UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 1, 2016, at 3:00 p.m.

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1. **16-24907-E-13** **MARY AIKEN** **MOTION TO VALUE COLLATERAL OF**
SLH-1 **Seth Hanson** **CIT BANK, N.A.**
9-15-16 [18]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on September 15, 2016. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

The Motion to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen (14) 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 secured claim of CIT Bank, N.A. ("Creditor") is continued to 3:00 p.m. on xxxxx, 2016. Opposition pleadings shall be filed and served on or before xxxxx, 2016, and Replies, if any, filed and served on or before xxxxx, 2016.

The Motion to Value filed by Mary Aiken ("Debtor") to value the secured claim of CIT Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 23104 Cottage Hill Drive, Grass Valley, California ("Property"). Debtor seeks to value the Property at a fair market value of $410,099.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

No Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor that appears to be for the claim to be valued.

CREDITOR'S OPPOSITION

Deutsche Bank National Trust Company, as Indenture Trustee for Indymac Home Equity Mortgage Loan Asset-Backed Trust, Series 2007-H1, as serviced by Specialized Loan Servicing LLC, filed a response to Debtor's motion on October 18, 2016. Dckt. 30. The response asserts that the secured claim is $96,794.56, including $49,806.71 in arrears and a Proof of Claim is forthcoming.

The response further asserts that the current value of the property is higher than Debtor's valuation; an appraisal or other expert valuation is similarly forthcoming. Lastly, the response asserts that the senior lienholder has yet to file a Proof of Claim—the deadline to file Proofs of Claim is November 30, 2016—, and Debtor provides no evidence to support her conclusion that the senior lienholder is owed $542,838.00. Creditor requests that the Motion be denied or that alternatively, the hearing be continued to gather the Proofs of Claims and the expert valuation report.

DISCUSSION

The court continues the hearing to allow Creditor to conduct discovery and file opposition pleadings.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Mary Aiken ("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 hearing on the Motion to Value Secured Claim of CIT Bank, N.A. ("Creditor") is continued to 3:00 p.m. on xxxxx, 2016. Opposition pleadings shall be filed and served on or before xxxxx, 2016, and Replies, if any, filed and served on or before xxxxx, 2016.

2. 16-24907-E-13 MARY AIKEN — MOTION TO CONFIRM PLAN
SLH-2 Seth Hanson — 9-15-16 [22]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 15, 2016. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

The hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on xxxxx, 2016.

Mary Aiken ("Debtor") filed a Motion to Confirm Amended Plan September 15, 2016. Dckt 22.

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion October 13, 2016. Dckt. 27. The Trustee Opposes Confirmation on the basis that:

A. Debtor cannot afford to make the payments or comply with the Plan. Debtor's Plan relies on the Motion to Value Collateral of CIT Bank, N.A. which is set for hearing on November 1, 2016. If the Motion to Value is not granted, Debtor's Plan does not have sufficient monies to pay the claim in full and therefore should be denied confirmation.

The court has continued the hearing on the Motion to Value the Secured Claim of CIT Bank, N.A. to allow discovery (an appraisal) to be conducted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on xxxxx, 2016.

3. **11-31509-E-13** **DAVID/ELYSE COX** **MOTION TO SELL**
JDM-3 **John Maxey** **10-17-16 [62]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 17, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Sell is granted.

The Bankruptcy Code permits the Chapter 13 Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to sell the real property commonly known as 6420 Virginia Town Road, Newcastle, California ("Property").

The proposed purchasers of the Property are Elliot Hall and Nicole Ciurej-Hall ("Buyer"), and the terms of the sale are:

A. The purchase price of the property shall be $425,000.00 as follows:

1. To be paid in cash or equivalent good funds at closing, and

2. $5,000.00 valid check or money order payable to Movant, promptly delivered no later than 5:00 p.m. three calendar days after the execution of the agreement;

B. The sale will close on September 15, 2016, contingent upon well, termite, and septic tank tests;

C. Buyer must pay transfer taxes, deed and deed of trust recording fees, association transfer fees, hazard and any other required insurance, Buyer's settlement fees, and all Buyer's loan related or lender related expenses; and

D. Movant must pay all of Movant's existing loans, liens, and related costs affecting the sale of the property; Movant's settlement fees; real estate commissions; the balance on any leased items that remain with the property; and a title insurance policy with Buyer to receive benefit of simultaneous issue.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

On August 6, 2016, Movant completed the Modified Chapter 13 Plan that was confirmed on May 7, 2015 (Dckt. 55), and the Trustee filed his Final Report in this case on October 21, 2016 (Dckt. 67). Debtor appears to be selling the Property while beginning the fresh start afforded by the Bankruptcy Code. Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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 Sell Property filed by David Cox and Elyse Cox, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that David Cox and Elyse Cox, the Chapter 13 Debtor, are authorized to sell pursuant to 11 U.S.C. § 363(b) to Elliot Hall and Nicole Ciurej-Hall or nominee ("Buyer"), the Property commonly known as 6420 Virginia Town Road, Newcastle, California ("Property"), on the following terms:
>
> A. The Property shall be sold to Buyer for $425,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 65, and as further provided in this Order.
>
> B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens,

other customary and contractual costs, and expenses incurred in order to effectuate the sale.

C. The Chapter 13 Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

D. Proceeds from the sale in excess of the amounts authorized to be paid above, may be disbursed directly from escrow to the Chapter 13 Debtor.

4. 12-21023-E-13 WW-4 | **SALVADOR/LAURA CORTES** **Mark Wolff** | **CONTINUED MOTION TO INCUR DEBT** **8-18-16 [80]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 18, 2016. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

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

The Motion to Incur Debt is denied without prejudice.

Salvador Cortes and Laura Cortes ("Debtor") seek permission to refinance their residence, commonly known as 9542 Alta Mesa Road, Wilton, California ("Property"). The total loan amount is $360,000.00, with monthly payments of $2,375.80 for thirty (30) years and including 3.5% interest.

Debtor states the following grounds with particularity in accordance with Federal Rule of Bankruptcy Procedure 9013:

A. "Debtors filed this case on or about January 19, 2012.

B. At the time this case was filed Debtors owned their residence located at 9542 Alta Mesa Road, Wilton California subject to a loan in favor of Indymac Bank serviced by OneWest. The Indymac Bank loan was a construction loan and the full amount is due.

C. Pursuant to the terms of Debtors' confirmed Chapter 13 Plan IndyMac is being paid as a Class 1 Creditors with an additional provision which requires that [they] refinance the property and pay IndyMac in full prior to the completion of the Chapter 13 Plan. See Declaration of Salvador Cortes and Laura Cortes which is being filed concurrently with this motion.

D. Debtors have looked into refinancing and have now found a lender willing to refinance their property. Debtors have received an estimate of loan terms which was memorialized in a 'Pre-Application Worksheet', a copy of which is attached hereto as Exhibit A.

E. Debtors wish to proceed with the refinance through American Pacific Mortgage Corp. While the terms are not yet locked, the estimated terms of the loan are as follows:

1.	Loan amount:	$360,000.00
2.	Term	30 years
3.	Interest Rate	3.5%
4.	Monthly payment (with P&I)	$2,375.80

F. Debtors are current in payments due under their Chapter 13 Plan. The refinance is also required under the terms of their plan.

G. The new debt is a single loan incurred only to refinance the existing debt and Debtors will not receive cash out of the refinance.

H. The only security for the new debt will be the property being refinanced.

I. All creditors with liens and security interests encumbering the property will be paid in full from the proceeds of the refinance.

J. The new monthly payment will be less than $2,500.00."

Dckt. 80.

TRUSTEE'S RESPONSE

The Trustee filed a Response on September 16, 2016. Dckt. 89. The Trustee states that he has no opposition to the instant Motion based upon the proposed loan terms.

SEPTEMBER 20, 2016 HEARING

At the hearing, the court continued the matter for final hearing to 3:00 p.m. on October 18, 2016. Dckt. 93. The court required the Debtor to file a copy of the final loan agreement or term sheet stating the significant terms of the loan on or before October 11, 2016.

OCTOBER 18, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 1, 2016, with supplemental pleadings to be filed by October 25, 2016. Dckt. 98.

DISCUSSION

No supplemental pleadings have been filed. Unfortunately, the court has not been provided with any documentation of the proposed loan.

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id*. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

In the Motion, Debtor states that they do not yet have an actual proposed loan modification agreed to with the new lender, but only possible proposed items. The court has been presented with little more than the Debtor's "hope." Debtor has not filed an actual refinance agreement for the court to review, but instead, they have filed a "Pre-Application Worksheet" (Exhibit A, Dckt. 83) that states at the top in bold: "Your actual rate, payment and costs could be higher. Get an official Loan Estimate before choosing a loan."

The court has continued the hearing on this Motion twice so the Debtor and Lender can provide the simple information about the actual proposed loan modification (whether trial or final). None has been provided.

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

IT IS ORDERED that the Motion for Authorization to Enter into Post-Petition Financing is denied without prejudice.

5. 16-25332-E-13 DPC-1 — STEPHEN/LESLEE FOURNIER — Mary Ellen Terranella — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 10-5-16 [27]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 5, 2016. 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Objection to Confirmation of Plan is sustained.

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

A. The Debtor is $40.00 delinquent in plan payments to the Trustee. The next scheduled payment of $1,965.00 is due October 25, 2016. The Debtor has paid $1,925.00 into the Plan to date.

B. The Debtor is not entitled to Chapter 13 relief because the Debtor is over the unsecured debt limit. Debtor lists unsecured debts as $328,573.00. However, the Trustee calculates total unsecured debts of $595,721.00 based on:

1. Debtor's Schedule D, which lists $90,516.00 for a second deed of trust to Chase and Merriwest C.U. for a 2014 Ford Escape;

2. Debtor's Schedule E/F lists:

a. Priority unsecured tax debts totaling $76,612.00,

b. Student loans of $321,591.00, and

c. General unsecured debts of $107,002.00.

C. Debtor unfairly discriminates against creditors. The Plan proposes to pay 0% to unsecured creditors. Debtor Leslie Fournier testified at the First Meeting of Creditors held on September 29, 2016, that she is making a $151.50 monthly student loan payments directly. Debtor's Schedule J does not disclose that expense. Where Debtor admits that the student loan payment is hidden in the budget, creditors do not have the opportunity to object to the direct payment to an unsecured debt.

D. Debtor's Plan may not be the Debtor's best effort. Debtor is above median income and proposes to pay 0% to general unsecured creditors.

1. The Trustee objects to the following deductions on Form 122C-2:

a. $489.00 for optional telephone services. Debtor's separate budgets list $165.00 for telephone expenses for Debtor Stephen Fournier and $0.00 for Debtor Leslee Fournier. According to the form, this deduction is not to be used for basic home telephone service, internet, cell phone, or self-employment expenses;

b. $37.00 for additional food and clothing expense. No proof of the expense is provided as required by the form;

c. $125.00 for charity expenses. No charitable expenses are disclosed on the Debtor's budget or on the Business Income and Expenses; and

d. $2,764.00 for Debtor Stephen Fournier's separate living expenses. Debtor has claimed standard Internal Revenue Service allowable living expense deductions for a household of two persons on lines 6, 7g, 8, 9, 11, 12, and 13a–f. The Trustee objects to Debtor taking additional deductions for the separate household expenses when already claiming expenses for a household of two persons.

Adjusting the form for these expenses results in monthly disposable income of $3,393.98. Based on the applicable commitment period of sixty months, unsecured creditors would be entitled to receive $203,638.80. The Plan proposes to pay $76,612.00 to priority unsecured creditors and a 0% dividend to general unsecured creditors.

2. Debtor's separate budgets both list a food expense of $600.00 on Schedule J. The Internal Revenue Service Allowable Living Expenses National Standard for food for one person is $307.00 per month. The Trustee requests proof that Debtor actually has these expenses above the national standard allowance.

The Trustee's objections are well-taken.

The Trustee opposes confirmation offering evidence that the Debtor is $40.00 delinquent in plan payments. This indicates that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. § 1325(a)(6).

Next, the Trustee opposes on the basis that Debtor is over the unsecured debt limit, disqualifying the Debtor from Chapter 13 relief. Pursuant to 11 U.S.C. § 109(e), an individual with regular income who owes, on the date of filing of the petition, "noncontingent, liquidated, unsecured debts" of less than $394,725.00 may be a debtor under Chapter 13. Here, the Debtor owes $595,721.00 in unsecured debt.

The Trustee also opposes confirmation due to the Debtor's unfair discrimination to unsecured creditors. Debtor Leslee Fournier testified at the First Meeting of Creditors that she is directly paying a monthly student loan payment of $151.00; however, Debtor failed to disclose this expense on Schedule J. By not disclosing this payment, Debtor has unfairly discriminated against other unsecured creditors by foreclosing them from objecting to the direct payment of an unsecured debt. This is cause to deny confirmation. 11 U.S.C. § 1322(a)(3), (b)(1).

The Trustee also offers evidence that the Plan is not Debtor's best effort based on Debtor's Statement of Current Monthly Income and on Schedule J. Debtor's Statement of Current Monthly Income (Form 122C-2) appears to make inappropriate deductions. Debtor deducts $489.00 for optional telephone services on Form 122C-2 but only lists $165.00 in total for telephone services on Debtor's separate Schedule J. According to the Form 122C-2, the deduction for optional telephone services is for:

> The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Official Form 122C-1, or any amount you previously deducted.

Further, while Debtor deducts additional food and clothing expenses of $37.00, the Form states "[y]ou must show that the additional amount claimed is reasonable and necessary." Debtor has provided no information showing that this amount is reasonable and necessary. Next, Debtor deducts charitable expenses of $125.00, yet no charitable expenses were disclosed on the Debtor's budgets or on the Business Income and Expenses. Debtor Stephen Fournier lists separate living expenses of $2,764.00; however, Debtor claimed standard Internal Revenue Service allowable living expense deductions for a household of two persons on lines 6, 7g, 8,9, 11, 12, and 13a–f. With the Debtor already claiming expenses for a household of two persons, a deduction for Debtor Stephen Fournier's separate living expenses is not appropriate. Accounting for the removal of these expenses, Debtor has disposable income of $3,393.98. That would allow unsecured creditors to be paid $203,638.80 through the Plan, rather than the current proposed $76,612.00 to only priority unsecured creditors.

Finally, the Trustee objects to Debtor's food expense as listed on their separate Schedules J. Each Debtor lists an expense for "Food and housekeeping supplies" in the amount of $600.00. With the National Standard for food for one person being $307.00 per month, the Debtor must prove that those food expenses actually occur to have expenses so far above the national standard allowance.

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

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

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

6.	**16-25332-E-13**	**STEPHEN/LESLEE FOURNIER** **Mary Ellen Terranella**	**OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, N.A.** **10-3-16 [24]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and the Chapter 13 Trustee on October 3, 2016. 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m. on November 22, 2016, to be heard concurrently with Debtor's Motion to Value Collateral of JPMorgan Chase Bank, N.A.

JPMorgan Chase Bank, N.A., a Creditor holding a secured claim, opposes confirmation of the Plan. FN 1.

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

The creditor opposes confirmation on the basis that:

A. Debtor's Plan fails to propose to cure the pre-petition arrears owed to Creditor and fails to provide that post-petition monthly mortgage payments are tendered to Creditor.

B. Debtor filed a Motion to Value Collateral of Creditor. The motion seeks to value the Property at $220,000.00 and strip Creditor's junior lien. Creditor filed an Opposition to the Motion to Value Collateral disputing the Debtor's estimated value, believing that the value of the Property is greater than $220,000.00. Creditor states there is significant equity beyond the first lien on the property to provide for its claim.

The objecting creditor indicates that it holds a deed of trust secured by the Debtor's residence and states that the amount due and owing under the Promissory Note is approximately $87,343.14, and the pre-petition arrearage amount owed is $3,067.04. Unfortunately, Creditor has not filed a Proof of Claim or provided admissible evidence (e.g., a declaration made under penalty of perjury) in its pleadings of the amount of the pre-petition arrears. FN. 2. Without such, the court cannot determine if the Debtor's Plan does not, in fact, provide for the full curing of Creditor's arrears or whether post-petition monthly mortgage payments are required.

FN.2. The moving party is reminded that the Local Rules require that every motion be accompanied by evidence establishing its factual allegations and demonstrating that movant is entitled to the relief requested. Local Bankr. R. 1001-1(g), 9014-1(d)(7).

The objecting creditor also indicates that the Debtor has filed a Motion to Value Collateral of property that the objecting creditor believes is worth more than the Debtor's valuation. This Objection to Confirmation of Plan is not the appropriate place to dispute Debtor's Motion to Value Collateral. The objecting party is reminded that every application, motion, contested matter, or other request for an order must be filed separately from any other request. Local Bankr. R. 1001-1(g), 9014-1(d)(1). The hearing on the Motion to Value Collateral has been continued to 3:00 p.m. on November 22, 2016. Dckt. 34.

STIPULATION

The parties filed a signed Stipulation on October 24, 2016. Dckt. 40. The parties state that there was a one-week delay in having the property appraised. Accordingly, the parties request that the hearing be continued to 3:00 p.m. on December 6, 2016, with Creditor filing supplemental opposition by November 7, 2016, and Debtor filing any reply by November 21, 2016.

Due to the interconnectedness of the present Objection and Debtor's Motion to Value Collateral (Dckt. 18), the hearing on the matter is continued to 3:00 p.m. on November 22, 2016.

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

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

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

IT IS ORDERED that the hearing on the Objection is continued to 3:00 p.m. on November 22, 2016, to be heard concurrently with Debtor's Motion to Value Collateral of JPMorgan Chase Bank, N.A.

7. 16-24337-E-13 DPC-2 — QUAY SAMONS, Eamonn Foster — CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS 9-14-16 [16]

Final Ruling: No appearance at the November 1, 2016 hearing is required.

The Chapter 13 Trustee having filed a Supplemental Ex Parte Motion to Dismiss the pending Objection on October 25, 2016, Dckt. 42; no prejudice to the responding party appearing by the dismissal of the Objection; the Trustee having the right to request dismissal of the motion 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 spousal waiver filed by the Debtor; the Ex Parte motion is granted, the Trustee'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 to Debtor's Claim of Exemptions filed by the Trustee having been presented to the court, the Trustee 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. 42, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Trustee's Objection to Debtor's Claim of Exemptions is dismissed without prejudice, and the bankruptcy case shall proceed.

8. **16-26838-E-13** **KATRINA CULVERSON** **MOTION TO EXTEND AUTOMATIC STAY**
SDH-1 **Scott Hughes**
10-17-16 [10]

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

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

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

Correct 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 October 17, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is denied.

Katrina Culverson ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 16-24458) was dismissed on October 13, 2016, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 16-24458, Dckt. 50, October 13, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

TRUSTEE'S OPPOSITION

David Cusick, Chapter 13 Trustee, filed an Opposition on October 18, 2016. Dckt. 15. Trustee asserts that Debtor's current filing is incomplete as Debtor has yet to file the Schedules, Statement of Financial Affairs, and Form 122C-1 Statement of Monthly Income. Trustee requests that this motion be denied unless the documents are filed.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?

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

Elliot-Cook, 357 B.R. at 814–15.

Dismissal of Prior Case

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why Debtor failed to make plan payments in the prior case. Debtor's testifies under penalty of perjury that on August 23, 2016, two days before the first payment was due on the plan in the prior case, she mailed six money orders, totaling $3,062.00 to the Trustee, but that the Trustee asserts that he never received them. Declaration, Dckt. 12. She further states that she "diligently" tried to recover the money, but that it had not been recovered by the time Trustee moved to dismiss the prior case.

Then, on September 16, 2016, Debtor's father suffered a heart attack, necessitating her traveling to Oregon to be with him. *Id.* On September 26, 2016, Debtor returned to Sacramento and contacted her attorney about the motion to dismiss. At that time she states she tried to make a payment, but:

> "Unbelievably, the package also got lost in the mail, but because I had a tracking number this time, I am able to track down the other missing payment. It was scheduled to arrive at the trustee's office on October 12, 2016, the day scheduled for the motion to dismiss the case. I do not know if the trustee received that payment. My attorney advised me that it will probably be returned to me if the case has been dismissed."

Id., ¶ 6.

Rather than addressing the defaults and recovering the monies to fund the Plan, Debtor concludes:

> "Because of the circumstances, and after discussing the options with my attorney, I decided to let the first case be dismissed. Rather than trying to catch up on the payments in the old case, I believe it would be easier for me and the trustee if I started over again with a new case."

Id., ¶ 7. Debtor states that now she intends to drop payments off at the Trustee's office rather than mail them to the Trustee.

Debtor concludes by testifying that her continuing in bankruptcy is important "to stop a foreclosure pending on my residence and to make sure my GMC Yukon is not repossessed." *Id.* ¶ 10.

The prior Chapter 13 case was dismissed on October 13, 2016. 16-24458; Order, Dckt. 50. It was dismissed based on Debtor's intentional choice to allow it to be dismissed. Debtor then filed this current case on October 14, 2016.

The Debtor's testimony and strategy decision to dump the first case and not try to recover the "missing" money orders is troubling. The Chapter 13 Trustee filed the motion to dismiss the prior bankruptcy case on September 28, 2016, two days after Debtor returned from Oregon. *Id.*; Motion, Dckt. 42. At that point, knowing that a plan payment had come due on September 25, 2016, Debtor and her counsel did not have Debtor drive the current payment over to the Trustee, but instead, Debtor waited and then used a procedure that would not have the payment (if actually sent) not received by the Trustee until October 12, 2016—two weeks after Debtor returned from Oregon. Why Debtor, in good faith, would intentionally schedule the payment to be received at the Trustee's office on October 12, 2016, most likely after the 10:00 a.m. hearing for the motion to dismiss that both she and her attorney had notice of is unaddressed.

As testified to by the Trustee in the prior case and admitted by the Debtor, she has not made the required $3,062.00 plan payments for August, September, and October 2016, pursuant to the prior plan. In fact, Debtor now testifies that she has the money, but just that the money orders were "lost" or may not have been received by the Trustee. Thus, it appears that the first month's payment in this case should be $12,248.00 (the three payments of $3,062.00 of projected disposable income which Debtor has for August, September, and October 2016, and then $3,062.00 for November 2016).

Debtor offers no explanation as to where this $12,248.00 is, choosing to ignore it in her Declaration. On Schedule B filed under penalty of perjury in this case the $12,248.00 is unaccounted for by Debtor. Dckt. 22. The Debtor lists having only $163.00 in a checking account and no other bank or savings accounts. *Id.* at 6. Under penalty of perjury Debtor does not list any "missing" cashier's checks or other monies she is due back from the Trustee. The $12,248.00 has just "disappeared," no explanation deemed warranted by Debtor.

Debtor's characterization of her testimony is accurate—it is unbelievable. This becomes even more troubling as the court reviews the late-filed Statement of Financial Affairs in this case. Debtor states under penalty of perjury having income in 2014 of $502,320.00 from "Worker's Comp." Even assuming that Debtor paid a contingent fee to an attorney who assisted in that claim, the Schedules are devoid of any indication of Debtor having assets of several hundred thousands of dollars.

Debtor states under penalty of perjury that she suffered no losses in the year prior to or made any gifts or contributions in excess of $600 in the two years prior to filing this bankruptcy case. Statement of Financial Affairs Parts 5 and 6, Dckt. 23. As with the $12,248.00, the $502,320.00 just disappears.

The Schedules in the prior Chapter 13 case are also devoid of any information concerning what has happened to the $502,320.00. 16-24458; Dckt. 9. As in this case, Debtor stated under penalty of perjury that in the two years prior to the filing of the bankruptcy cash she had not made any gifts or in the one year prior suffered any losses in excess of $600.00. *Id.*; Statement of Financial Affairs Parts 5 and 6, Dckt. 14.

Denial of Motion to Extend Automatic Stay

Congress has provided that pursuant to 11 U.S.C. § 362(c)(3)(A), the automatic stay shall terminate **as to the debtor** thirty days after the filing of a second bankruptcy case within a year of a dismissal of a prior bankruptcy case. However, the debtor may obtain an order extending the automatic stay so it **does not terminate as to the debtor** by rebutting the statutory presumption that the second bankruptcy case has been filed in bad faith. 11 U.S.C. § 362(c)(3)(B). Debtor must show that the second case was filed in good faith and rebut the presumption of bad faith by "clear and convincing evidence."

Here, Debtor has failed to rebut the presumption of bad faith. Rather, Debtor has demonstrated that she elected to allow the first case to be dismissed and has failed to account for $12,248.00 in projected disposable income that should be available to fund the plan. Debtor's Statement of Financial Affairs also raises a serious question as to the location of more than one-half of a million dollars of income Debtor received in 2014, less than two years prior to the Debtor starting the filing of her bankruptcy cases in the summer of 2016.

Debtor elected, as part of a legal strategy to have the prior case dismissed, ensuring such by not responding to the Motion to Dismiss (even though she states under penalty of perjury that she mailed cashier's checks scheduled to be delivered on October 12, 2016, to the Trustee to prevent the dismissal of the case). That testimony is not credible.

The Motion is denied, and the court does not extend the automatic stay as provided in 11 U.S.C. § 362(c)(3)(B). FN.1.

FN.1. 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 the 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 the Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only the 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 Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied, and the court does not extend the automatic stay as to the Debtor, which shall terminate as to the Debtor by operation of law pursuant to 11 U.S.C. § 362(c)(3)(A). The court does not make any order affecting the automatic stay as it exists pursuant to 11 U.S.C. § 362(a) for the bankruptcy estate and property of the bankruptcy estate.

9. 16-25441-E-13 RAS-1 | **AVELINO SANTOS, Chad Johnson** | **OBJECTION TO CONFIRMATION OF PLAN BY HSBC BANK USA, N.A. 9-19-16 [24]**

WITHDRAWN BY M.P.

Final Ruling: No appearance at the November 1, 2016 hearing is required.

Movant having filed a Notice of Withdrawal, which the court construes to be an Ex Parte Motion to Dismiss the pending Objection on October 10, 2016, Dckt. 47; no prejudice to the responding party appearing by the dismissal of the Objection; Movant having the right to request dismissal of the motion 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 response filed by the Debtor; the Ex Parte motion is granted, Movant'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 to Confirmation of Plan filed by HSBC Bank USA, N.A. having been presented to the court, Movant 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. 47, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Movant's Objection to Confirmation of Plan is dismissed without prejudice, and the bankruptcy case shall proceed.

10. 12-40142-E-13 DNL-6 — WILLIAM/BARBARA MIER — J. Russell Cunningham — MOTION FOR FURTHER ADMINISTRATION OF THE CASE AND SUBSTITUTION AS THE REPRESENTATIVE FOR OR SUCCESSOR TO THE DECEASED DEBTOR — 10-3-16 [87]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 3, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Substitute 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 (14) 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 Substitute is denied without prejudice.

Joint Debtor, Barbara Mier, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, William Mier. This motion is being filed pursuant to Federal Rules of Bankruptcy Procedure 1016 and 7025.

The Debtor filed for relief under Chapter 13 on December 24, 2012. On February 27, 2013, the Debtor's Chapter 13 Plan was confirmed. Dckt. 61. On August 4, 2016, Debtor William Mier passed away. The Joint Debtor asserts that she is the lawful successor and representative of the Debtor.

Pursuant to Federal Rules of Bankruptcy Procedure 1016 and 7025, the Joint Debtor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. A Notice of Death was filed on October 3, 2016. Dckt. 87. Joint Debtor is the surviving spouse of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed Opposition on October 18, 2016. Dckt. 92. The Trustee opposes on three grounds:

A. Debtor's accompanying declaration states that she received $25,000.00 in life insurance. Schedule B does not disclose any life insurance policy for the deceased debtor, however, and no life insurance expense was listed on Schedule J. An insurance deduction for "$556.00" was listed, but whether it includes life insurance is not specified. FN.1. No Amended Schedules B and C have been submitted.

FN.1. The court notes that both the original Schedule J and the Amended Schedule J list $156.00 for auto insurance. No other insurance expenses are listed.

The Trustee believes that the unscheduled, non-exempted property may be non-exempt property of the estate, which may lead the Trustee to propose a modified plan that includes the insurance proceeds.

B. The Debtor has not filed Supplemental Schedule I and J and may not be able to make plan payments. Debtor declares income of $4,741.00 now, but reports $4,567.00 on Schedule I. Current expenses are not disclosed. Debtor's budget is unknown.

C. Debtor's Motion does not cite Local Bankruptcy Rule 1016-1, which deals with the specific procedure upon death of a debtor and authorizes the current Motion.

DEBTOR'S REPLY

Debtor filed a Reply on October 25, 2016. Dckt. 95. Debtor states that the life insurance policy was disclosed on Schedule B as one procured through her employer with a value of $100,000.00. Debtor states that the insurance policy included a supplemental term policy for the deceased debtor with a value of $25,000.00—a policy that Debtor admits was omitted inadvertently from Schedule B. Debtor states that she will amend Schedule B and C accordingly.

Debtor states that her monthly net income is $4,500.00 after deductions and her current expenses are $3,900.00 approximately. Debtor's estimated income includes an average of $500.00 per month received from her interest in The Pasty Shack, LLC. Debtor states that she has mad all payments since her husband passed away.

Finally, Debtor argues that even though Local Bankruptcy Rule 1016-1 was not cited expressly, it was followed nevertheless.

APPLICABLE LAW

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless

> the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

DISCUSSION

Here, Barbara Mier has provided sufficient evidence to show that she should be allowed to continue in the administration of the Chapter 13 case and she, or the Chapter 13 Trustee, try to advance a possible plan. The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Notice of Death (Dckt. 87), but there are problems with Debtor's Schedules reflecting Debtor's current financial state.

Debtor listed an auto insurance expense of $156.00 per month on Amended Schedule J, but did not claim any other form of insurance expenses. Dckt. 22. Original and Amended Schedules C show that Debtor had a term life insurance plan through Debtor's employer (Williams Sonoma) with a face value of $100,000.00 and a cash value of $0.00, but Debtor did not claim any value as exempt under California Code of Civil Procedure § 703.140(b)(7). Dckt. 1, 26. Also, Schedule C shows that Debtor has a $141.00 per month annuity for life from Allstate Life Insurance. Debtor did not claim any value of it as exempt and stated that its current value without deducting an exemption is "Unknown." Dckt. 26. Debtor has not filed an Amended Schedule C yet.

Schedule B lists a community interest in a term life insurance plan through Debtor's employer with a current value of $0.00, a face value of $100,000.00, and a cash value of $0.00. Dckt. 1. Debtor has not filed an Amended Schedule B yet.

Amended Schedule I lists gross monthly income of $4,567.00, but Debtor approximates that her monthly income is closer to $4,741.00. Dckt. 74, 89. Debtor has not filed an Amended Schedule I to reflect that information, though. The court cannot determine if Debtor is able to comply with the Plan still.

One of the Trustee's grounds for opposition is that Debtor's Motion does not cite to Local Bankruptcy Rule 1016-1, which governs the instant matter. While the court acknowledges that there is no citation to the rule, the court also notes that Debtor has complied with the rule's requirements.

The court conditionally grants the Motion, with the condition being that the Debtor shall deliver to the Chapter 13 Trustee the $25,000.00 of insurance proceeds on or before November 10, 2016. The Trustee shall hold the monies pending further order of the court. All rights and interests of the Debtor in the insurance proceeds shall continue in full force and effect, notwithstanding the monies being delivered to the Trustee.

If the $25,000.00 is timely paid to the Trustee, counsel for Debtor shall prepare a proposed order granting the Motion and forward it for approval by the Chapter 13 Trustee, and then for the Chapter 13 Trustee lodging said order with the court.

If the$25,000.000 is not timely paid to the Trustee, counsel for the Chapter 13 Trustee shall prepare an order denying the Motion and lodge it with the 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 Substitute filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is conditionally granted, with an order grating the Motion to be entered if the Debtor delivers to the Chapter 13 Trustee the $25,000.00 of life insurance proceeds on or before November 10, 2016. The Trustee shall hold the monies pending further order of the court. All rights and interests of the Debtor in the insurance proceeds shall continue in full force and effect, notwithstanding the monies being delivered to the Trustee.
>
> **IT IS FURTHER ORDERED** that if the $25,000.00 is timely paid to the Trustee, counsel for Debtor shall prepare a proposed order granting the Motion and forward it for approval by the Chapter 13 Trustee, and then for the Chapter 13 Trustee lodging said order with the court.
>
> **IT IS FURTHER ORDERED** that if the $25,000.000 of life insurance proceeds are not timely paid to the Trustee, counsel for the Chapter 13 Trustee shall prepare an order denying the Motion and lodge it with the court.

11. 16-23056-E-13 WSS-3 | **ANDREW KNIERIEM** / **W. Steven Shumway** | **CONTINUED MOTION TO CONFIRM PLAN** / **8-25-16 [52]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 25, 2016. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is denied.

Andrew Knieriem ("Debtor") filed a Motion to Confirm Amended Plan on August 25, 2016. Dckt 52.

OCTOBER 18, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 1, 2016, to allow Debtor to become current on plan payments. Dckt. 80.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the instant Motion on September 27, 2016. Dckt. 67. The Trustee opposes confirmation on the basis that:

A. The Debtor is $2,425.00 delinquent in plan payments to the Trustee to date.

B. The Debtor cannot make the payments under the Plan or comply with the Plan. The Debtor's Plan is proposed as a thirty-six month Plan paying 0% to unsecured claims.

1. The Amended Plan calls for adequate protection payments to Deutsche Bank in Class 1 of $2,200.00 per month for the Plan term of thirty-six months.

This requires that the adequate protection payments alone total $79,200.00.

2. However, the Plan provides for monthly payments of only $140.00 a month for June through August, 2016, and then the payments step up to $2,425.00 per month for the final thirty-three months of the plan. The proposed plan payments total $80,165.00.

3. The Plan, as written and funded, does not provide the Trustee with sufficient monies to make the $2,200.00 per month adequate protection payments for June through September 2016. The plan funds only $2,845.00 for that period, but requires adequate protection payments of $8,800.00. After estimated Trustee's fees of 7%, there is only $2,645.00 of monies available for the adequate protection payments—a 70% shortfall.

C. The Plan relies on the Motion to Value Collateral of Deutsche Bank National Trust Co./Bank of New York, Mellon, which is set for hearing on October 18, 2016. If the Motion to Value is not granted, Debtor's Plan does not have sufficient monies to pay the claim in full.

The court has granted the Motion to Value, resolving this part of the Objection.

D. It appears Debtor cannot make the payments required under the Plan. Debtor's Amended Schedule I fails to report deductions for tax withholding. Schedule J does not report any allowance for tax savings. The Trustee objects that Debtor may be incurring post-petition tax debt if he has no deductions from payroll for his ongoing tax. In reviewing Amended Schedules I and J in light of this Opposition, the court notes the following:

1. Amended Schedule I, Dckt. 60:

a. Debtor states his gross income, from his new employment is $3,800.00 per month.

b. Debtor states that he has no withholding or payroll deductions for anything, and expressly states:

(1) Tax, Medicare, Social Security.....$0.00
(2) Retirement.....$0.00
(3) Insurance.....$0.00

c. Debtor states that in addition to the gross employment income, Debtor's spouse also receives $500.00 per month rent from a daughter and $500.00 per month rent from a sister.

d. Debtor computes the gross employment income and gross rent income to be $4,800.00 per month.

2. Amended Schedule J, *Id.*:

a. Debtor states that he and his spouse (showing wife income on Schedule I and stating he is married on the Statement of Financial Affairs, Part 1) have monthly expenses of only ($1,954.00) per month.

b. To state only ($1,954.00) of expenses per month, Debtor states under penalty of perjury having the following reasonable and necessary monthly expenses for two adults:

(1)	Home Maintenance	($ 50)
(2)	HOA Dues	($154)
(3)	Water/Sewer/Garbage	($115)
(4)	Phone/Cable/Internet	($250)
(5)	Food/Housekeeping Supplies	($600)
(6)	Clothing/Laundry	($ 50)
(7)	Personal Care Products	($ 25)
(8)	Transportation	($300)
(9)	Health Insurance	$0.00
(10)	Vehicle Insurance	($110)
(11)	Taxes	$0.00

E. The additional provisions of the Plan Section 1.01 has a typographical error, proposing "Debtor will make 33 payments of $2,450.00 each beginning 9/25/15." The effective date of the increased payment should be September 25, 2016.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is $2,425.00 delinquent in plan payments. According to the Trustee, the Plan in Section 1.01 calls for payments to be received by the Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. The Debtor's delinquency indicates that the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Next, while the Amended Plan calls for adequate protection payments of $140.00 paid in total for the first three months of the Plan, followed by $2,425.00 per month for the remaining thirty-three months, the Plan has insufficient funds to pay the claims as proposed. The Trustee does not have sufficient funds to make the first three adequate protection payments. Additionally, Debtor has not made his September payment, making it impossible for the Trustee to distribute the first $2,425.00 adequate protection payment. This is an indication that the Debtor will not be able to make all payments under the Plan or comply with the Plan. 11 U.S.C. § 1325(a)(6). It is also not clear whether the Plan is to pay the first

three months of adequate protection payments or if the Debtor made these payments directly to the lender. Without this information, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Deutsche Bank National Trust Co./Bank of New York, Mellon. The court having granted the Motion to Value Collateral, this portion of the Trustee's objections is overruled.

The Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Debtor's Amended Schedule I fails to report deductions for tax withholding, and Debtor's Schedule J does not report any allowance for tax savings. Debtor may be incurring post-petition tax debt if he has no payroll deductions for his ongoing income tax. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Trustee's final objection is based on a typographical error. The Additional Provisions of the Plan propose that Debtor will make thirty-three payments of $2,425.00 beginning September 25, 2015, but the effective date of the increased payment should be September 25, 2016. While this is a mere scrivener's error and could typically be corrected in the order confirming, in light of the Trustee's other objections the Plan as proposed cannot be confirmed.

CREDITOR'S OPPOSITION

Deutsche Bank National Trust Company, as Trustee for HarborView Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2006-9, its assignees and/or successors in interest ("Creditor") filed an Opposition to the instant Motion on September 27, 2016. Dckt. 70. The Creditor opposes confirmation on the basis that:

A. The Amended Plan is not adequately funded. The Proof of Claim filed by Creditor establishes pre-petition arrearages in the amount of $305,779.33, not $0.00 as provided in the Plan. The Plan fails to provide for Creditor's secured claim. Thus, the Plan does not provide adequate protection of Creditor's interest.

Creditor holds a deed of trust secured by the Debtor's residence. The Creditor has filed a timely proof of claim in which it asserts $305,779.33in pre-petition arrearages. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B).

However, the plan seeks to address the claim through the good faith prosecution of a loan modification request. As a condition of keeping the automatic stay in effect, Debtor proposes to make adequate protection payments to Creditor. However, as shown above, the adequate protection payments to Creditor are delayed for three months.

Creditor argues that confirmation must be denied until Debtor has prosecuted the loan modification. Taken at face value, Creditor contends that it is improper for it to receive adequate protection

payments for its interests in the property, and the court is compelled to stay any prosecution in this bankruptcy case until the loan modification process is completed. Such arguments would then require the court to only consider "adequate protection" as discussed by the Supreme Court in *United Savings Association of Texas v. Timbers of Inwood Forest*, 484 U.S. 365 (1988). Nothing Creditor has advanced indicates that the value of its collateral is decreasing. Rather, it appears that such collateral is increasing in value, assuming that it follows the same financial trends as other homes for which evidence has been presented in other cases.

The bulk of the Creditor's objections focus on Debtor's proposal to obtain a loan modification. The plan appears to utilize what has commonly been called in this court as the "Ensminger Provisions" proposing to provide adequate protection payments while delaying payment to mortgage arrears due to a pending loan modification. These provisions attempt to balance the rights and interests of Creditor with the automatic stay and adequate protection provisions of 11 U.S.C. § 361 put into place by Congress. Such provisions do not attempt to modify Creditor's rights, but to adequately protect Creditor while the Debtor obtains the relief afford by Congress in 11 U.S.C. § 362 through diligently prosecuting the Chapter 13 case.

Debtor does not explain in his declaration the status of any loan modification efforts. He does explain that shortly after filing this bankruptcy case he lost his job, has obtained new employment, and is seeking to address that financial event in this case (presumably rather than just dismissing this case and filing a new case).

Debtor proposes to make $2,200.00 per month adequate protection payments to Creditor, from which the property taxes and insurance are to be paid. In its Proof of Claim, Creditor states that the monthly escrow amount is $835.99. Proof of Claim No. 4. That would leave $1,664.00 of the adequate protection being paid Creditor for the delay on the obligation.

Creditor's secured claim is filed in the amount of $775,265.83. This consists of $535,527.87 principal, $163,353.14 interest, $8,280.37 fees and costs, and $67,104.45. The pre-petition arrearage is stated to be $305,779.33. *Id.*

Looking at Amended Schedule A, Debtor states that the property that secures Creditor's claim has a value of $570,000.00. Dckt. 60 at 11. Creditor does not argue that such valuation is incorrect. (The court notes that merely because such an argument is not asserted does not mean that it is admitted by Creditor.) For purposes of addressing the part of the Opposition asserted that Debtor has no realistic financial ability to pay even a modified loan, the court considers that argument in light of the asserted $570,000.00 value (and such asserted value only for purposes of the present matter).

If Creditor were to write down the loan to such asserted value and Debtor could qualify for a 4% interest rate, using the Microsoft Excel Loan Amortization Program, when amortized over thirty years, the monthly payment of principal and interest would be $2,721.27. When adding the $835.99 for insurance and taxes, the monthly payment of principal, interest, taxes, and insurance is $3,557.26.

Creditor argues that Debtor has not shown it to be colorable that he can feasibly seek a loan modification and be able to make the payments on the modified loan have merit. While Debtor may want

to retain the home, he has not shown a colorable ability to prosecute a loan modification to keep the home.

In looking at the Statement of Financial Affairs, in 2014 Debtor's family income was $57,537 and in 2015 it was $56,287.00. Dckt. 60 at 33. That is higher than the current annual gross employment income of $45,600.00 stated on Amended Schedule I. *Id.* at 27. Adding in the extra $1,000.00 per month of family rent paid, Debtor gets his annual gross income up to $57,600.00 per month. But, Debtor, as every other person, has to pay taxes, so he will not have that much in take-home income to spend.

Creditor is correct, that while a debtor can provide for adequate protection payments as part of a Chapter 13 plan to pursue a loan modification, there must be some reasonable ability shown to obtain a loan modification. Taken at face value, Debtor's statement of value of the property, income (even including the $1,000.00 per month of rent income, treating it as a tax free gift), and expenses demonstrates that proposing to do so is not reasonable as part of a Chapter 13 plan.

B. The Plan fails to require the maintenance of the ongoing post-petition monthly payments to Creditor. Debtor's Plan delays post-petition payments of adequate protection for three months, but fails to provide for a cure of this post-petition delinquency in the Plan.

If Debtor could show a colorable ability to fund payments for a financially reasonable modified loan, in light of the circumstance and job loss, providing for the adequate protection payments to begin a couple months into the plan would not be fatal. But, Debtor has not shown that there is a financially reasonable modification to be pursued. Even more significantly, Debtor has not show that he can even make the proposed adequate protection payments. Debtor has shown no grounds for which he is exempted from the federal and state tax laws.

C. The Plan may not have been proposed in good faith. The Debtor has filed four prior bankruptcy cases since 2010. The Creditor argues that Debtor's proposed payment is insufficient to maintain adequate protection payments. The Debtor proposes a payment of $2,200.00 (including principal, interest, taxes, and insurance) while the Debtor's loan modification application is pending. No proof that a loan modification has actually been submitted to Creditor is supplied.

1. Even with a loan modification, Debtor has insufficient income to maintain taxes and insurance. In the event that no loan modification is achieved, the Debtor's proposed payment of principal and interest payment of $1,365.00 does not even service interest. Creditor argues that the only purpose of the Plan is to delay the inevitable.

The court has addressed this argument above.

D. Debtor is attempting to avoid the lien of Deutsche Bank National Trust Company as Trustee for HarborView Mortgage Loan Trust, Mortgage Loan Pass-Through

Certificates, Series 2006-9 via motion without providing any statutory or legal authority. Deutsche Bank National Trust Company as Trustee for HarborView Mortgage Loan Trust, Mortgage Loan Pass-Through Certificates, Series 2006-9 is the current beneficiary of a consensual Deed of Trust secured by real property. Creditor argues that Debtor may not avoid this lien without filing an adversary proceeding and may not alter the contract terms without the consent of the Creditor.

Creditor misstates the terms of the Plan, and such opposition is overruled.

E. Debtor's proposed Plan attempts to modify Creditor's original Note and Trust Deed. A Debtor may modify the rights of holders of secured claims, other than a claim secured only by an interest in real property that is the Debtor's principal residence. The approximate payoff amount of the subject loan at the time of the bankruptcy filing was $775,265.83. Creditor objects to any valuation of the subject property to the extent that it may modify its secured claims.

Because the proposed plan does not modify the claim, this part of the opposition is overruled.

F. The proposed Plan does not provide for payments to the Creditor until the month of June after confirmation. The Creditor objects to any proposed Plan that does not provide for payments beginning immediately after confirmation of the Plan.

The court has addressed this issue above. To the extent that Creditor asserts that any delay in payments is a per se ground for denying confirmation, it is overruled.

G. The Debtor appears to be attempting to modify Creditor's lien. The Debtor's attachment to modify the normal and standard Plan terms in Class 1 regarding secured claims in default is problematic in that the Trustee will have no knowledge as to whether the Debtor has filed a loan modification application; complied with document requests; or when the loan modification is denied or the terms thereafter. Creditor argues that the Plan should be denied until the loan modification is completed.

This ground for opposition is overruled.

H. The Plan impermissibly attempts to modify Creditor's claim.

This ground for opposition incorrectly states the proposed plan terms and is overruled.

I. Debtor's Chapter 13 Plan fails to provide for pre-confirmation adequate protection payments and delays the start of adequate protection payments after the petition date creating a gap in payment.

The court has addressed this grounds for the objection above, and it is overruled. The contention that any delay in any payment is a per se grounds to deny confirmation is incorrect.

The Creditor generally objects on the basis that Debtor has not established that the Plan has been filed in good faith. Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren,* 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389–90 (9th Cir. 1982)). Factors to consider include:

A. The amount of the proposed payments and the amounts of the debtor's surplus;

B. The debtor's employment history, ability to earn, and likelihood of future increases in income;

C. The probable or expected duration of the plan;

D. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

E. The extent of preferential treatment between classes of creditors;

F. The extent to which secured claims are modified;

G. The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

H. The existence of special circumstances such as inordinate medical expenses;

I. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

J. The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

K. The burden which the plan's administration would place upon the trustee.

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))). While Debtor has filed several prior bankruptcies, that in and of itself does not mandate a determination of bad faith. Two cases were filed in 2010, in pro se by Debtor. The Chapter 13 case, 10-30250, was dismissed on May 3, 2010. The Chapter 7 case, 10-34354, was successfully prosecuted in pro se, and Debtor received his discharge on September 13, 2010.

The third case, a Chapter 13 case filed on May 11, 2015, (15-23632) was filed by Debtor in pro se. That case was dismissed on June 29, 2015. The current case was filed ten months later on May 1, 2016. This case was filed and is being prosecuted with the assistance of counsel. Creditor incorrectly asserts that the filing of these three prior cases establishes bad faith.

Creditor is correct that Debtor has failed to show a financial ability to prosecute a plan in this case that would provide for repayment of Creditor's claim pursuant to a good faith negotiated loan

modification. While not in "bad faith," Debtor has not show a good faith, bona fide ability to prosecute this case and provide for creditor claims. The court sustains the lack of good faith basis of the Opposition, as it relates to Debtor showing a colorable ability to fund a plan providing for a modified loan based upon the value of the property that secures the claim (which is a very liberal standard and would presume a creditor writing down the loan to the value stated by the debtor and reamortizing it over thirty years at a good borrower interest rate for confirming a plan with an Ensminger Additional Provision).

However, given the former objections of the Creditor and the Trustee, the amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

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

12. **11-35060-E-13** **ANTONETTE TIN** **MOTION TO AVOID LIEN OF**
RCB-1 **Robert C. Bowman, Jr.** **CITIBANK (SOUTH DAKOTA), N.A.**
9-28-16 [178]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on September 23, 2016. By the court's calculation, 39 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 (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of CITIBANK, N.A. ("Creditor") against property of Antonette Tin ("Debtor") commonly known as 8983 Richbourough Way, Elk Grove, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $1,513.62. It appears that an abstract of judgment was recorded on August 30, 2010 with Sacramento County, which encumbers the Property, but due to a docket-filing error, the complete abstract of judgment has not been provided. Dckt. 186. Additionally, the incomplete filing was assigned to the Motion to Avoid Lien of Target National Bank (item 13 on the court's November 1, 2016 calendar).

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $194,493.00 as of the date of the petition. The unavoidable consensual liens that total $430,448.00 as of the commencement of this case are stated on Debtor's Schedule D.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there would be no equity to support the judicial lien, and the fixing of this judicial lien would impair the Debtor's exemption of the real property such as for the court to avoid it subject to 11 U.S.C. § 349(b)(1)(B).

However, Debtor attached an incomplete Abstract of Judgment. The court does not issue orders avoiding liens without a properly authenticated copy of the lien document showing the recording information. The copy of the Abstract of Judgment provided is one obtained from the California Superior Court, and there is no evidence that it has been recorded or that any such lien has been placed on the Debtor's real property. Therefore, 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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

13. **11-35060-E-13** **ANTONETTE TIN** **MOTION TO AVOID LIEN OF TARGET NATIONAL BANK**
RCB-2 **Robert C. Bowman, Jr.** **9-28-16 [183]**

Final Ruling: No appearance at the November 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on September 23, 2016. By the court's calculation, 39 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 (14) days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Target National Bank ("Creditor") against property of Antonette Tin ("Debtor") commonly known as 8983 Richbourough Way, Elk Grove, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $10,199.86. An abstract of judgment was recorded with Sacramento County on August 30, 2010, which encumbers the Property. Dckt. 181. Due to a docket-filing error, the incomplete filing was assigned to the Motion to Avoid Lien of CITIBANK South Dakota, N.A. (item 12 on the court's November 1, 2016 calendar).

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $194,493.00 as of the date of the petition. The unavoidable consensual liens total $430,448.00 as of the commencement of this case are stated on Debtor's Schedule D.

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 this judicial lien impairs the Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Target National Bank, California Superior Court for Sacramento County recorded on August 30, 2010, Book 20100830 and Page 0287 with the Sacramento County Recorder, against the real property commonly known as 8983 Richbourough Way, Elk Grove, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

14. **16-25765-E-13** **MICHAEL LEAL** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Mohammad Mokarram** **PLAN BY DAVID P. CUSICK**
10-5-16 [15]

Final Ruling: No appearance at the November 1, 2016 hearing is required.

The Chapter 13 Trustee having filed a Supplemental Ex Parte Motion to Dismiss the pending Objection on October 17, 2016, Dckt. 24; no prejudice to the responding party appearing by the dismissal of the Objection; the Trustee having the right to request dismissal of the motion 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 response filed by the Debtor; the Supplemental Ex Parte motion is granted, the Trustee'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 to Confirmation of Plan filed by the Trustee having been presented to the court, the Trustee 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. 24, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Trustee's Objection to Confirmation of Plan is dismissed without prejudice, and the bankruptcy case shall proceed.

15. **14-20773-E-13** **WILLIAM KENITZER** **MOTION TO SELL**
SLH-1 **Seth Hanson** **10-5-16 [18]**

Final Ruling: No appearance at the November 1, 2016 hearing is required.

The Debtor having filed a Voluntary Dismissal of Motion, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on October 25, 2016, Dckt. 26; no prejudice to the responding party appearing by the dismissal of the Motion; the Debtor having the right to request dismissal of the motion 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 the Trustee; the Ex Parte motion is granted, the Debtor's Motion is dismissed without prejudice, and the court removes this Motion 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 Motion to Sell filed by the Debtor having been presented to the court, the Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 26, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Debtor's Motion to Sell is dismissed without prejudice, and the bankruptcy case shall proceed.

16. 16-25173-E-13 RONALD GRASSI MOTION TO CONFIRM PLAN
PLC-1 Peter Cianchetta 9-19-16 [23]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 19, 2016. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

The hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on November 22, 2016.

Ronald Grassi ("Debtor") filed a Motion to Confirm Amended Plan on September 19, 2016. Dckt 23.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion on October 12, 2016. Dckt. 33. The Trustee Opposes Confirmation on the basis that:

A. The Debtor may not be able to make payments or comply with the Plan.

1. The plan payments listed in the Additional Provisions of the Amended Plan are $1,500.00 for five months and $2,497.78 for fifty-five months. The Debtor's budget does not support the increase in plan payments beginning in the sixth month. Debtor's Schedule I indicates monthly net income of $1,500.34. Debtor offers no explanation how he is able to increase his plan payments by $997.78 per month.

2. Debtor's Schedule J lists a rent expense in the amount of $850.00 per month. The Voluntary Petition lists the Debtor's place of residence as 17 Forcallat Court, Sacramento, California. According to Zillow, this is a four bedroom,

three bathroom, 1,920 square foot home. It is not clear if the $850.00 rent expense is an accurate monthly expense. FN.1.

FN.1. The court does not accept as credible, admissible evidence hearsay valuation or property description information from third-party services such as Zillow.com. However, the court does accept the Trustee's argument that $850.00 in rent is a relatively low rent to be paid in the Sacramento Area. On Schedule A, Debtor states under penalty of perjury that he has no interest in any real property. Dckt. 9 at 3.

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3. Debtor's Schedule J lists a monthly expense of $150.00 for Family Law Attorney Fees. The Statement of Financial Affairs lists the dissolution of marriage as pending. It is not clear if this expense will continue for the life of the Plan.

B. The Debtor's Plan may not be the Debtor's best effort. The Debtor appears to be over the median income and proposes plan payments of $1,500.00 for five months and $2,497.78 for fifty-five months with a 0% dividend to unsecured creditors.

1. Debtor's Schedule I lists a Domestic Support Obligation in the amount of $915.42 per month. It is not clear if the obligation is child support, spousal support, or a combination of both types of support. Schedule J lists two dependents, a seventeen-year-old daughter and a twenty-year-old son. It appears the support obligation, if for child support only, could end within one year.

2. Schedule J lists an expense in the amount of $725.00 per month for "Son's Tuition and living Expense." Debtor has not provided any explanation as to the tuition or living expenses that total $43,500.00 over sixty months.

3. The Debtor has not properly completed Form 122C-1. Form 122C-1 lists Debtor's gross wages as $7,106.00, but Schedule I shows $13,340.17. Debtor lists his monthly disposable income as $401.48. It does not appear that this amount has been calculated correctly.

4. It does not appear that the Debtor has reported all of his income. According to the Golden 1 Credit Union Bank Statements received and reviewed by the Trustee, the Debtor appears to have numerous checking deposits from Ryan Baily. The Debtor receives monthly renewal commissions from Blue Shield of California, with an average commission of approximately $180.22 per month. Neither was disclosed on Schedule I or on the Statement of Financial Affairs. It is not clear if the Debtor continues to operate a business because no information was provided on the Statement of Financial Affairs.

DEBTOR'S REPLY

Debtor filed a Reply on October 24, 2016. Dckt. 39. Debtor states that he has almost reached an agreement for a Stipulation in his family law case that would cause the codebtor ex-spouse to pay half of the Chapter 13 plan payments. Debtor asserts that he owes only income taxes, and they would be paid fully by the additional money available with the Stipulation. Debtor requests that the hearing on the Motion be continued to November 22, 2016.

DISCUSSION

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

The Trustee's objections are well-taken. It is clear that Debtor has some very serious problems with this case and his credibility. While apparently attempting to minimize the situation by saying he "only" owes some taxes, the Internal Revenue Service has filed Proof of Claim No. 1 for $132,439.12, of which $49,007.62 is asserted to be secured, $69,072.83 as nondischargeable priority, and the balance as unsecured.

The court also notes that in reviewing Schedule I, though Debtor has gross income of $13,340 per month, his take-home income is only $6,150 per month. This more than $7,000 a month reduction appears to occur for several reasons. Debtor purports to have reasonable and necessary insurance expenses of $2,000.00 per month. Dckt. 9. On Schedule J, in addition to the college expenses, Debtor purports to have reasonable and necessary transportation expenses of $650.00 per month, $350.00 per month for clothing, $50 for charitable contributions, and $300 for entertainment. It appears that Debtor, wanting to receive all of the benefits of the extraordinary relief available under the Bankruptcy Code, does not want to accept the burden—choosing to maintain his pre-bankruptcy lifestyle that has caused him to incur over $130,000.00 of tax liabilities.

While the court respects the need for supporting the educational goals of one's children, it appears that Debtor is happy to do so—spending his creditor's money to do that. It is not the "parental obligation" of a creditor to fund the Debtor's child's education. Again, Debtor and Debtor's counsel present the court with a situation where the filing of bankruptcy is not going to impinge on Debtor's chosen lifestyle and "hang the law because we don't like it."

Additionally, while health is important, Debtor and Debtor's counsel will have to provide solid, credible evidence why spending $100 per month on gym membership is reasonable and necessary.

The information provided by the Trustee that Debtor has not disclosed all of his income is equally troubling. If true, such bad faith may doom not only this bankruptcy case, but Debtor's ability to seek any bankruptcy relief for the debts he now owes.

However, the court will give Debtor and Debtor's counsel the continuance. Hopefully, the marital dissolution (and all of the property division terms, which separate property of the Debtor and the community property are property of the bankruptcy estate) can be resolved (with Debtor keeping his eye on his fiduciary duties not to have or to engage in any fraudulent conveyances that attempt to put assets beyond the reach of his creditors through a marital settlement agreement). Debtor and Debtor's counsel come up with amendments to the Plan to take into account the realities of bankruptcy—which include the change in

a debtor's (heretofore unsustainable) lifestyle. Additionally, Debtor and his counsel can ensure that all income is accurately and truthfully disclosed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Confirm the Plan is continued to 3:00 p.m. on November 22, 2016.

17. 13-31975-E-13 PLC-6 | **JACK/LINDA GANAS** **Peter Cianchetta** | **MOTION TO MODIFY PLAN** **9-28-16 [157]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 27, 2016. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Jack Ganas and Linda Ganas ("Debtor") filed a Motion to Confirm Amended Plan September 27, 2016. Dckt 160.

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion on October 18, 2016. Dckt. 167. The Trustee Opposes Confirmation on the basis that the Trustee is uncertain of the Debtor's ability to pay. The Debtor did not submit Supplemental Schedules I and J in support of the reduced plan payment. However, the Trustee calculates the Plan will complete in approximately six months excluding the lump sum payment.

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

The Trustee's Objection is well-taken. A review of the docket shows that Debtors have failed to file Amended Schedules I and J in support of the reduced plan payment. Without accurate Schedules and information regarding income and expenses, it is impossible to determine the feasibility of Debtor's Plan.

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

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

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

18. 13-31975-E-13 DPC-2 | **JACK/LINDA GANAS** **Peter Cianchetta** | **CONTINUED MOTION TO DISMISS CASE** **9-9-16 [153]**

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, and Office of the United States Trustee on September 9, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Dismiss is continued to 10:00 a.m. on January 18, 2017.

The Trustee seeks dismissal of the case on the basis that Jack Ganas and Linda Ganas ("Debtor") are $7,875.05 delinquent in plan payments (with another $2,057.03 coming due before the hearing), which represents multiple months of the $2,057.03 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor filed an opposition on September 28, 2016. Dckt. 162. The Debtor states that they have prepared and filed a new plan along with a Motion to Confirm. They state that the Plan increases the dividend to creditors with unsecured claims to 100%.

OCTOBER 12, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 1, 2016, to be heard in conjunction with Debtor's Motion to Confirm Modified Plan. Dckt. 164.

DISCUSSION

Debtor filed a Modified Plan and Motion to Confirm, which the court has denied. While professing a desire to sell the home, the proposed Modified Plan did not provide for the sale, did not set any timing for the sale, and did not set any benchmarks for a sale. Dckt. 160. As written, Debtor had no obligation to sell the property, and if Debtor decided to sell it, it could be at any time.

Previously, the court was concerned that Debtor was not prosecuting this case in good faith. Rather, it appeared that what was being offered as the defense to the Motion to Dismiss was a Plan that said Debtor will, at some unknown time, sell property, if desired. Now, the court is still concerned about the prosecution of this case.

However, a review of the docket shows that a Motion to Employ a real estate broker to market the property has been filed with the court. The court continues the hearing to afford Debtor the opportunity to actively prosecute the modification of the Plan. If Debtor chooses not to so do, it is likely that this case will be dismissed at the continued hearing.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is continued to 10:00 a.m. on January 18, 2017.

19. 13-31975-E-13 PLC-7 — JACK/LINDA GANAS — Peter Cianchetta — MOTION TO EMPLOY OSCAR TERRAZAS AS BROKER(S) O.S.T. 10-24-16 [171]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2106. By the court's calculation, 8 days' notice was provided. The court required 8 days' notice. Dckt. 178.

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

The Motion to Employ is granted.

Jack Ganas and Linda Ganas ("Debtor") seek to employ real estate broker Oscar Terrazas, pursuant to 11 U.S.C. § 327(a). Debtor seeks the employment of a broker to assist the Debtor in the sale of Debtor's residence.

The Debtor argues that the real estate broker's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate because of the Debtor's material default of the present Plan and because the Trustee's Motion to Dismiss and Objection to Modification cannot be overcome without employment of a real estate broker to sell the property.

Oscar Terrazas, the real estate broker, testifies that he has held a real estate license since 1984; a real estate broker license since 2005; a NMLS License that is currently inactive because he is engaged in sales activity; he is a member in good standing with the Sacramento Association of Realtors; and he has sold homes in Sacramento, Placer, San Joaquin, Yuba, Sutter, Solano, and Napa. Oscar Terrazas testifies he

does not represent or hold any interest adverse to the Debtor or to the estate and that he has no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and must be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of a real estate broker, considering the declaration demonstrating that the real estate broker does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Oscar Terrazas as real estate broker for the Debtor on the terms and conditions set forth in the Listing Agreement filed as Exhibit B. Dckt. 175. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Debtor is authorized to employ Oscar Terrazas as Real Estate Broker for the Debtor on the terms and conditions as set forth in the Listing Agreement filed as Exhibit B, Dckt 175.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.
>
> **IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

20. **16-26593-E-13** **JAY KLIPP** **MOTION TO EXTEND AUTOMATIC STAY**
MOH-2 **Michael Hays**
10-18-16 [23]

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 18, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Jay Klipp ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in

the past year. The Debtor's prior bankruptcy case (No. 16-23635) was dismissed on September 12, 2016, after Debtor failed to attend the 341 Meeting of Creditors and failed to pay plan payments. *See* Order, Bankr. E.D. Cal. No. 16-23635, Dckt. 27, September 12, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

TRUSTEE'S OPPOSITION

The Trustee filed an Opposition on October 25, 2016. Dckt. 31. The Trustee states that the proposed plan may be unconfirmable because Debtor's petition is incomplete.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?

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

Elliot-Cook, 357 B.R. at 814–15.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why Debtor failed to attend the 341 Meeting of Creditors and failed to pay plan payments in the prior case. Debtor explains that his fiancée was unemployed at the time the prior case was filed, and she suffered a medical emergency soon after the case was filed. That resulted in Debtor losing several days of work with no pay. Now, Debtor's fiancée has obtained employment, and Debtor has drafted a plan that is more suitable to actual dispensable income.

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

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

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

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

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

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

21. 13-34597-E-13 VAN PHAM
CA-5 Michael Croddy

CONTINUED MOTION TO MODIFY PLAN
8-8-16 [69]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, party requesting special notice, and Office of the United States Trustee on August 8, 2016. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is denied.

Van Pham ("Debtor") filed the instant Motion to Confirm Second Modified Plan August 8, 2016. Dckt. 69.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, an Opposition to Debtor's Motion to Confirm Second Modified Plan on September 6, 2016. Dckt. 79. The Trustee opposes confirmation on the basis that:

A. The proposed Modified Plan reduces plan payments by $535.00—from $591.00 per month to $56.00 per month. The dividend to unsecured creditors is being reduced from no less than 33% to no less than 9%.

B. The Motion may mislead parties as to the reason for the modification. While no child care expense is present on Schedule I or J, the Motion states:

> Debtor had a rise in her income (paycheck included) and rise in expenses like child care (addressed through amendment). these changes are incorporated in this motion to modify (Dckt. 69).

1. The Debtor had proposed a modified plan paying $393.00 per month on October 17, 2015, which included a current Schedule J. Although this Modified Plan was denied on December 12, 2015, the Debtor paid $393.00 or more each month from January 2016 through August 2016.

2. Debtor had a Motion to Incur Debt granted December 2, 2015, allowing the Debtor to purchase a vehicle for $457.00 per month. The current Schedule J reflects a car payment of $357.09 per month.

3. The Debtor has filed current Schedules I and J with this Motion.

   a. Debtor's income has increased by $616.16, but Debtor's payroll taxes have decreased by $85.18.

   b. Deductions for insurance have increased by $1,200.46

   c. The paystub presented as an Exhibit to the Debtor without analysis appears to show what may be $500.00 per month to health spending accounts (HSA and DCFSA) with no declaration from the Debtor explaining if these expenses are reasonable. Where a U.S. Bank HSA account was listed on Schedule B with a $15,000.00 balance at filing, the paystub may show that the Debtor is diverting $500.00 per month from income, which may not be reasonably necessary.

   d. Debtor did not provide updated income and expenses in April 2016 as required by the Order Granting Debtor's Motion to Incur New Debt.

   e. Debtor's Dependents' ages appear incorrectly listed. The children do not age between the first set of Schedules filed and in the most recent Schedule. The daughter has aged two years, while the son has aged four years.

f. Debtor no longer references any expected decrease or increase on Schedule I where previously she had stated she was not contributing to her 401K retirement and that she was no longer receiving $1,700.00 in rental income.

g. Debtor does not directly address in her declaration whether her spouse has income.

SEPTEMBER 20, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on November 1, 2016. Dckt. 82.

DISCUSSION

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

No supplemental pleadings have been filed since the September 20, 2016 hearing. The Trustee's objections are well-taken.

The Trustee objects to confirmation on a basis that the proposed Modified Plan reduces payments to $56.00 per month, lowering the dividend to unsecured creditors to no less than 9%, and he has expressed concern regarding Debtor's Plan. The court is concerned that the Debtor's proposed Modified Plan may not have been proposed in good faith. To begin, the Motion may mislead the parties as to the reason for the modification. The Motion states:

> Debtor had a rise in her income (paycheck included) and rise in expenses like child care (addressed through amendment). these changes are incorporated in this motion to modify.

However, no child care expense is present on Schedule I or J.

Additionally, there are a series of unexplained changes in the Debtor's Schedules. Even though Debtor's income has increased, Debtor's payroll taxes have decreased. Debtor's deductions for insurance have increased by $1,200.46. The pay stub entered as an exhibit to Debtor's motion shows $500.00 to HSA ($300.00) and DCFSA ($200.00). Debtor offers no declaration explaining if these expanses are reasonable, however. A U.S. Bank HSA account is listed on Debtor's original Schedule B with a $15,000.00 balance. This pay stub could be an indication that the Debtor is diverting monies from her income, which may not be reasonably necessary. The Debtor's dependents' ages are incorrectly listed and inconsistent. The Debtor no longer references any expected increase or decrease on Schedule I, where previously she stated she was not contributing to Debtor's 401K account or receiving $1,700.00 in rental income. Finally, the Debtor does not directly address in her declaration whether her spouse has income.

The Debtor was granted a Motion to Incur Debt to allow the Debtor to purchase a vehicle for $457.00 per month, but the current Schedule J reflects a car payment of only $357.09 per month. The Debtor also failed to provide updated income and expenses in April 2016 as required by the Order Granting

Debtor's Motion to Incur New Debt. These issues, combined with the failure of the Debtor to provide sufficient information, are reasons to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

Taking the Supplemental Schedule J as true and the information provided under penalty therein concerning expenses as true, Debtor cannot make even the minimal $56.34 a month plan payment in light of her increased car payment by $100.00 a month than what is stated in Supplemental Schedule J. FN.1.

FN.1. Debtor actually states that this is an Amended Schedule J, which would then date back to the date this case was filed, and a Supplemental Schedule J providing post-petition changed financial information as of July 27, 2016. The court will presume that Debtor, in her enthusiasm in advancing this proposed Modified Plan to reduce her plan payments, her careful review focused on the financial information and she forgot to question how she was doing both an amended and a supplemental filing.

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

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

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

22.	**16-26860-E-13 LBG-1**	**MICHAEL/BERNADETTE AMBERS Lucas Garcia**	**MOTION TO EXTEND AUTOMATIC STAY O.S.T. 10-24-16 [14]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2016. By the court's calculation, 8 days' notice was provided. The court required 8 days' notice. Dckt. 20.

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

The Motion to Impose the Automatic Stay is denied without prejudice.

Michael Ambers and Bernadette Ambers ("Debtor") seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. FN.1. This is the Debtor's third bankruptcy petition pending in the past year with the two prior cases having been dismissed. The Debtor's prior bankruptcy cases (Nos. 16-20687 and 15-25328) were dismissed on October 7, 2016, and January 28, 2016, respectively. *See* Order, Bankr. E.D. Cal. No. 16-20687, Dckt. 35, October 7, 2016; Order, Bankr. E.D. Cal. No. 15-25328, Dckt. 55, January 28, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(i), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

FN.1. The court notes that Debtor claims to be filing a Motion to Extend the Automatic Stay, but the Debtor is wrong. As explained in this ruling, the motion is actually one to impose the automatic stay.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions imposed if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The

subsequently filed case is presumed to be filed in bad faith if two or more of Debtor's cases were both pending within the year preceding filing of the instant case. *Id.* § 362(c)(4)(D)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(4)(D).

Here, Debtor's prior cases were dismissed after Debtor failed to make plan payments (No. 16-20687) and after Debtor failed to obtain confirmation of an amended plan (No. 15-25328).

Debtor argues that the instant case was filed in good faith and explains that the previous case (No. 16-20687) was dismissed because the Debtor's mother died from a serious illness, and the expenses for her end of life care were beyond the Debtor's ability to recuperate. Debtor fails to offer an explanation for why Case No. 15-25328 was dismissed, however.

In the prior two bankruptcy cases Debtor was represented by counsel, the same counsel as in this bankruptcy case. It appears that Debtor had every opportunity to perform Chapter 13 plans in the prior to cases but was incapable of so doing. In the prior bankruptcy case, the Chapter 13 Trustee sought dismissal because Debtor was $19,600.00 in default in plan payments. 16-20687; Motion, Dckt. 30. The Monthly plan payments were $4,900.00, which puts Debtor four months in default when the motion was filed. *Id.*; Plan, Dckt. 5. The motion to dismiss was filed only six months into that case.

In the second case dismissed within one year of the commencement of this case, the Trustee objected to confirmation because Debtor was $9,300.00 in default (two months payments) four months into plan payments, as well as the Debtor having a $2,300 default in payments to a secured creditor. 15-25328; Civil Minutes, Dckt. 51.

Accepting that the loss of a parent causes both financial and emotional toll, assuming Debtor actually has $4,900 per month to fund a plan, in the fourteen months since the first bankruptcy case dismissed in the last year was filed and now, there should be around eleven months of the $4,900 lying around—that totals $53,900.00. No such large sum of money is accounted for in the Schedules.

The court finds that Debtor has not sufficiently rebutted, by clear and convincing evidence (11 U.S.C. § 362(c)(4)(B)) the presumption of bad faith under the facts of this case and the prior cases for the court to impose the automatic stay. The Motion is denied without prejudice, and the automatic stay is not in effect yet in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Impose the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice, and the automatic stay is not in effect yet in this case.

23. **16-26771-E-13** **JOHN MOORE** **MOTION TO EXTEND AUTOMATIC STAY**
SJS-1 **Matthew DeCaminada** **10-13-16 [8]**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 13, 2016. 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Extend the Automatic Stay is denied.

John Moore ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case as applied to Wells Fargo Bank, N.A. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 12-33903) was dismissed on August 31, 2016, after Debtor filed an Ex Parte Motion to Dismiss. *See* Order, Bankr. E.D. Cal. No. 12-33903, Dckt. 101, August 31, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if 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). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

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

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

GROUNDS STATED BY DEBTOR AND EVIDENCE PROVIDED

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor requested dismissal through an ex parte motion. In that case, Debtor's monthly mortgage payments fluctuated frequently from a low of $1,030.00 to a high of $1,510.18. Debtor had a confirmed modified plan that included provisions to apply for a loan modification, but that application was denied. The current Plan provides for Wells Fargo Bank, N.A. to be paid pre-petition arrears and ongoing conduit mortgage payments through Section 2.08 of the Plan. The Plan also includes monthly payments in Class 2A to a creditor with a judgment line and two holding claims in Section 2.13 to the Internal Revenue Service and Franchise Tax Board.

With respect to the prior case which was dismissed, Debtor testifies:

A. Declaration ¶ 8 -

1. "I live in my primary residence with my daughter and survive on a single income."

2. "During the duration of my prior case, my ongoing monthly mortgage payment fluctuated constantly and at times, I was unsure how I would be able to afford the increased monthly payments to the trustee."

3. "With the assistance of my counsel, I filed a new Chapter 13 plan which, as informed by my counsel, was a 'loan modification' plan and its success was contingent on the approval of a loan modification."

4. "I applied for a loan modification under the terms of the Plan but, unfortunately, was denied."

B. Declaration ¶ 9 -

1. "I am filing the current bankruptcy and plan in order to cure my current pre-petition arrears and keep the residence my daughter and I live in.

2. "Since the dismissal of my last case, I have worked with my attorney to prepare, complete and file a full petition with Chapter 13 plan."

3. "It has been explained to me that the plan filed is not premised on a loan modification and I must make all monthly payments to the trustee so he may pay my ongoing mortgage payment directly to the lender."

4. "I have also been informed that I am free to apply for, and seek the Court's consent if conditionally approved, a loan modification at any point during my bankruptcy."

The court notes that this testimony is curious, as Debtor expressly states that he is not filing a "loan modification plan," but one in which he will cure the arrearage and make all the current monthly mortgage payments. It appears that quite possibly Debtor's secret plan is to just treat this as a "loan modification plan."

Declaration, Dckt. 10.

REVIEW OF SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS IN CURRENT BANKRUPTCY CASE

The Chapter 13 Plan filed in this case requires Debtor to make a $3,290.00 per month plan payment for sixty months. Dckt. 5. From these payments Debtor will first pay $6,000.00 to Debtor's counsel (no pre-petition retainer having been paid) and $13,828.00 for Chapter 13 Trustee's fees (estimated at 7% of the plan payments).

For Class 1, Debtor provides for making a $1,982.68 current monthly mortgage payment and a $701.04 monthly payment on a $46,862.48 arrearage on this claim secured by Debtor's residence. This appears to be the loan for which a modification was denied.

REVIEW OF PRIOR BANKRUPTCY CASE

At this juncture, Debtor's testimony that "my ongoing monthly mortgage payment fluctuated constantly and at times, I was unsure how I would be able to afford the increased monthly payments to the trustee" rings in the court's ears. Under the Original Plain in the prior case, Debtor was required to pay only a $1,030.00 then current monthly mortgage payment and only a $150.00 payment for an arrearage of only $15,228.68. 12-33903; July 30, 2012 filed Chapter 13 Plan, Dckt. 5. The Debtor was unable to make those payments or the other regular payments that came due on the adjustable rate mortgage.

On December 2, 2014, Debtor filed a proposed modified plan that increased the current monthly mortgage payment to $1,510.18 and listed the arrearage on the claim to be $17,754.01, $2,500.00 greater than when the Debtor started making the payments through the plan more than two years earlier. *Id.*; Proposed Modified Plan, Dckt. 61. The Additional Provision further provided that Debtor's plan payments will step up to $3,236.73 beginning January 25, 2015 (the month after the Proposed Modified Plan was filed).

The court denied the Motion to Confirm the Proposed Modified Plan in the prior case, with the court's findings and conclusions including the following:

A. "A review of the Schedules and the Amended Schedules shows that Debtor may not be able to afford the step-up in plan payments under the proposed Plan. As the Debtors finances are currently presented, the Debtor will be unable to make the plan payments starting on the 41st month under the Debtors current disposable income."

B. "As to the third objection, the Debtor has not provided information as to what happened to the business expenses and why there is a change in Debtors monthly income on the Amended Schedule J. The court, looking only at the Schedules filed, finds that the discrepancy in the income listed on Schedule I and Amended Schedule J and the absence of the business expenses on the Amended Schedule J raises sufficient feasibility concerns of the proposed plan that the court cannot confirm the Plan."

C. Debtor failed to file supplemental pleadings, notwithstanding the court continuing the hearing, to file supplemental pleadings to address this issue.

Id.; Civil Minutes.

In June 2015, Debtor filed a Proposed Second Modified Plan. *Id.*; Dckt. 86. This was three years into the prior bankruptcy case. This Second Modified Plan no longer provided for payment of the current monthly mortgage installment and the cure payments, but provided that Debtor would seek a loan modification, make adequate protection payments of $1,046.66, and if the loan modification was denied, the creditor was granted relief from the automatic stay to foreclose on the collateral (Debtor's residence).

The court granted the motion to confirm the Second Modified Plan, which provided that either the creditor would voluntarily agree to a loan modification or the creditor would be allowed to foreclose on its collateral. *Id.*; September 3, 2015 Confirmation Order, Dckt. 98.

On August 24, 2016, Debtor filed an Ex Parte Motion to Dismiss the prior Chapter 13 case. *Id.*; Dckt. 99. The Motion merely states that Debtor wants to dismiss the Chapter 13 case (which dismissal must be requested in good faith, *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008)). The court granted the Debtor's request that he no longer wanted to continue in a bankruptcy case and dismissed the prior case. *Id.*; Order, Dckt. 101.

REVIEW OF SCHEDULES IN CURRENT CASE

In the current Plan, Debtor now lists Creditor having a pre-petition arrearage of $46,862.48—a tripling ($30,000 increase) of the pre-petition arrearage during the prior bankruptcy case filed in 2012. Debtor's declaration offers no testimony how or why this $30,000 arrearage occurred and why it will not continue. Debtor also offers no testimony as to why, having to give up in the prior case and commit to either a loan modification or allowing the Creditor to foreclose, Debtor can now make a monthly mortgage and arrearage payment totaling $ 2,603.72.

On Schedule D in this case, Debtor lists Wells Fargo Bank, N.A. having a $334,642.57 claim secured by Debtor's residence, which Debtor states has a fair market value of $431.613.00. Schedule D, Dckt. 1 at 21. On Schedule D in the prior bankruptcy case Debtor stated under penalty of perjury that the Wells Fargo Bank, N.A. claim was in the amount of $246,975. 12-33903; Dckt. 1 at 14. Since the filing of the prior bankruptcy case, the effect of the prior bankruptcy case has caused this debt to more than double.

On Schedule I in this case, Debtor lists having $3,522.33 in net business income, and then an additional "Anticipated Business Income" of $800.00 per month. Dckt. 1 at 33. In his prior bankruptcy case, though Debtor determined that filing a Supplemental Schedule J in June 2015 in the prior case was necessary, he did not update the income information and continued to present to the court that the original 2012 income information was accurate. In the only Schedule I filed in the prior case, Debtor stated under penalty of perjury that Debtor had monthly net business income of $2,741.00 and additional "anticipated business income" of $800.00 a month. 12-33903; Dckt. 1 at 22. The business expenses are shown in Attachment A to Schedule J in the prior case listing expenses of $906.00. *Id.* at 25. No income taxes or self employment taxes are show on Schedules I and J in the prior case.

Jumping to Supplemental Schedule J filed in the prior case on June 22, 2015, no business expenses or taxes (income or self employment) are listed. *Id.*, Dckt. 82. On Supplemental Schedule J Debtor lists his income at $2,634.00 (which indicates that there is no "additional business income"), and after his stated monthly expenses of $2,406.66, Debtor had only $228.17 of monthly net income. To get to that number, Debtor provided for making only a $1,046.66 payment on the Wells Fargo Bank, N.A. secured claim. Debtor also states under penalty of perjury that he has, for Debtor and a teenage daughter: (1) no health insurance expense, (2) no medical or dental expenses, and (3) only $20.00 per month clothing and laundry expense.

On Debtor's Schedule I in this case, he states under penalty of perjury that his monthly net business income has jumped to $3,522.33 (a 46% increase from the June 2015 Amended Schedule J in the prior case). On top of this, Debtor states that there is, as in the prior case, an additional $800.00 in "additional business income." If true, then Debtor's income would rise to $4,322.33, an 80% increase over what Debtor stated it was under penalty of perjury in June 2015.

Again, no provision is made for payment of income and self employment taxes on Schedules I and J filed in this case. Dckt. 1 at 33–36.

On the Statement of Financial Affairs, Debtor states under penalty of perjury that in 2016 the gross income from his business has been $0.00 through the first nine and one-half months. *Id.* at 38–39; Statement of Financial Affairs Part 2, Question 4. For 2015 Debtor states that he had gross income of $67,820 in income from his business. *Id.* He further states that in 2014 he had $68,962 in gross income from his business. *Id.* Even with that (as opposed to the $0.00 in 2016), Debtor could not make the lower payments required under the Chapter 13 Plans in the prior case. On Schedule J in the current case, for Debtor and his twenty-year-old daughter, Debtor lists only $1,030 in expenses. *Id.* at 36. With only $1,000.00 in expenses, Debtor purports to have $3,292.33 in Monthly Net Income to fund a plan. To get to only $1,000.00 in expenses, Debtor states under penalty of perjury the questionable expenses of: (1) $0.00 for self-employment and income taxes; (2) $350.00 for food and housekeeping supplies; (3) $20.00 for

clothing and laundry; (4) $170.00 for transportation (repairs, registration, fuel); (4) $0.00 for health insurance; (5) $0.00 for medical and dental expenses; and (6) $0.00 for entertainment expenses.

These expense statements are not credible, especially in light of the Debtor's higher (and still questionable) expenses stated in June 2015 under penalty of perjury. Debtor's income stated is questionable, not only in light of that he lists "anticipated business income of $800" in addition to the business income of $3,522.33 per month, but that he states under penalty of perjury having $0.00 income in 2016 on the Statement of Financial Affairs.

Debtor has repeatedly proven that he cannot make the current monthly mortgage and arrearage payments. Debtor defaulted under two different confirmed plans in the prior case. Then, in the third confirmed plan, Debtor committed to pursuing a loan modification and if denied, to allow the creditor to foreclose.

Debtor's "reorganization" efforts have caused the secured claim of Wells Fargo Bank, N.A. to more than double over what Debtor originally stated. Debtor has tripled the arrearage, with it now eclipsing $45,000.00.

At best, Debtor has used the Chapter 13 process in his prior case to avoid making the mortgage payments, but continue to live in a house he cannot afford.

Debtor has not provided the court with clear and convincing evidence to rebut the presumption that this Chapter 13 case, filed after Debtor failed multiple times in the prior case over four years, is not filed in bad faith.

The motion is denied, and the court does not extend the automatic stay, which is **terminated as to the Debtor** by operation of law pursuant to 11 U.S.C. § 362(c)(3)(B). FN.1.

FN.1. 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 the 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 expressly provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate), and the bankruptcy case. While terminated as to the Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only the 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 Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied, and the court does not extend the automatic stay as to the Debtor, which shall terminate as to the Debtor by operation of law pursuant to 11 U.S.C. § 362(c)(3)(A). The court does not make any order affecting the automatic stay as it exists pursuant to 11 U.S.C. § 362(a) for the bankruptcy estate and property of the bankruptcy estate.

24. 16-26998-E-13 SLH-1 | **LEWIS/SHEILA WALKER** **Seth Hanson** | **MOTION TO IMPOSE AUTOMATIC STAY O.S.T. 10-24-16 [10]**

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

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

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

Correct 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 October 24, 2016. By the court's calculation, 8 days' notice was provided.

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

The Motion to Impose the Automatic Stay is granted.

Lewis Walker and Sheila Walker ("Debtor") seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. This is the Debtor's third bankruptcy petition pending in the past year with the two prior cases having been dismissed. The Debtor's prior bankruptcy cases (Nos. 16-24362 and 16-20433) were dismissed on October 13, 2016, and June 27, 2016, respectively. *See* Order, Bankr. E.D. Cal. No. 16-24362, Dckt. 32, October 13, 2016; Order, Bankr. E.D. Cal. No. 16-20433, Dckt. 20, June 27, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(i), the provisions of the automatic stay did not go into effect upon the filing the instant case.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions imposed if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The subsequently filed case is presumed to be filed in bad faith if two or more of Debtor's cases were both pending within the year preceding filing of the instant case. *Id.* § 362(c)(4)(D)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(4)(D).

Here, Debtor's prior cases were dismissed after Debtor failed to provide the Trustee with employer payment advices for the period of sixty days preceding the filing of the petition and 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 (No. 16-24362) and after Debtor failed to provide proof of Social Security number and obtain confirmation of an amended plan within seventy-five days (No. 16-20433).

Debtor argues that the instant case was filed in good faith and explains that the previous case was dismissed because during Debtor's first case, Debtor Sheila Walker experienced medical problems, which made Debtor unable to make plan payments. Debtor attempted to file a second bankruptcy without an attorney because Debtor could not afford one at the time.

Debtor filed this case to resolve past-due income taxes owing to the Internal Revenue Service and the Franchise Tax Board, to get back on track with car loans, and to pay back as much to unsecured creditors as possible. Debtor anticipates that the current bankruptcy will pay general unsecured claims at least 41%. Debtor is now represented by counsel and is confident that Debtor Sheila Walker's medical issues will come under control and have greater predictability in treatment.

RESPONSE OF CHAPTER 13 TRUSTEE

The Chapter 13 Trustee filed a Response on October 27, 2016, stating that the does not have an opposition to the Motion. Dckt. 16.

RULING

The Chapter 13 Plan in this case requires $2,960.00 per month payments. Dckt. 5. There is no mortgage claim to be paid through Class 1 under the Plan. For Class 2, Debtor provides for several tax claims and two vehicle loans to be paid. There is a $17,250.00 priority tax claim to be paid, and then at least a 41% dividend on general unsecured claims.

On Schedule I, Debtor lists having $14,161.48 in gross wage income. Dckt. 1 at 38. Debtor lists having $3,472 withheld for taxes and Social Security (24.5% on $169,932 in gross wage income). No disability insurance or other income is shown for the co-Debtor who is suffering the ongoing illness.

On Schedule J (Dckt. 1 at 41–42) Debtor lists having four minor dependants, for a total of six members in this family unit. Including a home mortgage (PIIT) of $2,150.00, Debtor lists monthly expenses of $6,907.39. It appears that Debtor has the ability to successfully prosecute this case.

Under the specific facts of this case, including the Debtor's income to fund a plan and there not being an ongoing default and increasing arrearage on a claim secured by real property, Debtor has sufficiently rebutted the presumption that this case was filed in bad faith.

In so concluding, Debtor needs to recognize that this is the case in which Debtor and Debtor's counsel need to actively prosecute this case. If this case were dismissed, the credibility of Debtor in coming back a with fourth case would be substantially compromised.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Impose the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the automatic stay is imposed pursuant to 11 U.S.C. § 362(c)(4)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.