on the Motion is continued to 3:00 p.m. on **xxxxxxxx**, 2018. On or before **xxxx**, 2018, Creditor shall file and serve its evidence of value, and Replies, if any, filed and served on or before **xxxxx**, 2018.

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

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

The Motion to Value Collateral and Secured Claim filed by Tena Robinson ("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 pursuant to 11 U.S.C. § 506(a) to value the secured claim of Bosco Credit LLC ("Creditor"), a second in priority deed of trust, is continued to 3:00 p.m. on **xxxxxxxx**, 2018. On or before **xxxx**, 2018, Creditor shall file and serve its evidence of value, and Replies, if any,

16.	<a href="#"><u>18-23365</u></a> -E-13 JB-2	TENA ROBINSON Jason Borg	MOTION TO AVOID LIEN OF BOSCO CREDIT, LLC 7-19-18 <a href="#"><u>[33]</u></a>
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The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Avoid Judicial Lien is granted.**

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$237,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$394,349.77 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 28. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of \$1.00 on Schedule C. Dckt. 1.

## **TRUSTEE'S RESPONSE**

Chapter 13 Trustee, David Cusick ("Trustee") filed a Response to the Motion on August 3, 2018. Dckt. 57. Trustee states the Property is included on Debtor's Schedule A/B with a value of \$237,000.00; Debtor has claimed an exemption of \$1.00 on Schedule C on the Property; Creditor is included in Debtor's Schedule D with a secured claim of \$153,184.89; and the Creditor is listed in Section 2C item 2 of the proposed Plan to be valued at \$0.00.

## **CREDITOR'S OPPOSITION**

Bosco Credit LLC ("Creditor") filed an Opposition to Debtor's Motion to Value on August 7, 2018. Dckt. 60. Creditor asserts that Debtor has improperly based her valuation on her own research. *Id.* at 2:17-21. Creditor also argues that the Senior mortgage holder entered into a loan modification with Debtor that prejudicially added to the principal of the senior lien in the amount of \$51,000.00, the amount of which should therefore be treated as junior to Creditor's Second Deed of Trust. *Id.* at 3:28-4:13. After the prejudicial amount is treated as a junior lien, there is sufficient equity in the Property such that Creditor's claim should not be wholly unsecured. *Id.* at 4:13-16. Creditor concludes that Debtor's Motion should be denied in its entirety as the existence of equity prevents valuation or avoidance in any way. *Id.* at 5:13-15. Creditor requests in the alternative that an appraisal should be obtained to ensure an accurate valuation. *Id.* at 5:17-18.

## **DISCUSSION**

### **Requirement to File Separate Documents**

As noted in the court's decision on the Motion to Value, there is some confusion in Creditor's Opposition. The Opposition is titled "Opposition to Motion to Value." Dckt. 60. However, it also identifies itself as "supplemental opposition to Debtor's Motion to Avoid Lien." *Id.* at 2:3. Creditor states that Debtor filed "the Motion to Avoid Respondent's lien." *Id.* At 2:8. Creditor also states "Respondent hereby files this Opposition to Motion to Value." Dckt. 60 at 2:14. Creditor is intentionally or unintentionally attempting to respond to Debtor's Motion to Value and Motion to Avoid Judicial Lien (Dckt. 29 & Dckt. 33, respectively) in one document. This is not permitted under Local Rule 9004-2(c)(1).

This issue is most applicable here where it would otherwise appear that there was no Opposition to this Motion.

## **Impaired Exemption Calculation**

Also discussed in Debtor's other motion is Creditor's conclusion that the existence of any equity prevents its claims from being valued or avoided in any way. Dckt. 60 at 5:14-15. Creditor's conclusion seems to muddy valuation with avoidance of judicial liens under 11 U.S.C. § 522(f)(1). That formula requires adding all liens, the Debtor's exemptions, and the judicial lien to determine whether the judicial lien impairs the exemption. 11 U.S.C. § 522(f)(2)(A). Proof of Claim 1-1 filed by HSBC indicates a First deed of trust for \$241,164.68, and Proof of Claim 2-1 filed by Bosco Credit LLC Second deed of trust for \$153,184.89. These liens total \$394,349.57. For purposes of an impaired exemption analysis, it is unclear how Creditor is perceiving its judicial lien for \$79,227.45 is not wholly unsecured.

## **Conclusion**

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided in excess of \$79,227.45 subject to 11 U.S.C. § 349(b)(1)(B).

## **ISSUANCE OF A COURT-DRAFTED ORDER**

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

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

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

**IT IS ORDERED** that the judgment lien of Bosco Credit LLC, California Superior Court for Sacramento County Case No. 34-2009-00061308, recorded on April 30, 2012, Book 20120430 and Page 0721, with the Sacramento County Recorder, against the real property commonly known as 5611 34th Avenue, Sacramento, California, is avoided in its entirety for all amounts in excess of \$79,227.45 pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.



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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, interested parties, and Office of the United States Trustee on July 19, 2018. 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<p><b>The Motion to Avoid Judicial Lien is granted.</b></p>
-------------------------------------------------------------

This Motion requests an order avoiding the judicial lien of Bosco Creditor LLC ("Creditor") against property of Tena Robinson ("Debtor") commonly known as 3350 Y Street, Sacramento, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$79,227.45. An abstract of judgment was recorded with Sacramento County on April 30, 2012, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$355,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$394,349.77 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 28. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of \$1.00 on Schedule C. Dckt. 1.

## **TRUSTEE'S RESPONSE**

Chapter 13 Trustee, David Cusick ("Trustee") filed a Response to the Motion on August 3, 2018. Dckt. 54. Trustee states the Property is included on Debtor's Schedule A/B with a value of \$355,000.00;

Debtor has claimed an exemption of \$1.00 on Schedule C on the Property; Creditor is included in Debtor's Schedule D with a secured claim of \$79,227.45; and the Creditor is listed in Section 2C item 2 of the proposed Plan to be valued at \$0.00.

## **DISCUSSION**

### **Requirement to File Separate Documents**

As noted in the court's decision on the Motion to Value, there is some confusion in Creditor's Opposition. Dckt. 60. It appears to the court that the Opposition filed was a combined opposition to Debtor's Motion to Value and Motion to Avoid Lien as property located at 561134th Avenue, Sacramento, California. The court has addressed the Opposition in discussing those motions.

### **Conclusion**

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided in excess of \$79,227.45 subject to 11 U.S.C. § 349(b)(1)(B).

## **ISSUANCE OF A COURT-DRAFTED ORDER**

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

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

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

**IT IS ORDERED** that the judgment lien of Bosco Credit LLC, California Superior Court for Sacramento County Case No. 34-2009-00061308, recorded on April 30, 2012, Book 20120430 and Page 0721, with the Sacramento County Recorder, against the real property commonly known as 3350 Y Street, Sacramento, California, is avoided in its entirety for all amounts in excess of \$79,227.45 pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 6, 2018. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

**The Motion to Confirm the Amended Plan is denied.**

Amy Woods ("Debtor") seeks confirmation of the Amended Plan subsequent to losing employment. Dckt. 24. The Amended Plan provides for Monthly Plan payments of \$529.00 from April 2018 to May 2018, and \$465.00 from June 2018 and thereafter. Dckt. 28. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on July 30, 2018. Dckt. 30. Trustee asserts as follows:

1. Debtor cannot make Plan payments. At the Meeting of Creditors May 10, 2018, Debtor advised Trustee she was laid off from work and is currently unemployed. Dckt. 17. Debtor has failed to file Amended Schedules I and J illustrating her ability to make Plan payments of \$465.00. In Debtor's Declaration (Dckt. 26 at 2:8), she provides that she anticipates becoming employed at a much lower income, but that her two adult sons (one

indicated as unemployed on Debtor's Schedule J) will assist her in making payments. One of Debtor's sons provides a declaration indicating he is employed full-time, but there is no factual detail as to his financial ability.

2. Debtor may have a potential lawsuit against her former employer for wrongful termination. At the Meeting of Creditors, Debtor explained she was fired and may have a claim. This court previously held the Debtor must disclose any such claims and include them in a confirmable Plan. Dckt. 22 at 3.

## **SUPPLEMENTAL DECLARATION OF DEBTOR**

Debtor filed a Declaration August 11, 2018. Dckt. 42. Debtor states that she is uncertain whether she has legal claims, but will report them if she files suit. *Id.* at ¶ 2. Debtor states further she will notify the Trustee once she has obtained new employment. *Id.* at ¶ 3.

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has affirmed that she remains unemployed. Dckt. 42. While Debtor may have indicated before her sons can assist her with payments, specific financial information supporting feasibility of that plan has not been provided. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### **Undisclosed Assets**

A Chapter 13 debtor has a statutory duty to disclose all assets or potential assets to the bankruptcy court, pursuant to 11 U.S.C. §§ 521(1) and 541(a)(7). *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274–75 (11th Cir. 2010) (holding that a post-petition lawsuit is property of the bankruptcy estate that debtor had a duty to disclose). The duty to disclose does not end once the forms are submitted to the bankruptcy court; rather the debtor must amend financial statements if circumstances change. *Id.* A pending lawsuit seeking monetary compensation qualifies as an asset, and such asset is property of the bankruptcy estate. *Id.*

While Debtor is uncertain whether she has claims and states she will notify the Trustee “if” she files a claim, Debtor's perception of and decision to undertake her claims is simply not relevant. Debtor has a duty to disclose all *potential* assets. 11 U.S.C. §§ 521(1) and 541(a)(7). As stated by this court already (Dckt. 22.), it appears the Estate has claims for wrongful termination which must be administered by 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 Confirm the Amended Chapter 13 Plan filed by Amy Woods (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

19. [18-23567](#)-E-13 TRAVIS/LUCELYN STEVENSON OBJECTION TO CONFIRMATION OF  
DPC-1 Pauldeep Bains PLAN BY DAVID P. CUSICK  
7-24-18 [22](#)

**Final Ruling:** No appearance at the August , 2018 hearing is required.

David Cusick (“the Chapter 13 Trustee”) having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on June 20, 2018, is confirmed.**

Counsel for Travis Jake Stevenson and Lucelyn Ann Stevenson (“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.

**The Objection to Confirmation is dismissed without prejudice.**

20. [18-23867](#)-E-13      **FIAZ JAVED**  
**Robert McCann**

**STATUS CONFERENCE RE: CHAPTER  
13 VOLUNTARY PETITION  
6-19-18 [\[1\]](#)**

Debtor's Atty: Robert McCann

Notes:

Chapter 13 Plan filed 7/19/18 [Dckt 28]

Motion to Extend the Automatic Stay filed 7/20/18 [Dckt 30]; Order denying motion filed 7/26/18 [Dckt 32]

[RHS-1] Order for Chapter 13 Status Conference filed 7/26/18 [Dckt 34]

Trustee Report at 341 Meeting lodged 8/3/18. Debtor appeared, meeting concluded.

Trustee's Objection to Exemptions filed 8/8/18 [Dckt 42], set for hearing on 9/11/18 at 3:00 p.m.

<b>The Status Conference is <span style="color: red;">XXXXXXXXXXXXXXXXXXXXXXXXXXXX</span></b>
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Fiaz Javed, the Chapter 13 Debtor, commenced this case on June 19, 2018. Petition, Dckt. 1. Debtor had pending and dismissed one prior Chapter 13 case within the one-year period prior to the commencement of this case. Debtor's prior bankruptcy case, 17-25942 ("First Case"), was filed on September 7, 2017, and dismissed on January 22, 2018. The First Case was dismissed due to Debtor's monetary defaults in the Chapter 13 Plan payments. 17-25942; Civil Minutes, Dckt 96.

On July 20, 2018 (the thirtieth-day after commencement of this case), Debtor filed a Motion to Extend the Automatic Stay in the current bankruptcy case. Debtor requests in the Motion that the court extend the automatic stay as to all creditors. Dckt. 30. No Certificate of Service has been filed. (A list of names and addresses of persons to be served but: (1) no one attests to service having been made, and (2) it is not filed as a separate document as required by the Local Bankruptcy Rules.)

No declaration or other evidence is provided in support of the Motion. No points and authorities are provided to show the legal basis constructed by Debtor's counsel has been filed.

### **CHAPTER 13 STATUS CONFERENCE**

Upon review of the Motion to Extend Time and the files in this case, the court has determined that a Chapter 13 Status Conference is appropriate and will be beneficial for all parties in interest. The present Motion was filed too late to address the terminating interests of the Debtor. That could be misconstrued to somehow lead to the Debtor or parties in interest into believing that the automatic stay has been terminated as to property of the bankruptcy estate.

The court notes that Debtor has filed a Chapter 13 Plan on July 19, 2018. Dckt. 28. The basic terms of the Plan are that the Debtor will fund the Plan with payments of \$188.00 a month for thirty-six (36) months. Plan ¶¶ 2.01, 2.02; *Id.* The Plan requires payments to satisfy \$3,000.00 in attorneys' fees for Debtor's counsel (\$83.34 a month), \$188.00 post-petition payment on Bank of America HELOC claim, and \$15.04 for the Chapter 13 fees (est. at 8%). The Plan on its face is under funded.

In the recent Motion to Extend the Automatic Stay, Debtor's counsel argues (no evidence was presented in support of that Motion) that there is no obligation owed on the Bank of America HELOC and that the Bank is wrong in asserting that an obligation is owed. Dckt. 30. Notwithstanding it being asserted that no obligation is owed, Debtor requires in the Plan that it make a \$188.00 a month payment to Bank of America.

On Schedule A (Dckt. 11 at 1) Debtor lists owning one real piece of real property (the "Property"). Debtor claims a homestead exemption in this property on Schedule C. Dckt. 12 at 1.

On Schedule D, Debtor lists Chase Home Mortgage having a \$30,000.00 claim secured by the Property. Dckt. 13 at 1. No provision is made for the payment of this secured claim in the proposed Chapter 13 Plan. (Even if it is not in default and the term of the obligation exceeds the term of the Chapter 13 plan, it must be provided for in Class 4 of the plan.) Schedule D also lists a secured claim of Chase Auto Loan that is secured by a vehicle and a secured claim of Wells Fargo Bank secured by a vehicle. *Id.* at 1-2. No provision is made in the Plan for these secured claims.

Schedule D also lists a disputed claim for Bank of America for an equity line of credit. *Id.* at 3. It is stated that no funds were drawn on this equity line.

On Schedule I, Debtor lists monthly gross income for Debtor and non-filing spouse of \$6,132.00. Dckt. 17 at 1. On Schedule J, Debtor lists monthly expenses of (\$4,188.00), which includes a (\$1,127.94) mortgage/rent payment and (\$313.00) car payment, and monthly net income of \$1,683.22. Dckt. 18. It appears that Debtor is able to fund a plan and protect the asserted rights and interests in the Property (bankruptcy filed to stay the allegedly improper foreclosure by Bank of America, Motion to Extend Stay, Dckt. 30).

The Motion to Extend the Stay also argues that "Debtor is seriously ill and a breast cancer survivor." Motion ¶ 6, Dckt. 30.

While filing a Chapter 13 Plan, Debtor has failed to file a motion to confirm the plan and set it for a hearing. L.B.R. 3015-1(c)(3).

Debtor has tried, and failed to prosecute one bankruptcy case this year. If Debtor were to fail to prosecute this case and it were dismissed, and Debtor immediately filed a third case, the provisions of 11 U.S.C. § 362(c)(4) could come into play, creating an even greater risk for the Debtor and what is now property of the bankruptcy estate.

The court determined that a status conference was necessary for Debtor and Debtor's counsel to explain to the court how and what will, and can, be done in the good faith prosecution of this case. If

Debtor's allegations are valid, there is substantial value of the property in the bankruptcy estate. Debtor's income appears to be substantial and well able to fund a plan (which properly provides for creditor claims and adjudication of a disputed claim), if Debtor is and will prosecute the case. Additionally, there is Debtor's argument that she is serious ill, which serious illness may impair Debtor's ability to prosecute the case and protect property of the estate.

### **Recent Pleadings and Action in Prosecution of Case**

Since the court issued the order for this Status Conference on July 26, 2018, Debtor has not filed any further pleadings in this bankruptcy case.

21.	<a href="#"><u>18-21469-E-13</u></a> <b>DEF-3</b>	<b>DONNA WELCH</b> <b>David Foyil</b>	<b>CONTINUED MOTION TO CONFIRM PLAN</b> <b>6-1-18 [71]</b>
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**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 1, 2018. By the court's calculation, 60 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

<b>The Motion to Confirm the Amended Plan is <span style="color: red;">XXXXXXXXXX</span></b>
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Donna Welch ("Debtor") seeks confirmation of the Second Amended Plan because the First Amended Plan was denied and because changes have been made to address problems with the prior plan.



Dckt. 73. The Amended Plan calls for plan payments of \$1,120.00, with Amador County Tax Collector and Wells Fargo Bank, N.A., each being paid \$50.00 per month for the first eleven months. The Amended Plan also calls for Debtor to sell her real property within twelve months. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

## **CHAPTER 13 TRUSTEE’S RESPONSE**

David Cusick (“the Chapter 13 Trustee”) filed a Response on July 12, 2018. Dckt. 86. The Chapter 13 Trustee does not oppose the plan, provided there is an explicit statement included in the plan that the Chapter 13 Trustee shall be the disbursing agent on the Class 1 arrearage to Wells Fargo Bank, N.A., and on the Class 2 Claim of Amador County Tax Collector. Both claimants hold liens on the real property commonly known as 17071 Wilderness Way, Jackson, California, which is to be sold. The Chapter 13 Trustee will provide oversight for the satisfaction of those loans by ensuring the checks are exchanged with the title company when escrow is closed.

## **JULY 31, 2018, HEARING**

At the July 31, 2018, hearing, the court continued the Motion to August 21, 2018. Dckt. 93.

## **SUPPLEMENTAL PLEADINGS**

No supplemental pleadings have been filed since the July 31, 2018, hearing.

## **DISCUSSION**

At the hearing **XXXXXXXXXXXX**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 7, 2018. By the court's calculation, 39 days' notice was provided. 14 days' notice is required.

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

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**The Motion to Value Collateral and Secured Claim of First Investors Financial Services ("Creditor") is granted, and Creditor's secured claim is determined to have a value of \$8,300.00.**

The Motion filed by John J. Martin ("Debtor") to value the secured claim of First Entertainment CU ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2014 Nissan Sentra SR (the "Vehicle") and values the Vehicle at a fair market value of \$8,300.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

## TRUSTEE'S OPPOSITION

Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion August 10, 2018. Dckt. 40. Trustee asserts the Motion fails to meet Local Bankruptcy Rule 9014-1(d) and Federal Rule of Bankruptcy Procedure 9013 because no legal authority is provided. The Trustee asserts further that the

case number, motion control number, and date of hearing listed on the Declaration are in brackets, indicating possible alteration after being signed and executed.

## DISCUSSION

As the Trustee notes, counsel has not made any reference to the legal basis for the relief sought. Counsel's "confusion" over what is being requested is further shown in that Debtor merely seeks the court "Value of the Collateral" of First Entertainment CU. The court is unsure of what relief is being granted by an informational order as to the value of collateral.

The Trustee's point is that if the Debtor and counsel had reviewed the legal basis for the relief sought and made simple reference to it, the Motion would be one to value the secured claim of Creditor pursuant to 11 U.S.C. § 506(a). Congress does not provide for the court to issue an order that merely values the collateral of a creditor, but value the secured claim itself (which requires the court to make a factual finding of the value of the collateral.)

Here, the Motion of Debtor states with particularity (Fed. R. Bankr. P. 9013) the following grounds and relief requested:

1. Debtor "moves the court to Value the Collateral Securing the Indebtedness to First Entertainment CU." Motion, p. 1:15.5-17.5; Dkt. 32.
2. In so asking, Debtor alleges "to wit a 2014 Nissan Sentra SR Automobile." *Id.*, p. 1:17.5.
3. No proof of claim has been filed by the creditor.
4. The debt owed to Creditor is approximately \$15,963. *Id.*, p. 1:21.5-24.5.
5. The deficiency with respect to the claim is an unsecured claim. *Id.*, p. 1:25.5-26.5.
6. The Debtor testifies "in the declaration served and filed herewith that the [?] has seasoned over 1 year since it was an auto refinance which was dated around May 25, 2107." Further, that this obligation paid off the balance previously owing to Nissan Motor Acceptance. *Id.*, p. 2:1-5.
7. The Debtor's opinion of value of the vehicle, based on condition issues stated, is \$8,300.00. *Id.*, p. 2:6-9.

In the prayer, Debtor does expressly request that the court value the secured claim of First Entertainment CU Inc. at \$8,300.00.

While the Trustee is correct and the motion should make reference to the statutory provision is applicable, at least Debtor requested with particularity in the prayer that the secured claim should be valued.

While the court grants the present Motion, counsel for Debtor should go back and clean up his forms, have a citation to the applicable law, format his pleadings with paragraphs, and properly caption his motions for the actual relief requested.

The lien on the Vehicle's title resulted from a refinancing and secures a debt owed to Creditor with a balance of approximately \$15,963.00. Because the loan was a refinancing, it was not a purchase money security interest. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$8,300.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by John J. Martin ("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 First Entertainment CU ("Creditor") secured by an asset described as 2014 Nissan Sentra SR ("Vehicle") is determined to be a secured claim in the amount of \$8,300.00, 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 \$8,300.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 7, 2018. By the court's calculation, 39 days' notice was provided. 14 days' notice is required.

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

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**The Motion to Value Collateral and Secured Claim of First Investors Financial Services ("Creditor") is granted, and Creditor's secured claim is determined to have a value of \$4,500.00.**

The Motion filed by John J. Martin ("Debtor") to value the secured claim of First Investors Financial Services ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2013 Jeep Patriot Sport 2wd (the "Vehicle") and values the Vehicle at a fair market value of \$4,500.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

## TRUSTEE'S OPPOSITION

Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to the Motion August 10, 2018. Dckt. 43. Trustee asserts the Motion fails to meet Local Bankruptcy Rule 9014-1(d) and Federal Rule

of Bankruptcy Procedure 9013 because no legal authority is provided. The Trustee asserts further that the case number, motion control number, and date of hearing listed on the Declaration are in brackets, indicating possible alteration after being signed and executed.

## DISCUSSION

As the Trustee notes, counsel has not made any reference to the legal basis for the relief sought. Counsel's "confusion" over what is being requested is further shown in that Debtor merely seeks the court "Value of the Collateral" of First Entertainment CU. The court is unsure of what relief is being granted by an informational order as to the value of collateral.

The Trustee's point is that if the Debtor and counsel had reviewed the legal basis for the relief sought and made simple reference to it, the motion would be one to value the secured claim of Creditor pursuant to 11 U.S.C. § 506(a). Congress does not provide for the court to issue an order that merely values the collateral of a creditor, but value the secured claim itself (which requires the court to make a factual finding of the value of the collateral.)

While the Trustee is correct and the motion should make reference to the statutory provision is applicable, at least Debtor requested with particularity in the prayer that the secured claim should be valued.

While the court grants the present Motion, counsel for Debtor should go back and clean up his forms, have a citation to the applicable law, format his pleadings with paragraphs, and properly caption his motions for the actual relief requested.

The lien on the Vehicle's title resulted from a refinancing and secures a debt owed to Creditor with a balance of approximately \$10,629.00. Because the loan was a refinancing, it was not a purchase money security interest. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$4,500.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by John J. Martin ("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 First Investors Financial Services ("Creditor") secured by an asset described as 2013 Jeep Patriot Sport 2wd ("Vehicle") is determined to be a secured claim in the amount of \$4,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the

Vehicle is \$4,500.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

24. [18-24872](#)-E-13      KEITH/LAKEISHA STEWART      MOTION TO EXTEND AUTOMATIC  
RK-1      Richard Kwun      STAY  
8-2-18 [\[10\]](#)

## **This Matter is Duplicative of Item 25, the same Motion having been Filed Twice.**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and creditors on August 2, 2018. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

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**The Motion to Extend the Automatic Stay is filed as Dckt. 10, is dismissed without prejudice as being moot, the Motion having been refiled the same day at Docket 15.**

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.

**IT IS ORDERED** that the Motion filed on August 2, 2018, Docket Entry 10, is dismissed without prejudice, having been rendered moot by the subsequent refile of the same motion on August 2, 2018 as Dckt. 15.

**August 21, 2018, at 3:00 p.m.**  
**- Page 64 of 118 -**



pursuant to 11 U.S.C. § 362(c)(3)(B). The Motion states with particularity (Fed. R. Bank. P. 9013) the following grounds upon which the requested relief is based:

1. “Richard Kwun attorney for the above captioned debtors hereby moves this court for an order extending the automatic stay pursuant to Title 11 U.S.C. § 362(c)(3)(B) as to debtor husband Keith Stewart.” Motion, p. 1:11-13.5; Dckt. 15.
2. “Debtor will show by clear and convincing evidence that the current case is filed in good faith and but for attorney’s recommendation to consolidate his prior case and the deficiencies in his wife’s prior case his current case would have been unnecessary.” *Id.*, p. 1:13.5 - 17.5.

Those two sentences are the sum total of the grounds stated with particularity by which Debtor Keith Anthony Stewart asserts that he overcomes the presumption of this second case having been filed in bad faith. As required by 11 U.S.C. § 362(c)(3)(C), the showing of good faith to rebut the presumption must be by clear and convincing evidence for the sufficient grounds.

At best, the grounds are that Debtor Keith Stewart’s counsel gave him advice to consolidate his prior bankruptcy case with his wife’s case. Further, that such “advice” was not successful because of deficiencies in his wife’s prior case. The Motion does not disclose that his prior counsel was his wife’s prior counsel, and is current both their counsel in this joint case.

The Declaration filed in this Motion purports to be a joint motion by the two Debtors, Keith Stewart and La Keisha Matlock. Dckt. 18. However, the Declaration has only a “/s/” signature for Keith Stewart, none for La Keisha Matlock. Significantly, the “Declaration” does not state that any of the information therein is stated under penalty of perjury. The Declaration fails to meet the minimum requirements of 28 U.S.C. § 1746.

Keith Stewart states that he filed Chapter 13 twice “in the midst of an eviction and propose a plan that would pay off my car which was recently repossessed.” Declaration ¶ 2, Dckt. 18. Further, he has had background checks with Uber and Lyft and is “driving full time.” *Id.* ¶ 4.

Since 2010, Keith Stewart has had three prior cases: 10-46696, 11-43190, and most recently 18-20612. His co-debtor has been very active in filing cases having nine prior cases: 10-38946, 13-25864, 13-35889, 14-23581, 14-32311, 15-25312, 15-28096, 17-26708, and 17-27331.

This is Debtor’s second bankruptcy petition pending in the past year. Debtor’s prior bankruptcy case (No. 18-20612) was dismissed on July 30, 2018, after Debtor’s Voluntary Dismissal. *See* Order, Bankr. E.D. Cal. No. 18-20612, Dckt. 118, July 30, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case would not have been dismissed but for consolidation. Dckt. 18. Debtor’s prior Motion for Voluntary Dismissal germanes with Debtor’s current “testimony.” Bankr. E.D. Cal. No. 18-20612, Dckt. 116.

## TRUSTEE'S OPPOSITION

Chapter 13 Trustee, David Cusick ("Trustee") filed an Opposition to the Motion on August 9, 2018. Dckt. 25. Trustee asserts the Debtor's Declaration was not properly attested to, and that the attorney of record is unclear.

## APPLICABLE LAW

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

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

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

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

## DISCUSSION

As this court has previously stated on a number of occasions, not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that

what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

Here, the Motion states “Debtor will show by clear and convincing evidence that the current case is filed in good faith and but for attorney’s recommendation to consolidate his prior case and the deficiencies in his wife’s prior case his current case would have been unnecessary.” Dckt. 15. Debtor’s allegation that he will be able to demonstrate by clear and convincing evidence that a prior recommendation for co-debtors to consolidate their cases was unnecessary and is a mere legal conclusion. The Pleadings standard requires Debtor allege the ultimate facts within the Motion itself, not merely alert the court that the facts will be shown. FED. R. BANKR. P. 9013.

Debtors Keith Stewart and La Keisha Matlock have used various attorneys over the past eight years in filing their bankruptcy cases (including some in *pro se*). Their current counsel has represented them since 2015, filing four cases for LaKeisha Matlock, one case for Keith Stewart, and the current case jointly for the two of them.

## **DEFICIENT DECLARATION**

The Trustee’s argument regarding defective declarations is well-taken. Debtor’s declaration fails to meet the requirements under 28 U.S.C. § 1746. The “declaration” states “Executed on August 1, 2018, at West Sacramento, Yolo County, California.” Dckt. 18. 28 U.S.C. § 1746 requires an affirmation that the “foregoing is true and correct.” Debtor’s declaration is merely a recitation of facts in its current state.. Debtor’s Declaration does not meet the requirements of Federal Rules of Evidence 601 and 602 and cannot be relied on. Unfortunately, this leaves no evidence supporting Debtor’s Motion.

The court notes that on August 12, 2018, an Amended Declaration was filed that has the penalty of perjury paragraph. Dckt. 31. While potentially addressing that one issue (though the court cannot fathom how a law office has declaration forms that comply with 28 U.S.C. § 1746 and forms that do not, or what federal judges waive the § 1746 requirement), it does not address the lack of any substantive testimony as to why and how jointly filing a case with La Keisha Stewart is in good faith.

## **ATTORNEY OF RECORD UNCLEAR**

Trustee’s argument with respect to the attorney of record is well-taken. The Motion indicates Debtor’s counsel is “Richard Kwun (SBN 146163).” Dckt. 15. The State Bar of California’s website indicates there is only one “Richard Kwun” licensed by the California Bar, SBN 249134.<sup>FN.1.</sup> The State Bar Number of 146163 is for another local attorney, Steele Lanphier. *Id.*

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FN.1. <http://members.calbar.ca.gov/fal/Licensee/Detail/249134>

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Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. The summary, non-specific nature of the Motion

and supporting Declaration form demonstrate a non-good-faith filing of the current case. Debtor offers no testimony as to, now, years into deficient bankruptcy filings and dismissed cases, what will be his plan, what he will pay, and how he and La Keisha Matlock will now prosecute this case in good faith.

The Motion is denied.

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

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

The Motion to Extend the Automatic Stay filed by Keith Anthony Stewart and LaKeisha Michelle Stewart (“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 extend the automatic stay, which terminates only as to Debtor pursuant to 11 U.S.C. § 362(c)(3)(A) thirty days after the commencement of this case, is denied. No determination is made by the court to the other provisions of 11 U.S.C. § 362(a) that apply to property of the bankruptcy estate.

JULLIAN BATTILANA VS.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on July 13, 2018. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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<p><b>The Motion for Relief from the Automatic Stay is granted.</b></p>
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Jillian Battilana ("Movant") seeks relief from the automatic stay to allow Superior Court for the State of California, County of Sacramento, *In Re the Marriage of Battilana* No. 16FL04193 ("State Court Litigation") to be concluded. Movant has provided the Declaration of Scott Sagaria to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by William Rudolph Battilana, II ("Debtor").

The Scott Sagaria Declaration states that Movant requests relief from the automatic stay so she may adjudicate the issue of attorneys' fees and costs in the Family Law Matter (listed on Debtor's Schedules E and F) and obtain a final order resulting in a fully liquidated claim against the Debtor. Dckt. 14. On April 17, 2018, the Honorable Matthew J. Gary, presiding judge in the Family Law Matter, issued an order resolving the substantive issues at hand concerning the dissolution however he bifurcated the issue of attorneys' fees and costs. *Id.* The Movant was ordered to, and has, file an Income and Expense Declaration detailing the billing of attorneys' fees and costs from the inception of the case through the date of the order. *See*, Exhibit A. Dckt. 15.

## No Opposition Filed

No Opposition has been filed to Movant's Motion.

## AUGUST 8, 2018, HEARING

At the August 8, 2018, hearing, the court continued this Motion to August 21, 2018. Dckt. 43.

## DISCUSSION

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The moving party bears the burden of establishing a prima facie case that relief from the automatic stay is warranted, however. *LaPierre v. Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.)*, No. EC-16-1087, 2016 Bankr. LEXIS 2205, at \*8–9 (B.A.P. 9th Cir. May 23, 2016). To determine “whether cause exists to allow litigation to proceed in another forum, ‘the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate.’” *Id.* at \*9 (quoting *Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.)*, No. CC-08-1056-DKMo, 2008 Bankr. LEXIS 4692, at \*6 (B.A.P. 9th Cir. Aug. 15, 2008)) (citing *In re Aleris Int’l, Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011)). The basis for such relief under 11 U.S.C. § 362(d)(1) when there is pending litigation in another forum is predicated on factors of judicial economy, including whether the suit involves multiple parties or is ready for trial. *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Santa Clara Cty. Fair Ass’n v. Sanders (In re Santa Clara Cty. Fair Ass’n)*, 180 B.R. 564 (B.A.P. 9th Cir. 1995); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

The court finds that the nature of the State Court Litigation warrants relief from stay for cause. The issues appear to have been litigated already, and the only remaining issue is attorney's fees and costs. Therefore, judicial economy dictates that the state court ruling be allowed to continue after the considerable time and resources put into the matter already.

The court shall issue an order modifying the automatic stay as it applies to Debtor to allow Movant to continue the State Court Litigation. The automatic stay is not modified with respect to enforcement of the judgment against Debtor, David Cusick (“the Chapter 13 Trustee”), or property of the bankruptcy estate. Any judgment obtained shall be submitted to this court for the proper treatment of any claims arising under the Bankruptcy Code.

No other or additional relief is granted by the court.

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 Relief from the Automatic Stay filed by Jillian Battilana (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are modified as applicable to William Rudolph Battilana, II (“Debtor”) to allow Jillian Battilana, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors to proceed with litigation in Superior Court for the State of California, County of Sacramento, In Re the Marriage of Battilana No. 16FL04193 to determine the respective attorney’s fees and costs obligations of the parties thereto..

The court does not modify the stay to allow for the enforcement of any attorney’s fees and costs obligations of the Debtor, which obligations and rights continue to be subject to of this bankruptcy case and plan herein.

No other or additional relief is granted.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 12, 2018. By the court’s calculation, 40 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

<p><b>The Motion to Confirm the Amended Plan is denied.</b></p>
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Rickey Albert Fong and Chriselle De Leon Fong (“Debtor”) seeks confirmation of the Amended Plan. Dckt. The Amended Plan proposes Debtor remit plan payments of \$1,785.00 starting July 2018 for 57 months, providing no less than 27% to general unsecured creditors. Dckt. 33. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### **CHAPTER 13 TRUSTEE’S OPPOSITION**

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on August 1, 2018. Dckt. 38. Trustee opposes confirmation on the following grounds:

1. Debtor and Debtor’s counsel lack credibility where they do not provide any reason for the proposed Plan Amendment. Because Debtor does not provide facts stating what went wrong, the court is unable to determine Plan feasibility.



2. The court should deny the Motion for failure to plead with particularity as required by FBRP 9013. Debtors must address what is being amended and why.
3. Debtor's Declaration contradicts the Plan claiming that general unsecured claims will receive 48% (Dckt. 34 at 1.) when the Plan only pays 27% (Dckt. 33 at 5.) And that Debtor has only paid \$1,275.00 total. Dckt. 34 at 1. On July 12, 2018, Debtor filed Amended Schedule I (Dckt. 36.) Where they reduce co-debtor Chriselle Fong's gross income from \$11,840.38 to \$9,940.30 and removed \$445.84 deducted from line 5e for Health Insurance, leaving her net income at \$4,405.83. The net difference is \$3,007.98. Debtor's explanation for the changed income is merely "reduced monthly hours from full time to part time because medical condition and health reasons." Dckt. 37.
4. Debtor's Plan places multiple plan payments and a qualifying date in §2.01 of the Plan rather than placing the multiple payment amounts and applicable dates in the additional provisions, interlineating. Furthermore, Debtor appears to mischaracterize Proof of Claim 15-1 as a purchase money security interest.
5. Debtor's Plan calls for payments of \$425.00 for the first 3 months and \$1,785.00 for the next 57 months starting July 2018, where the case was filed March 22, 2018. Debtor has only paid four payments of \$425.00, leaving Debtor delinquent under the Plan terms.
6. The Plan is not proposed in good faith, as no disclosures of changes were made, nor any discussion of the objection made by Trustee as to the original Plan, or the court's finding regarding best efforts. Debtor has not addressed the average \$28,354.00 per month spent gambling each 6 months before filing, or the 19 debts that were not scheduled. Debtor has amended Schedules to add only one creditor, holding an unsecured student loan claim valued at \$120,388.51.
7. Based on Claim 9, no 2017 tax returns have been filed by Debtor which is a pre-petition year. While technically the returns were not due at filing, failure to file returns has resulted in a \$34,550.60 priority claim and the Plan estimates only \$5,401.00 (Dckt. 33.). Either the return is due under 11 U.S.C. § 1308, under other applicable law, or failure to file the returns may results in additional attorney's fees and possibly overpayment by the creditor.
8. The Plan is not Debtor's best efforts. The court in a prior ruling found that disposable income should be listed at \$2,434.89 monthly (absent additional explanation), that the payments should increase after each of the three

retirement loans have become paid, and that expenses are not adequately explained as to \$500.00 double-counted health insurance, \$1,613.00 transportation, \$1,000.00 child's living expense while away at college, and Debtor's household expenses exceeding national allowable living expenses.

9. Debtor is above median income. Form 122C-2 shows at line 45 Debtor's monthly disposable income is in excess of \$1,195.55 net. Dckt. 27 at 10. Based on the applicable period, unsecured creditors should be receiving \$71,733.00 where they are instead paid \$44,088.13 through the Plan.
10. Co-debtor Chriselle Fong pays \$680.72 monthly to retirement loans. Dckt. 36 at 5. That loan will pay off in the 46th month of the Plan on January 22, 2022. Debtor does not propose an increase in payment based on the reduced expense. This concern has already been raised. Dckt. 13 at 4.
11. Debtor filed Amended Schedule J (Dckt. 36) on July 12, 2018, reducing expenses by \$4,412.98 and filing a Declaration in support. Dckt. 37. Debtor's reduction in expenses was explained by a statement that "the following changes to our income resulting from an inaccuracy in that the health deduction is not paid by my paycheck." Despite Debtor subsequently removing the health care deduction of \$445.84 from Schedule I and the health expenses of \$500.00 from Schedule J, Trustee's review of pay stubs provided found co-debtor Chriselle Fong does have dental, health, and vision withholdings.
12. Debtor has drastically changed expenses for food and transportation, reducing food by \$1,300.00 and transportation by \$1,313.00 without explanation. The Declaration in #4 provides a graph of changes to the budget, but those adjusted figures are not reflective of figured on Amended Schedule J. Dckt. 36 at 7.
13. Debtor's Declaration in support of changes to Schedules I and J explains there was a reduction in support to Debtor's daughter from \$1,000.00 to \$400.00 monthly. However, no such expense is listed on Schedule J. Debtor's support for Debtor's daughter did not come out until the Meeting of Creditors; Trustee is uncertain if Debtor can afford the additional expense given it is not listed.

## **DEBTOR'S REPLY**

Debtor's counsel filed a Reply to Trustee's Opposition on August 13, 2018. Dckt. 41. No declaration is provided by Debtor. Debtor's counsel argues:

1. Debtor has amended the Plan because the initial plan was un-confirmable. Counsel for Debtor did not know that a plan which was un-confirmable

needed a reason to file a confirmable plan. The co-debtor did testify at the Meeting of Creditors that she had been a victim of an armed robbery at work, which caused numerous emotional injury, was not in the position to work full-time when the case was filed. Over the period in filing the case and attending the meeting of creditors, the co-debtor has returned to work and is able to perform the terms of the plan as proposed. Given the personal nature of the illness, the debtors hoped that explaining the details at the meeting of creditors with the Trustee would avoid the need to document these personal medical conditions. Such are the reasons that the co-debtors income has been reduced from full time to part time. The co-debtor is trying to avoid worker's compensation and staying busy by working part-time. The co-debtor could provide medical evidence is necessary but believed the live testimony would have sufficed. The debtors pray that the injury is temporary, and understand their duty to inform the court of any further changes.

2. The Trustee opposes the use of "the sum of \$425 x 3, \$1,785 x 57, starting 7-18" in section 2.01, which the Trustee asserts is incorrect and should be placed in the Additional Provisions Section. The Trustee also notes that 2009 Mercedes ML is secured by Check Into Cash, rather than OE Federal Credit Union. As such, the debtors request to be allowed to correct these items in the Order Confirming Plan.
3. Debtor intends to be current under the plan before the date of this hearing.
4. Debtor would again ask the Trustee to review the transcripts as the injury caused by the Robbery. Here, the co-debtor was injured, which caused the issues arising in gambling, for which treatment is being sought and treated just prior to the filing of this case. Debtor would be willing to submit monthly bank statements to evidence that gambling has stopped, and/or proof of G.A. meeting attendance post-petition. Debtor did address these issues at the meeting of creditors, with Mr. Cusick personally on the record. Debtor added the student loan, which they misunderstood as needing to be listed, regardless of the non-dischargeability of the claim.
5. Debtor has a legal extension as the Trustee "technically" admits. As the proof of claim will control the amount of the claim, the amount of disposable income proposed will pay either the \$5,401.00 estimated, or upon the filing the tax debt will be offset by the deductions paid, which will greatly reduce any additional priority taxes.
6. Debtor agrees to increase the plan payment after each of the three retirement loans are repaid. The debtors have submitted Docket #37, in support of the amended Schedules I & J.

7. Debtor is not attempting to pay \$44,088.13, but is proposing to pay \$71,733, or 27% of the total unsecured claims. Debtor acknowledges that the \$1,195.55, or \$71,733.00 must be paid to the unsecured creditors, with the total unsecured claims is \$265,289.53, which computes to 27%.
8. Debtor is willing to increase the plan payment on the 47th month of the plan by \$680.72 per month. Debtor requests this language be placed in the Order Confirming Plan.
9. Debtor appears to have reduced the health insurance twice, which results in \$445.84 NOT being properly deducted. Given the reduction to part-time, and the union job finishing as also was explained at the meeting of creditors, causing the reduction in diving related expenses; i.e. gas and food. Here, Debtor's union job places him at various job sites, which periodically change and which has changed post-petition calling for the decrease in expenses.
10. Debtor did spend \$1,000.00 to support Debtor's daughter in college. Because of co-debtor's injury, lack of income, all payments to daughter have been stopped as a line item. As explained to Debtor, the creditors have not signed on to put their daughter in college, however, if Debtors are able to scratch \$400.00 from the children's education, entertainment, personal food, transportation, etc. by budgeting within the goals set, then such payment would have to be from a reduction of standard of living. Otherwise, while Debtor hopes to budget enough to help her, they are not doing so at the creditors demise. As such, Debtor does not have an additional \$400.00, but hopes to live within means to do so.
11. Debtor in this case are proposing a plan to pay their creditors to the best of their ability given a union job that transfers the debtor to various locations, and physical injury sustained by the co-debtor which caused medical conditions leading to gambling problems, for which the debtors are attempting to rebuild their lives.

## **DISCUSSION**

As this court has repeatedly addressed with counsel for Debtor, arguments by counsel do not replace the testimony of his clients. Here, in the Reply, counsel argues "facts" which he says were stated in other forums. He argues "facts," for which the Debtor and Co-Debtor fail (or refuse) to provide testimony. This failure to provide testimony and have counsel just argue "facts" is not indicative of good faith.

## **Unexplained Changes in Expenses and Income**

The Chapter 13 Trustee discusses several instances where Debtor's income or expenses have suddenly changed, without explanation, leaving to question what the actual financial situation is. Among these changes include: reductions in co-debtor Chriselle Fong's gross income from \$11,840.38 to \$9,940.30; removal of the \$445.84 deducted from co-debtor's line 5e for Health Insurance; reduction of food expenses by \$1,300.00; reduction of transportation expenses by \$1,313.00; and reduction in support to Debtor's daughter from \$1,000.00 to \$400.00 monthly (not listed on Schedule J). While Debtor addresses these matters with Debtor's Reply, no Declaration is provided attesting to the factual detail provided, and Debtor has not provided Amended or Supplemental Schedules. Therefore, Debtor has not explained how Debtor is capable of shifting *necessary* expenses in such a dramatic way. If Debtor was previously providing \$1,300.00 more for food and \$1,313.00 more for transportation, the court questions what changed and whether Debtor's remaining listed expenses are accurate. Conversely, if Debtor is not providing enough for expenses now, it is likely Debtor will be unable to make payments. Debtor has not provided the court adequate information to determine the feasibility of the Plan as required. 11 U.S.C. § 1325(a)(6).

### **Failure to Provide Disposable Income**

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor's fluidity with stated income and expenses again comes into play here, as it is unclear whether Debtor was previously putting all discretionary income into the proposed Plan, and whether they are doing so now. Trustee notes that this court in a prior ruling sustaining Trustee's Objection to Confirmation found that Debtor's disposable income should be listed at \$2,434.89 monthly absent additional explanation. *See*, Dckt. 17 at 2. Debtor has not provided additional explanation. Trustee also notes the Plan does not account for retirement loans which will be paid in full before the Plan ends, or for money put towards Debtor's daughter's support.

The Plan proposes to pay a 27 percent dividend to unsecured claims, which total \$265,289.53, though Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) appears to total \$2,434.89 monthly. Thus, the court may not approve the Plan.

### **Failure to Complete Plan Within Allotted Time**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. Trustee notes that Debtor has still failed to address 19 debts that have not been scheduled but are outstanding. Debtor's failure to be forthcoming about debts owing leads the court to believe there may be claims unaccounted for within the Plan, which would cause the Plan to exceed the

maximum sixty months allowed under 11 U.S.C. § 1322(d). This is cause to deny the confirmation of the Plan.

### **Delinquency**

The Chapter 13 Trustee asserts Debtor's Plan calls for payments of \$425.00 for the first 3 months and \$1,785.00 for the next 57 months starting July 2018, where the case was filed March 22, 2018. Debtor has only paid four payments of \$425.00, leaving Debtor delinquent under the Plan terms. Debtor's counsel indicates Debtor intends to become current before the hearing on this Motion, but Debtor's intent as provided in an unattested document is not persuasive. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Debtor Fails Means Test**

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the means test. The Chapter 13 Trustee states that the Plan proposes 27% (\$44,088.13) to paid to unsecured claims, while Debtor's listed disposable income of \$1,195.55 (Dckt. 27 at 10.) Indicates unsecured creditors are entitled to \$71,733.00.

### **Conclusion**

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

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by Rickey Albert Fong and Chriselle De Leon Fong ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13, creditors, and Office of the United States Trustee on July 2, 2018. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

**The Motion to Confirm the Plan is granted.**

Christine Ann Ow ("Debtor") seeks confirmation of the Plan which will provide for the sale of Debtor's primary residence and provide 100% distribution to unsecured creditors. Dckt. 27. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on July 17, 2018. Dckt. 31. Trustee asserts Debtor has not provided adequate protection payments to Debtor's mortgage with Postcity Financial Credit Union ("Secured Creditor") listed in Class 1. Trustee notes further that Section 2.03 of Debtor's Plan lists the Plan term as 6 months, while the Plan Additional Provisions provide for Debtor to make \$200.00 payments for 3 months following a lump-sum sale. Trustee also adds that the lump sum date of June 2017 appears to be a scrivener's error.

## DISCUSSION

### Adequate Protection

Trustee alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of Creditor's matured obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or
- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

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

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

Here, Secured Creditor has not raised any objection or opposition to Debtor's proposed Plan. Furthermore, Debtor's Plan provides for the full payment of Secured Creditor's claim within three or six



months. Therefore, failure to provide “adequate protection” is not grounds to deny Plan confirmation under these facts and circumstances.

### **Failure to Complete Plan Within Allotted Time**

Trustee seems to argue that Debtor’s Plan might not be feasible or might not complete within the required time period because it depends on a sale of Debtor’s primary residence, indicated as being either three or six months into the Plan. A Plan cannot exceed the maximum sixty months allowed under 11 U.S.C. § 1322(d). Here, it appears Debtor will be able to sell her home long before the provided deadline. While the Plan’s conflicting terms do raise concerns over Plan feasibility, either the three month or six month sale periods here would render the Plan feasible.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by Christine Ann Ow (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor’s Chapter 13 Plan filed on June 21, 2018, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick (“the Chapter 13 Trustee”) for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 5, 2018. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

**The Motion to Confirm the Amended Plan is denied.**

Daniel Lawrence Brennan and Allison Lyn Brennan (“Debtor”) seeks confirmation of the Amended Plan because Debtor has been able to acquire an appraisal of Debtor’s primary residence and seeks to sell the home to provide for claims under the Plan. Dckt. 44. The Amended Plan provides for 1 monthly payment of \$0.000 and 59 monthly payments of \$5,000.00, as well as providing for the sale of Debtor’s primary residence within 15 months and paying the net proceeds into the Plan. Dckt. 46. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE’S OPPOSITION

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on July 20, 2018. Dckt. 58. Trustee opposes Debtor’s Motion on the following grounds:

1. Debtor cannot afford plan payments because the Plan depends on a Motion to Value. Debtor proposes to value the claims of the Internal Revenue Service and Franchise Tax Board. Debtor’s Plan does not have sufficient monies to pay the claims in full if the Motions are denied.

2. The Motion does not state with particularity the grounds upon which relief may be granted and therefore fails to meet the requirements of FRBP 9013. Trustee presumes the Motion is brought pursuant to 11 U.S.C. § 1325.
3. Section 3.10 of Debtor's proposed Amended Plan (Dckt. 46.) Lists a Class 4 direct pay mortgage to Chase of \$5,985.57 monthly. Chase filed Proof of Claim No. 4 listing arrears at \$25,019.46. Where the Plan calls for sale of the property, Debtor should provide for this claim within Class 1 to ensure ongoing payments are made by Debtor. Section 3.07 includes in Class 1 "all delinquent secured claims that mature after the completion of this plan, including those secured by the Debtor's residence." Therefore, Chase's claim should likely be included as a Class 1 claim.

### **JPMORGAN CHASE'S OPPOSITION**

JPMorgan Chase Bank, National Association ("Chase") filed a Chase's Opposition on August 6, 2018. Dckt. 70. Chase opposes confirmation of Debtor's Amended Plan on the following grounds:

1. Debtor's Plan does not provide for the full value of Chase's claim, as required under 11 U.S.C. § 1325(a)(5)(B)(ii). Creditor's claim for pre-petition arrears is in the total amount of \$25,019.46. Proof of Claim No. 4. Debtor's proposed Amended Plan fails to provide for payment of the pre-petition arrears on Chase's secured claim.
2. Debtor's Plan cannot be confirmed because it does not promptly cure Chase's pre-petition arrears as required by 11 U.S.C. § 1322(b)(5). Creditor's secured claim consists of \$25,019.46 in pre-petition arrears. Debtors will have to increase their monthly payment through the Chapter 13 Plan to Creditor to approximately \$416.99 in order to cure Creditor's pre-petition arrears over a period not to exceed 60 months.
3. Debtor's plan is not feasible as required by 11 U.S.C. § 1325(a)(6). Debtors allege that they have income from the operation of a business, however, Debtor has failed to provide a detailed statement of their business income as required by Official Form B106I. Absent the aforementioned documentation, the Debtor's Chapter 13 Plan is speculative. Further, the Debtor's Plan is dependent on a sale of their residence by month 15, but there is no information regarding the current marketing of the property. The Debtor states that the residence has a fair market value of \$1,000,000.00, but does not state why the additional non-exempt equity projected at said price is not being funded into the Plan, which appears to again indicate the funding of the Debtor's Plan is highly speculative.

### **INTERNAL REVENUE SERVICE'S OPPOSITION**

The Internal Revenue Service (“IRS”) filed an Opposition to Debtor’s Motion on August 7, 2018. Dckt. 72. The IRS opposes confirmation of Debtor’s Amended Plan on the following grounds:

1. The unsecured debt owed by the petitioners to the IRS, which according to Debtor was \$580,554 at the time of filing, far exceeds the debt limit of 11 U.S.C. § 109(e). Thus, Debtor is not eligible to be debtors under Chapter 13. As such, this case should be converted to a case under Chapter 7 or dismissed, whichever is in the best interest of the creditors.
2. The Debtor’s Plan fails to correctly list and provide for full payment of the IRS’s secured claim, in violation of 11 U.S.C. § 1325(a)(5). The IRS’s secured claim must also be paid with interest: Bankruptcy Code section 506(b) provides that the holder of an allowed secured claim is entitled to interest on said claim. See also *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989). In addition, the Service is entitled to post-confirmation interest on its secured claim at the rate set forth in the Internal Revenue Code, specifically I.R.C. § 6621(a)(2). In *re Corona*, 230 B.R. 204, 206 (Bankr. N.D. Ga. 1997). The plan lists the interest rate of the IRS’ secured claim as four percent instead of the statutory interest rate of five percent compounded daily.
3. Debtor has not been compliant with Debtor’s post-petition obligations to make estimated tax payments. They have made one estimated tax payment of \$8,000 and failed to pay their second which was due on June 15, 2018. The Debtor reports earning \$29,920 a month in self-employment income and is currently making payments on Debtor’s mortgage and to the trustee. Debtor has a 2017 tax liability of \$86,163. As a result, Debtor’s estimated monthly tax liability is \$7,180. If Debtor had paid Debtor’s estimated tax payments through the end of July, \$50,261 should have either been paid to the IRS or sequestered in an account to be paid. This shows that the Debtor is either unable or unwilling to pay ongoing tax obligations.

## **DISCUSSION**

The various arguments presented by the Trustee and creditors’ arguments are well-taken.

### **Review of Minimum Pleading Requirements for a Motion**

The present “Motion” to confirm the First Amended Chapter 13 Plan states with particularly the following grounds to show compliance with 11 U.S.C. §§ 1325 and 1322:

#### **“DEBTORS’ MOTION FOR CONFIRMATION OF FIRST AMENDED CHAPTER 13 PLAN**

Debtors, DANIEL LAWRENCE BRENNAN and ALLISON L YN BRENNAN, hereby move the court for an Order Confirming First Amended Chapter 13 Plan.

The motion to confirm first amended chapter 13 plan has been set for August 21, 2018, at 3:00p.m.”

Motion, Dckt. 42. The above is the sum total of all the “grounds stated with particularity” upon which Debtor bases the requested relief of confirmation of the Chapter 13 Plan.

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to “read every document in the file and glean from that what the grounds should be for the motion.” That “state with particularity” requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. See 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. See 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the “state with particularity” requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the “short and plain statement” standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations

supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, “shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought.” The standard for “particularity” has been determined to mean “reasonable specification.”

*Martinez v. Trainor*, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

Trustee asserts Debtor’s Motion does not meet the pleadings standard, failing to provide citation to legal authority forming the Motion’s basis. The Trustee’s argument is well-taken. However, Trustee also notes “Trustee presumes the Motion is brought pursuant to 11 U.S.C. § 1325.” The court also agrees that it is apparent what grounds Debtor was proceeding under. While the court takes the requirements of the pleadings standard seriously, no party herein has been materially prejudice and the court will consider Debtor’s Motion.

### **Debtor's Reliance on Motion to Value Secured Claim**

Trustee asserts and a review of Debtor's Plan shows that it relies on the court valuing the secured claims of the IRS and the FTB. On August 8, 2018, the court entered Orders granting both Motions to Value. Dckt. 79 & 80. Therefore, the Trustee's objection is moot.

### **Failure to Provide for a Secured Claim**

Chase asserts a claim of \$725,003.24 in this case. Debtor's Schedule D estimates the amount of Creditor's claim as \$701,576.80 and indicates that it is secured by a deed of trust on Debtor's residence. The Plan provides for treatment of this as a Class 4 claim.

Chase and the Trustee allege that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of Creditor's matured obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

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

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

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

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or
- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

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

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

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

### **Failure to Cure Arrearage of Creditor**

Chase holds a deed of trust secured by Debtor's residence. Chase has filed a timely proof of claim in which it asserts \$25,019.46 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

### **Failure to File Business Documents Required by Schedule I**

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

### **Section for 109 Amount of Debt Compliance**

The IRS alleges that Debtor does not qualify for Chapter 13 treatment because the unsecured debt limit in 11 U.S.C. § 109(e) has been exceeded. That section limits Chapter 13 eligibility to individuals with regular income who owe "on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$394,725 and noncontingent, liquidated, secured debts of less than \$1,184,200." Debtor's Summary of Schedules indicates that Debtor holds \$759,171.00 in unsecured debts. Dckt. 1. This includes IRS's claim of \$658,979.45, with a secured portion of \$54,996.76 and the FTB's claim of \$35,182.19, with a secured portion of \$0.00. Dckt. 79 & 80. The two aforementioned debts alone exceed the \$639,164.88 allowed in Chapter 13 for unsecured claims. Because Debtor exceeds the maximum unsecured debt pursuant to 11 U.S.C. § 109(e), Debtor is ineligible for a Chapter 13 case and the Plan cannot be confirmed.

### **Conclusion**

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

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



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

The Motion to Confirm the Amended Chapter 13 Plan filed by Daniel Lawrence Brennan and Allison Lyn Brennan (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

30.	<a href="#"><u>18-24689-E-13</u></a> MEV-1	DAVID SHELTON Marc Voisenat	<b>MOTION TO EXTEND AUTOMATIC STAY</b> 8-1-18 <a href="#"><u>10</u></a>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and parties requesting special notice on August 1, 2018. By the court’s calculation, 20 days’ notice was provided. 14 days’ notice is required.

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

<p><b>The Motion to Extend the Automatic Stay is granted.</b></p>
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David T. Shelton (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor’s second bankruptcy petition

pending in the past year. Debtor's prior bankruptcy case (No. 17-27364) was dismissed on January 31, 2018, after Debtor failed to provide pay advices and was delinquent in payments. *See* Order, Bankr. E.D. Cal. No. 17-27364, Dckt. 38, January 31, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states the previous Chapter 13 case was dismissed because he was unable to make his plan payment on the 25th of the month because he was paid on the 30th of the month. Dckt. 12. Since the dismissal of the last case, Debtor has obtained additional employment. This has increased Debtor's disposable income and Debtor can now make his plan payments. *Id.* Moreover, this new job pays me on a weekly basis which give me more flexibility in making my plan payments. *Id.*

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

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

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

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

Debtor has had one prior case since 2009 in this District. The Motion states with particularity (Fed. R. Bankr. P. 9013) that Debtor has obtained additional employment, from which he can generate the monies to fund the plan. Debtor provides his Declaration about obtaining unspecified additional employment. Dckt. 12. While more detailed testimony of the employment, how his income has increase, and the economic changes is more desirable testimony, in light of one prior case and the effect of termination of the stay as to the Debtor, and not the estate, pursuant to 11 U.S.C. § 362(c)(3), it is adequate.

The Motion is granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) as to all purposes and parties, until 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 David T. Shelton (“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 extend the automatic stay granted and the automatic stay is extended in full force and effect pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, until terminated by operation of law or further order of the court.

31. [18-23695](#)-E-13      **RANDY/GRACIELA ACHESON**      **MOTION TO VALUE COLLATERAL OF**  
**PGM-1**      **Peter Macaluso**      **SAFE CREDIT UNION**  
7-20-18 [\[15\]](#)

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on July 20, 2018. By the court’s calculation, 32 days’ notice was provided. 28 days’ notice is required.

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

**The Motion to Value Collateral and Secured Claim of Safe Credit Union (“Creditor”) is denied without prejudice.**

The Motion filed by Randy Michael Acheson and Graciela Caldera Acheson (“Debtor”) to value the secured claim of Safe Credit Union (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of a 2005 Toyota Avalon (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$6,000.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The Trustee’s argument regarding defective declarations is well-taken. Debtor’s declaration fails to meet the requirements under 28 U.S.C. § 1746. The “declaration” states Debtors “declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief.” Dckt. 18. 28 U.S.C. § 1746 requires an affirmation that the “foregoing is true and correct.” Debtor’s declaration is essentially a statement affirmed with plausible deniability.

Unfortunately, the court cannot conceive of a plausible explanation by an attorney who has regularly appeared in Department E for more than eight years to have a “plausible deniability” declaration.

Such indicates a less than good faith willingness of the Debtor to provide testimony in this court. Even more significantly, it fails to give the court credible testimony upon which the court can make the require finding of value. Fed. R. Evid. 601, 602.

The Motion is denied without prejudice.

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

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

The Motion to Value Collateral and Secured Claim filed by Randy Michael Acheson and Graciela Caldera Acheson (“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 without prejudice.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on July 20, 2018. By the court’s calculation, 32 days’ notice was provided. 28 days’ notice is required.

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

**The Motion to Value Collateral and Secured Claim of Safe Credit Union (“Creditor”) is denied without prejudice.**

The Motion filed by Randy Michael Acheson and Graciela Caldera Acheson (“Debtor”) to value the secured claim of Safe Credit Union (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of a 2007 Dodge Ram (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$4,500.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

#### **TRUSTEE’S RESPONSE**

Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition to this Motion on August 3, 2018. Dckt. 35. Trustee asserts the Debtor’s Declaration fails to meet the requirements of 28 U.S.C. § 1746 because Debtor attests to his statements only to the extent of “knowledge and belief.” Trustee notes that the Declaration was executed two days before the petition was filed, and uses the “/s/” format. Trustee is uncertain Debtor actually reviewed his Declaration. Furthermore, Trustee is unsure Debtor formed his opinion of value on July 20, 2018. Trustee questions Debtor’s credibility in this case and requests the court prohibit Debtor’s counsel from using the “/s/” signature.

## **DISCUSSION**

The Trustee's argument regarding defective declarations is well-taken. Debtor's declaration fails to meet the requirements under 28 U.S.C. § 1746. The "declaration" states Debtors "declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief." Dckt. 18. 28 U.S.C. § 1746 requires an affirmation that the "foregoing is true and correct." Debtor's declaration is essentially a statement affirmed with plausible deniability.

Unfortunately, the court cannot conceive of a plausible explanation by an attorney who has regularly appeared in Department E for more than eight years to have a "plausible deniability" declaration. Such indicates a less than good faith willingness of the Debtor to provide testimony in this court. Even more significantly, it fails to give the court credible testimony upon which the court can make the required finding of value. Fed. R. Evid. 601, 602.

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

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

The Motion to Value Collateral and Secured Claim filed by Randy Michael Acheson and Graciela Caldera Acheson ("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 without prejudice.

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

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

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

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

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

<b>The Objection to Confirmation of Plan is sustained.</b>
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David Cusick (“the Chapter 13 Trustee”) confirmation of the Plan on the basis that:

- A. Debtor’s Plan fails the liquidation analysis. Debtor’s non-exempt equity totals \$3,900.00 and Debtor is proposing a 3.6% dividend to unsecured creditors, totaling \$2,565.00. The Trustee determines the Plan provides for a 5.2% dividend totaling \$3,753.00 and is not opposed to addressing the issue within the Order Confirming.
- B. Debtor’s Plan relies on a Motion to Value collateral with a hearing set for August 21, 2018, and therefore Debtor cannot make payments under the Plan.

The Chapter 13 Trustee’s objections are well-taken.



## **DEBTOR'S REPLY**

Debtor's counsel filed a Reply to Trustee's Opposition on July 31, 2018. Dckt. 29. Debtor's counsel argues The Liquidation Analysis computed by the Trustee fails to include the "estimated Chapter 7 Administrative Expense" which would be \$975.25, thus reducing the available amount to General unsecured creditors to \$2,925.75. Debtor provides a liquidation analysis, attached as Exhibit A. *See*, Dckt. 30. Debtor's counsel argues further its Motion to Value that the plan is dependant upon is to be heard on August 21, 2018, to which no objection has yet to be filed.

## **TRUSTEE'S RESPONSE TO DEBTOR'S REPLY**

Trustee filed a Response to Debtor's Reply on August 7, 2018. Dckt. 38. Trustee agrees that Debtor may be able to get the court to consider Chapter 7 Administrative Expenses, but Trustee does not believe Debtor has proven unsecured creditors will get what they would given Schedules signed May 29, 2018, case being filed June 13, 2018, and the assets including a bank account. Trustee renews its argument that the Plan is dependant on the Motion to Value.

## **DEBTOR'S RESPONSE TO TRUSTEE'S REPLY**

Debtor filed a Reply to Trustee's Response on August 14, 2018. Dckt. 43. Debtor provides statements from Safe Credit Union and Chase Bank, alleging they show that Debtor had a balance of \$0.00 in Debtor's savings account from April 1, 2018 through June 30, 2018. Dckt. 44. Debtor states further the statement from Chase Bank shows a balance of \$1,870.49 on the date of filing. Debtors' Schedule B shows that the value of the bank account at \$2,500.00. Debtor's Schedule C shows that the amount of \$1,750.00 was exempted using statute C.C.P. § 704.070. Debtor concludes Debtor has therefore proven that unsecured creditors will receive at least what they would receive in a Chapter 7 proceeding, if not more.

## **DISCUSSION**

### **Liquidation Analysis**

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Trustee concedes in his Response to Debtor's Reply that Debtor's liquidation analysis relies in part on consideration of Administrative Expenses that the court may consider permissible. While Trustee continues to object based on the time of filing and the existence of assets including bank accounts, Trustee has not provided any specific analysis contrary to Debtor's, and Debtor in its Response to Trustee's Reply provides a summary of bank account assets. *See*, Exhibits A & B, Dckt. 44. Debtor has provided a liquidation analysis. Exhibit A, Dckt. 30. Based on the aforementioned, the court finds Debtor has met the liquidation analysis.

### **Debtor's Reliance on Motion to Value Secured Claim**

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Safe Credit Union. Unfortunately, the court has denied the two motions to value, which render this Plan unconfirmable at this time.

The Objection to Confirmation is sustained.

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

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

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

**IT IS ORDERED** that the Objection is sustained and confirmation of the Plan is denied, without prejudice.

34.	<a href="#"><u>16-27697</u></a> -E-13 PGM-4	<b>BRIAN OKAMOTO</b> <b>Peter Macaluso</b>	<b>MOTION TO MODIFY PLAN</b> <b>7-5-18 [92]</b>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on July 5, 2018. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

<b>The Motion to Confirm the Modified Plan is denied.</b>
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Brian Okamoto (“Debtor”) seeks confirmation of the Modified Plan because Debtor’s non-filing spouse has had her wages garnished in the amount of \$288.99 per pay period, causing Debtor to fall delinquent. Dckt. 94 at ¶ 2. The Modified Plan will begin remitting payments of \$2,100.00 for July 2018, then increase payments to \$3,025.00 starting August 2018 due to a 401K and CPU loan payoff. Dckt. 94 at ¶ 3. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## **CHAPTER 13 TRUSTEE’S OPPOSITION**

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on August 3, 2018. Dckt. 102. Trustee notes that the proposed Modified Plan suspends all disbursement to the Internal Revenue Service due to the non-filing spouse’s wage garnishments; while the Debtor states there have been requests for a payment plan it does not appear one has been confirmed. Trustee asserts further that while Debtor’s Amended Schedules I and J indicate an expected future income increase due to ending loans, there is no indication of the \$288.99 wage garnishment Debtor mentions with this Motion. Trustee lastly addresses several issues with Debtor’s pleadings, including abrupt endings within Debtor’s Motion (Dckt. 92.), absence within Debtor’s Declaration (Dckt. 94.) of any detailed income or budget information, failure to provide a Proof of Service for Debtor’s Amended Schedules I and J (*See*, Dckt. 97.), and complete omission in Debtor’s Amended Schedules I and J of wage garnishments referenced within his Declaration (Dckt. 98.). Trustee notes finally that he has reservations as to whether Debtor has actually reviewed documents and his declaration.

## **DEBTOR’S RESPONSE**

Debtor filed a Response to Trustee’s Opposition on August 13, 2018. Dckt. 105. Debtor argues that the IRS has been served notice of and has not opposed suspension of payments in order to get the Plan back on track. Debtor argues further that Trustee’s assertion the proposed treatment of the IRS claim is contrary to Section 3.02 of the Plan is misplaced as Section 3.02 relates to executory contracts or unexpired leases. Debtor refers the court to Exhibits B and C (Dckt. 95.) for support.

Debtor’s counsel clarifies that Debtor’s Amended Schedules being indicated as amending both “I” and “J” was due to inadvertent error. Also error was failure to indicate notice of Amended Schedules on Debtor’s Proof of Service where notice was actually provided. Debtor indicates further that wage garnishments have ceased, that Debtor failed to address income increases stemming from tighter food budgeting (\$200.00 monthly saved). Debtor responds finally that Trustee’s reservations as to Debtor’s review of documents and his Declaration is uncalled for and untrue.

## **DISCUSSION**

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has stated that his non-filing spouse’s wages are being garnished. Dckt. 94 at ¶ 2. While Debtor’s Response indicates garnishments have ceased, there is no evidentiary support provided. Debtor’s Modified Plan is heavily dependant on consent to a payment plan by the IRS.

As the Supreme Court in *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010), instructed, just because a party asks for relief and the other party is asleep at the switch, federal judges are not to grant relief unless the requesting party provides the necessary evidentiary and legal basis for such relief. Here, Debtor's plan facially does not comply with the Bankruptcy Code.

Though not raised, another issue struck the court. Though a non-debtor, Debtor's spouse is his spouse. California is a community property state. Debtor's spouse's wages are community property. Community property is included in the bankruptcy estate and are included for the funding of this Chapter 13 Plan. So, if the community property wages are property of the bankruptcy estate (11 U.S.C. § 541) and included as the funding for a plan confirmed under federal law, how is this asset being diverted away from this bankruptcy case, creditors going unpaid, and Debtor and the non-debtor spouse using, or allowed to be used, this property for purposes other than as permitted under the plan? See 11 U.S.C. § 1306 for property of the estate in a Chapter 13 case, which includes post-petition acquired assets acquire before the case is closed, dismissed or converted.

In coming forward with a new plan, and pending such plan, Debtor (as the fiduciary for the plan and of the bankruptcy estate) needs to consider what actions he needs to take to protect this property.

Trustee's other arguments essentially go to the same point that Debtor's proposed Modified Plan and supporting documents do not accurately reflect changes in Debtor's finances. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s attorney on July 25, 2018. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

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

<b>The Objection to Confirmation of Plan is Sustained.</b>
------------------------------------------------------------

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

- A. Debtor is unable to make the payments under the plan or comply with the plan. Debtor fails to provide inside or outside the Plan for a \$100,000.00 claim of Outsource Legal Support, LLC secured by a Second deed of trust; for a \$80,000.00 claim of Outsource Legal Support, LLC secured by a Third deed of trust; or for a \$180,000.00 claim of Outsource Legal Support, LLC secured by Debtor’s business “In N Out Honda.”
- B. Debtor cannot make payments under the Plan. Debtor fails to list on Schedules D or E/F a secured claim for \$6,178.07 held by Creditors Adjustment Bureau. Trustee is uncertain Debtor will be able to make Plan payments given the unaccounted for claim.

- C. The plan is not the Debtor's best effort where no interest is proposed to unsecured claims. Debtor is below the median income only when not including gross business income of \$8,851.00. Co-Debtor wages are \$3,479.12, which combined with gross business income reach an annual income of \$147,961.44. While this amount puts Debtor over the median income, Trustee notes further that Debtor's 2017 tax return shows gross business income of \$147,096.00, calling into question values provided. Dckt. 60.
- D. Debtor's Plan provides that Debtor's attorney was paid \$2,620.00 and proposes an additional \$3,380.00 in fees. Debtor's 2016(b) report states that Debtor's attorney was paid \$1,620 prior to filing. Dckt. 1 at 61. Debtor filed Amended 2016(b) reflecting the \$2,620.00 on May 22, 2018. No Rights and Responsibilities have been filed; Trustee opposes "no look" fees.
- E. Debtors' plan may not be proposed in good faith. The case commenced under Chapter 7, and contained several large secured claims which are not provided for within the Plan (Outsource Legal Support, LLC, discussed, *supra*). Trustee notes that these claims appear based on notes from 2013 that were not secured by deed of trust until August 18, 2017, recorded September 6, 2017, and UCC-1 filed November 1, 2017. Debtor's original case was filed November 1, 2017. The Plan does not provide for preserving the Trustee's ability to avoid these transfers.

## RESPONSE OF CREDITOR TAPAN TRIVEDI

Creditor Tapan Trivedi, administrator of the Estate of Ortansa Ambrus-Cernat ("Creditor") filed a Response to Trustee's Objection on August 6, 2018. Dckt. 85. Creditor notes that Debtor filed this case to avoid trial in a superior court action. Dckt. 85 at 2:2-5. Creditor objects to the Plan on the following bases:

1. The Plan proposes to provide for 100% of claims, based on disposable income of \$4,405.00 per month, for sixty months, or \$264,300.00, however, the debtors do not provide for any payment to Outsource Legal Support, LLC.
2. Debtor has testified that Debtor runs a "cash" business in which they have "\$100,000.00 in October of 2012, and \$80,000 in April of 2013. *Id.* at 2:20-22. A review of Debtor's 2016 tax return shows a total of \$12,495 in "cars" to produce \$35,290 in sales. This would compute to a 35% margin, with no payments to the alleged secured creditor, at an average of \$32,000 cost per year, and an average of \$12,000 additional purchases, Debtor would have an average of \$20,000.00 in cost, on \$180,000.00 in materials which results in a undeclared amount of \$160,000.00. Exhibit B, Dckt. 86. Debtor has submitted in the Response to Request for Production of Documents that the income in 2017 January thru October was: \$275, \$160, \$295, \$725, \$1,400, \$580, \$635, \$768, \$650, and \$285, respectively. Exhibit C, Dckt. 86.

Either, Debtor does not have enough inventory to last throughout the plan, or Debtor has never received the \$180,000.00, because the tax returns for the years preceding the alleged \$80,000.00

in April of 2013, i.e. 2014, 2015, 2016, and 2017 do not reflect that such an inventory was ever purchased, nor sold as the debtors hold no adequate financial records.

The risk of losing a discharge for failing to keep adequate records was addressed by a Bankruptcy Court in the Eastern District of Michigan, Southern Division. See *In re Barbara Moore*, Case No. 08-31004-dof (E.D.Bank,MI., 2009). As in this case, Debtor in *In re Barbara Moore*, was denied discharge under 11 U.S.C. §§ 727(a)(3) and (a)(5), after she failed to produce adequate records for expenditures of insurance proceeds which were received just months prior to filing for bankruptcy protection. Here, Debtor has run a “chase” business for the last five years, and has not addressed the lack of records disclosing how and where the \$180,000.00 went, or if it was ever really obtained at all in an attempt to defraud the creditor, and now this court.

## **DISCUSSION**

The Chapter 13 Trustee and Creditor’s objections are well-taken.

### **Failure to Afford Plan Payment**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor’s Plan does not provide for secured claims held by Outsource Legal Support, LLC or the Creditors Adjustment Bureau. There is no indication that Debtor will be able to make Plan payments inclusive of these claims. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

### **Not Best Effort**

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

The Plan proposes to pay a zero percent dividend to unsecured claims, which total \$0.00, though Debtor’s projected disposable income under 11 U.S.C. § 1325(b)(2) likely totals upwards of \$147,961.44 annually. Dckt. 74 at ¶¶ 6-7. Furthermore, as Trustee notes, it is questionable whether Debtor is putting forth best efforts given \$147,096.00 solely as gross business income reported on Debtor’s 2017 income tax returns. Dckt. 74 at ¶ 8. Thus, the court may not approve the Plan.

### **Infeasible Plan**

Trustee alleges no Rights and Responsibilities have been filed, despite Debtor indicating Debtor’s attorney was paid \$2,620.00 pre-petition and proposing an additional \$3,380.00 in fees paid through the

Plan. Trustee opposes “no look” fees. Without a clear determination of administrative expenses, the court cannot assess Debtor’s financial reality or the Plan’s feasibility. 11 U.S.C. § 1325(a)(6).

Trustee also notes secured claims unaccounted for, and claims of Outsource Legal Support, LLC that became secured shortly before Debtor’s filing of this case. Debtor does not provide for the treatment of the secured claims within or without the Plan, nor does it provide a plan to avoid the claims secured shortly before filing.

Creditor reiterates Trustee’s concern about Debtor’s failure to provide for the claims of Outsource Legal Support, LLC , and brings further objections to the feasibility based on a failure to provide or keep adequate business records. Creditor notes this failure is sometimes cause for denial of discharge under 11 U.S.C. §§ 727(a)(3) and (a)(5). At best, obfuscation of the Debtor’s business records and financial situation prevents the court from assessing the feasibility of the Plan. For the aforementioned reasons, the Plan may not be confirmed.

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

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

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

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

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



## FINAL RULINGS

36. [14-29505](#)-E-13 JOHN/CAROLIN FUNDERBURG MOTION TO MODIFY PLAN  
DJC-8 Diana Cavanaugh 7-16-18 [[150](#)]

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

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Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 16, 2018. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

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

John and Carolin Funderburg ("Debtor") seeks confirmation of the Modified Plan to increase Trustee payments to \$5,486.00 monthly, waiving payment delinquencies and paying unsecured claims 81%. Dckt. 151. The Modified Plan removes prior budgeting for an automobile payment of \$309.87, makes adjustments to reflect current monthly income, and reflects a slightly higher living expense (despite decreasing mortgage payments). Dckt. 152. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## **CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 3, 2018. Dckt. 157. Trustee notes Debtor is delinquent \$5,486.00 under the Modified Plan terms. Trustee asserts Debtor cannot likely make payments required under 11 U.S.C. § 1325(a)(9).

## **TRUSTEE'S STATUS UPDATE**

Trustee filed a status update to his Opposition on August 14, 2018. Dckt. 160. Trustee states that Debtor is no longer delinquent and Trustee no longer opposes confirmation.

## **DISCUSSION**

The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by John and Carolin Funderburg ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on July 16, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**Final Ruling: No appearance at the August 21, 2018 Hearing is required.**

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Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 5, 2018. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

**The Motion to Confirm the Modified Plan is granted.**

Aaron Magsayo Catubig ("Debtor") seeks confirmation of the Modified Plan to Restructure his car loan and pay back-taxes owed. Dckt. 86. The Modified Plan is proposed for Debtor to bring his payments current and also allow for a lump sum payment at the end of his plan. Dckt. 86. Debtor has also obtained new employment and therefore filed a new budget with the court. *Id.* at ¶ 7. Debtor's Plan requires a lump sum payment at the end of his Plan; if Debtor is otherwise unable to make this payment, he will seek a loan against his 401K. *Id.* at ¶ 6. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### **CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 3, 2018. Dckt. 93. Trustee notes that Section 3.05 of the proposed Modified Plan indicates attorney's fees are paid through the Plan are \$3,005.00 whereas the Order Confirming grants fees of \$3,012.00. Trustee asserts that Debtor is current and his Plan is feasible, and therefore Trustee does not oppose the Motion so long as Section 3.05 is corrected.

## DISCUSSION

Trustee's argument is well-taken. The Order Confirming Second Amended Chapter 13 Plan provided for \$3,012.00 in attorney's fees. The proposed Modified Plan does not account for these fees. However, given that the different is \$7.00, an amount which would be exhausted by the court, counsel for debtor, and counsel for the Chapter 13 Trustee in seconds if addressing the issue at a hearing, the court sua sponte orders that the attorney's fee amount is corrected to provide for the \$3,012.00 as an amendment stated in the Order confirming the Plan. Therefore, payments would not be completed within the permitted period and Plan is not feasible. 11 U.S.C. §§ 1322(d), 1325(a)(6).

The Modified 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 Modified Chapter 13 Plan filed by Aaron Magsayo Catubig ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirm the Modified Plan is granted, and the proposed Second Modified Chapter 13 Plan filed on July 5, 2018, as amended to state that \$3,012.00 in prior attorney's fees for Debtor's counsel have been approved, is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

**Final Ruling: No appearance at the August 21, 2018 Hearing is required.**

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, and Office of the United States Trustee on July 13, 2018. By the court's calculation, 39 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<b>The Motion to Vacate is denied.</b>
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Johnnie Jeff Johnson ("Debtor") filed the instant case on June 1, 2018. Dckt. 1. A plan was Filed on July 6, 2018. Dckt. 31. A Motion to Confirm the proposed Plan was also filed July 6, 2018. Dckt. 33.

On July 9, 2018, the court entered an Order Dismissing Case for Failure to Timely File Documents. Dckt. 37.

On July 16, 2018, Debtor filed this instant Motion to Vacate, claiming his case was dismissed after he inadvertently left out a Statement of Financial Affairs while submitting all other required documents before the July 6, 2018, due date. Dckt. 40. Debtor notes further that, because he is in *Pro Se*, he did not have access to the court's docket and did not discover his case was dismissed until July 12, 2018. Debtor argues believes his error was excusable and that he is a good candidate for a Chapter 13 case.

Debtor does not refer to a code section for legal authority. Debtor being in *Pro Se*, this court presumes he seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

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

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to this Motion on July 18, 2018. Dckt. 44. Trustee asserts that Debtor is ineligible for Chapter 13 under 11 U.S.C. § 109(e) because Debtor has secured debts totaling \$1,766,400.

## SEQUOIA MORTGAGE CAPITAL, INC

Sequoia Mortgage Capital, Inc. (“Creditor”) filed an Opposition to this Motion on July 25, 2018. Dckt. 47. Creditor notes that Debtor initially filed in the Bankruptcy Court for the Northern District, and that his case was transferred by that court, *sua sponte*, for improper venue. Creditor states further that Debtor holds property valued at \$3,200,000.00, which is encumbered by Creditor’s secured debt in the amount of \$1,755,000.00, and that Debtor has filed another Chapter 13 case in the Northern District Bankruptcy Court. Creditor argues the Motion should be denied because Debtor is not entitled to a Chapter 13 under 11 U.S.C. § 109(e) and because the Order to Vacate would leave Debtor with two consecutive, ongoing Chapter 13 cases.

## APPLICABLE LAW

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

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

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

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken

as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

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

## DISCUSSION

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

The sole ground for the dismissal of Debtor's case was the failure to timely file documents. Debtor requested and the court granted an extension of the deadline for filing documents, setting a deadline of July 6, 2018. Dckt. 16. Debtor claims he filed all other necessary documents by the Order's deadline, and only left out a statement of financial affairs “due to inadvertence.” Dckt. 40. Debtor does not describe what this inadvertence was or why he finds it excusable. The court infers that due to being *Pro Se* Debtor simply was unfamiliar with the required documents and left the statement of financial affairs out when he in good faith believed all documents had been filed (though this is not pleaded).

However, Trustee and Creditor's arguments are well-taken. A review of Debtor's Schedules shows secured claims totaling approximately \$1,766,400.00 from a *ta lien* and First Deed of Trust. Schedule D, Dckt. 32. Only individuals with secured debts less than \$1,184,200.00 may be a debtor under Chapter 13. 11 U.S.C. 109(e). Moreover, Debtor has already filed another Chapter 13 case with the United States Bankruptcy Court for California's Northern District on July 17, 2018,. *See*, Case No. 18-10486.

The court *may* relieve a party from a final judgement for mistake, inadvertence, surprise, or excusable neglect. FED. R. CIV. P. 60(b)(1). Here, the court's discretion would be of little good where Debtor is not entitled to file a case under Chapter 13 and where he has already filed another Chapter 13 case notwithstanding this Motion. Therefore, in light of the foregoing, the Motion is denied without prejudice.<sup>FN.1.</sup>

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FN.1. On August 17, 2018, Debtor's new counsel filed a “withdrawal” of the Motion to Vacate the Dismissal. No authority was given for the Debtor's unilateral right to “withdraw” something which has been submitted to the court. Since opposition has been filed, Debtor cannot unilaterally dismiss the Motion. Fed. R. Civ. P. 41(a)(1)(A)(i), Fed. R. Bank. P. 4041, 9014. However, the court accepts the “withdrawal” as a concurrence in the denial of the Motion.  
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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 filed by Johnnie Jeff Johnson (“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 without prejudice.

39.     [18-23940](#)-E-13     **JOHNNIE JOHNSON**     **MOTION TO CONFIRM PLAN**  
          JJ-1                   Pro Se                   7-5-18 [\[33\]](#)

**Final Ruling:** No appearance at the August 17, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 5, 2018. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

<b>The Motion to Confirm the Modified Plan is denied as moot.</b>
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Johnnie Jeff Johnson (“Debtor”) filed a Chapter 13 petition June 1, 2018. Dckt. 1. On July 9, 2018, the court dismissed Debtor’s case for failure to timely file documents. Dckt. 37.



Debtor filed a Motion to Vacate Dismissal on July 16, 2018. Dckt. 40. The court has tentatively denied the Motion because Debtor is ineligible under Chapter 13 and has already filed another case in California's Northern District.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by Johnnie Jeff Johnson ("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 without prejudice.

40.	<a href="#"><u>18-23459-E-13</u></a> DPC-1	JOHN CASTORINA Justin Kuney	<b>OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK</b> 7-23-18 <a href="#"><u>[26]</u></a>
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**Final Ruling: No appearance at the August 21, 2018 Hearing is required.**

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor on July 23, 2018. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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

<p><b>The Objection to Confirmation of Plan is Sustained, the plan having been rendered moot by dismissal of this case.</b></p>
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David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that:

- A. Debtor failed to provide tax returns for the most recent pre-petition tax year for which the return was required.
- B. Debtor listed a value of \$0.00 on Schedule B, line#33 for a worker's compensation settlement in the amount of \$840,000.00 gross and a future \$160,000.00 lifetime salary.
- C. The Debtor's plan payment is insufficient to pay the increase in Class 1 mortgage payments based on the Notice of Mortgage Payment Changes. Bank of America increased the Class 1 mortgage payment from \$301.00 to \$662.12. Dckt. 22. Chase bank increased the Class 1 mortgage payment from \$773.00 to \$784.80. Dckt. 23. The plan payment would need to increase to \$4,233.14 to pay the Class 1 mortgage payments.

## **DISCUSSION**

### **Failure to Provide Tax Returns**

The Chapter 13 Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Failure to Provide Disposable Income / Not Best Effort**

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

Debtor admitted at the First Meeting of Creditors that he received a worker's compensation settlement in the amount of \$840,000.00 and would receive a lifetime salary of \$160,000.00. Doc. 28. Debtor failed to list this asset with value on Schedule B, line#33. However, California Code of Civil Procedure § 704.160 provides that after payment of a worker's compensation settlement, the claim is exempt unless domestic support obligations exist. There do not appear to be any such obligations here.

### **Failure to Afford Plan Payment / Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has failed to accurately present all assets on Schedule B. Debtor's plan payment of

\$3,830.000 in insufficient to pay recent increases to the Class 1 mortgage payments. Dckt. 22, 23. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

On August 17, 2018, the court ordered this case dismissed. The Debtor's plan is rendered moot and the objection is sustained.

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

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

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

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

41. [14-30278](#)-E-13      GARY SHREVES AND KAREN      MOTION TO MODIFY PLAN  
WW-10      BAYSINGER- SHREVES      7-6-18 [236]  
Mark Wolff

**Final Ruling: No appearance at the August 21, 2018 Hearing is required.**

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 9, 2018. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

**The Motion to Confirm the Modified Plan is granted.**

Gary Wayne Shreves and Karen Lee Baysinger- Shreves ("Debtor") seeks confirmation of the Modified Plan because co-debtor Karen Shreves lost her job and is now working part-time while receiving social security, resulting in reduced income. Dckt. 238. The Modified Plan provides for payments of \$475.00 monthly for 44 months, and \$932.00 monthly for 16 months. Dckt. 239. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### **CHAPTER 13 TRUSTEE'S OPPOSITION**

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 3, 2018. Dckt. 251.

1. According to Trustee's calculation the Plan will take approximately 62 months to complete. Debtor has completed approximately 45 months, and approximately \$13,903.00 remains to be paid to creditors. The proposed Plan payment of \$932.00 is \$862.10 net of Trustee fees. Payments of \$862.00 would take 17 months to reach the \$13,903.00 remaining. Trustee calculates the Plan payment would need to be \$1,002.00 to complete the

Plan on time. Debtor's Schedule J shows a net income of \$1,123.48, which would be enough to cover the increased payment. Trustee does not oppose increasing the Plan payment in the Order Confirming Plan.

2. Debtor's Notice (Dckt. 237.) Does not comply with Local Bankruptcy Rule 9014-1(d)(3)(B)(iii).

## **DEBTOR'S REPLY**

Debtor filed a Reply to Trustee's Opposition on August 13, 2018. Dckt. 256. Debtor consents to the adjustment as proposed by the Trustee. Debtor agrees to the increased payment of \$1,002.00 for the remaining 15 months.

## **DISCUSSION**

The Trustee withdrawing Objection due to Debtor's agreement to increase the Plan payment, the Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by Gary Wayne Shreves and Karen Lee Baysinger- Shreves ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on July 6, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**IT IS FURTHER ORDERED** that under the Modified Plan Debtor shall make 15 monthly payments of \$1,002.00 for the final fifteen months of the plan.

42. [17-27397](#)-E-13      **GEVORG POLADYAN AND**      **OBJECTION TO CLAIM OF TAPAN**  
**GEL-2**      **ARMINE ASATRYAN**      **TRIVEDI, CLAIM NUMBER 1**  
      **Gabriel Liberman**      **7-5-18 [67]**

**Final Ruling:** No appearance at the August 21, 2018, hearing is required.  
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**The Objection to Claim of Tapan Trivedi is dismissed without prejudice.**

Gevorg George Poladyan and Armine Asatryan (“Debtor”) having filed a Notice of Withdrawal of Objection, which the court construes to be an Ex Parte Motion to Dismiss the pending Objection on August 7, 2018, Dckt. 88; no prejudice to the responding party appearing by the dismissal of the Objection; Debtor having the right to request dismissal of the objection pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by David Cusick (“The Chapter 13 Trustee”); the Ex Parte Motion is granted, the Debtor’s Objection is dismissed without prejudice, and the court removes this Objection from the calendar.

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 filed by Gevorg George Poladyan and Armine Asatryan (“Debtor”) having been presented to the court, Debtor having requested that the Objection itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 88, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Claim of Tapan Trivedi is dismissed without prejudice.