UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 6, 2018 at 3:00 p.m.

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1. **18-22010-E-13** **JERRY/CAROLINE CHAVEZ** **MOTION TO CONFIRM PLAN**
JSO-1 **Jeffrey Ogilvie** **9-25-18 [41]**

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

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

Below is the court's tentative ruling.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 25, 2018. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

Jerry Robert Chavez and Caroline Margarit Chavez ("Debtor") seek confirmation of the Amended Plan, which would be the first Confirmed Plan in this case. The Amended Plan provides for payments of $3,207.00 for 2 months and $3,310.17 thereafter for the 60 month term. Dckt. 44. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on October 18, 2018. Dckt. 47. Trustee opposes the Motion because the Debtor's supporting Declaration (Dckt. 43) merely states components of 11 U.S.C. § 1325(a), and does not provide necessary factual information, including a statement that Co-Debtor Caroline Chavez' disability is permanent and therefore Debtor meets the liquidation test.

SUPPLEMENTAL DECLARATIONS

Debtor filed a Supplemental Declaration on October 30, 2018. Dckt. 51. Debtor states Co-Debtor Caroline Chavez is permanently disabled and has been so since 2003. Debtor states further that Co-Debtor is on Social Security Disability.

DISCUSSION

While Debtor provides a skeleton of a Declaration, the Trustee's grounds for opposition have been addressed. Co-Debtor Caroline Chavez is permanently disabled, and Debtor passes the liquidation test. The Amended Plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Jerry Robert Chavez and Caroline Margarit Chavez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on September 25, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

2. **18-26402-E-13** **DENNIS/ROBIN COBB**
MET-1 **Mary Ellen Terranella**

MOTION TO EXTEND AUTOMATIC STAY AND/OR MOTION TO REINSTATE AUTOMATIC STAY
10-17-18 [10]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, U.S. Attorney for the IRS, U.S. Department of Justice, and Office of the United States Trustee on October17, 2018. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Dennis and Robin Cobb ("Debtor") seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 12-21512) was dismissed on July 4, 2018, after Debtor failed to make Plan payments. *See* Order, Bankr. E.D. Cal. No. 18-21512, Dckt. 40, July 4, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor incurred several unexpected expenses, including medical, dental, and emergency home-maintenance expenses. Dckt. 12. Debtor states that the unexpected financial hardships

have been resolved. Further, the Declaration states that Dennis and Robin Cobb were separated during their prior case and have since reconciled and are living together (resulting in lower expenses). *Id*.

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

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

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 sudden unexpected expenses have been resolved, and Debtor has reduced its expenses. Debtor has rebutted the presumption of bad faith.

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 Dennis S. Cobb and Robin K. Cobb ("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.

3.	**18-26407-E-13** **RWH-1**	**NICHOLE MORGAN** **Ronald Holland**	**MOTION TO EXTEND AUTOMATIC STAY** **10-13-18 [9]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 13, 2018. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Nichole Cleveland Morgan ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 17-26129) was dismissed on August 7, 2018, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 17-26129, Dckt. 32,

August 7, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor incurred unexpected expenses, including medical and tree branch removal costs. Dckt. 11. Debtor states further that she now intends to budget to account for possible future unexpected expenses.

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

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

A. Why was the previous plan filed?

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

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

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 sudden unexpected expenses have been resolved, and Debtor has begun to budget for future unanticipated expenses. Debtor has rebutted the presumption of bad faith.

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 Nichole Cleveland Morgan ("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 denied 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.

4. **18-26477-E-13 JMM-1** | **JEANNE RENNERT** / **Jeffrey M. Meisner** | **MOTION TO EXTEND AUTOMATIC STAY** **O.S.T.** **10-29-18 [23]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and creditors on October 29, 2018. By the court's calculation, 8 days' notice was provided. The court set the hearing for November 6, 2018. Dckt. 28.

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

The Motion to Extend the Automatic Stay is granted.

Jeanne C Rennert ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No.18-23694) was dismissed on July 30, 2018, after Debtor requested voluntary dismissal. *See* Order, Bankr. E.D. Cal. No. 18-23694, Dckt. 25,July 30, 2018. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor did not believe she could afford the plan payments. Debtor cares for her permanently disabled daughter full time. Debtor has retained new counsel and seeks to prevent a possible eviction in this case–Debtor asserts she fell behind in lease payments because she needed to make a down payment on a new vehicle.

Debtor states further that she has made a good faith payment of $394.66 towards rent, and plans monthly payments of $268.34.

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

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

A. Why was the previous plan filed?

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

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

Debtor has sufficiently demonstrated the case was filed in good faith under the facts of this case and the prior case for the court to extend the automatic stay. Debtor dismissed her prior case believing she would not be able to afford the plan payments. Debtor's new counsel has filed a plan and Debtor has made payments towards her lease.

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 Jeanne C Rennert ("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.

5. **18-26629-E-13** **DWAYNE MONEY** **MOTION TO VALUE COLLATERAL OF**
RJ-1 **Richard Jare** **CAPITAL ONE AUTO FINANCE**
10-23-18 [12]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on October 23, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Capitol One Auto Finance ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $7,200.

The Motion filed by Dwayne E. Money ("Debtor") to value the secured claim of Capitol One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2014 Nissan Maxima ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $7,200 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).

Counsel for the Debtor asserts Creditor has repossessed the Vehicle and has agreed to turnover the Vehicle back to the Debtor.

The lien on the Vehicle's title secures a purchase-money loan incurred on January 2015 which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of

approximately $16,000.00. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $7,200, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Dwayne E. Money ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Capitol One Auto Finance ("Creditor") secured by an asset described as 2014 Nissan Maxima ("Vehicle") is determined to be a secured claim in the amount of $16,000.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $7,200 and is encumbered by a lien securing a claim that exceeds the value of the asset.

6. **18-26475-E-13 RJ-1** | **AMANDA SHRINER** **Richard Jare** | **MOTION TO VALUE COLLATERAL OF ONEMAIN FINANCIAL SERVICES 10-23-18 [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)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on October 23, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of One Main Financial Services ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $3,200.00.

The Motion filed by Amanda C. Shriner ("Debtor") to value the secured claim of OneMain Financial Services ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2006 Chevy Tahoe LT 2WD ("Vehicle 1") and a 2002 Honda Accord 2D V6 Coupe ("Vehicle 2")(collectively "Vehicles"). The Vehicles are cross collateralized through the same agreement. Debtor seeks to value the Vehicle 1 at a replacement value of $2,600.00 and Vehicle 2 at $600 as of the petition filing date. Vehicle 1 has 133,000 miles. Declaration, Dckt. 16. Vehicle 2 has 234,000 miles, does not run, and has major mechanical problems. *Id*. 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 lien is asserted to not be in the nature of a purchase money security interest. The Vehicles secure a debt owed to Creditor with a balance of approximately $13,000.38. Schedule D, Dckt. 1. The

Vehicles being valued at $3,200.00, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of $3,200.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Amanda C. Shriner ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of OneMain Financial Services ("Creditor") secured by an asset described as a2006 Chevy Tahoe LT 2WD ("Vehicle 1") and a 2002 Honda Accord 2D V6 Coupe ("Vehicle 2")(collectively "Vehicles"), is determined to be a secured claim in the amount of $3,200.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicles is $3,200.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

7.	**18-20578-E-13** **SMB-2**	**CONNIE MALLAVIA** **Stephan Brown**	**MOTION TO CONFIRM PLAN** **9-28-18 [57]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 28, 2018. By the court's calculation, 38 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Connie Mallavia ("Debtor") seeks confirmation of the Amended Plan to properly provide for postpetition mortgage fees. Dckt. 59. The Amended Plan provides for payments as follows: $2,825.00 for Months 1 through 3; $2,750.00 for Months 4 through 11; and $2,827.66 for Months 12 through 60. Dckt. 61. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on October 19, 2018. Dckt. 63. The Trustee opposes confirmation on the basis that Debtor is delinquent $2,663.60 having not made a payment in July 2018.

DISCUSSION

Debtor is $2,663.60 delinquent in plan payments, which represents a partial payment of the $2,750.00 plan payment. Before the hearing, another plan payment will be due. The Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

CONCLUSION

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

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

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

8. **18-25210-E-13 DPC-1** **SEGUNDO ALMOGELA** **Pro Se** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-26-18 [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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*) on September 26, 2018. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor failed to appear at the First Meeting of Creditors held on September 20, 2018. The meeting was continued to October 25, 2018.

B. Debtor does not propose to pay any claims as Class 1, 2, 3, 4, 5, or 6 and provides a blank dividend to general unsecured claims in Class 7.

C. Debtor has not filed tax returns during the 4-year period preceding the filing of the petition. Specifically, Debtor has not filed tax returns for the 2014 and 2015 taxable years. The IRS filed Proof of Claim, No. 1 on September 4, 2018.

D. Debtor cannot make the plan payments as Debtor's projected disposable monthly income listed on Schedule J is -$29.09.

E. Debtor's income is above the median income but Debtor failed to file Form 122C-2.

F. Debtor has failed to provide the Chapter 13 Trustee with 60 days of employer payment advices received prior to filing th petition pursuant to 11 U.S.C. § 521(a)(1)(B)(iv).

G. Debtor has not provided the Chapter 13 Trustee with Debtor's Federal Income Tax Return for the 2017 taxable year.

Trustee's objections are well-taken.

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

The Continued Meeting of Creditors was held on October 25, 2018, and the Chapter 13 Trustee's Report indicates Debtor did not appear.

11 U.S.C. § 1325(a)(1) provides for confirmation of a plan if it complies with Chapter 13 provisions and other applicable Code provisions. Here, Debtor has proposed a plan that is woefully lacking in compliance with the Bankruptcy Code. Debtor has proposed a plan payment of $0.00 and has not proposed any other terms in the Plan, including payments to Classes 1–6 or a dividend amount to Class 7. The Plan does not comply with 11 U.S.C. § 1325(a)(1).

The IRS filed Claim 1 on September 4, 2018, indicating that Debtor has not filed returns during the 4-year period preceding the filing of the Petition. Specifically, federal income tax return for the 2014 and 2015 tax years have not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Schedules show that Debtor is unmarried and unemployed. Debtor's Schedule J states a monthly income of -$29.09. Even with plan payments of $0.00 per month, Debtor is unable to make plan payments. This plan is simply not realistic.

Further inquiry into Debtor's schedules shows that Debtor is actually far above the median income, grossing $8,012.15 monthly. Schedule I, Dckt. 1. Despite this more than ample income, Debtor manages to scrape together even greater expenses, totaling $8,041.24. Schedule J, Dckt. 1. Among the expenses are the following:

Electricity, heat, natural gas	$350

Telephone, cell phone, internet, satellite, and cable services	$440
Car repair	$500
Childcare and children's education	$300
Vehicle Insurance	$550
Help Son Jeremy and Grandson Jordan	$800

While some of Debtor's expenses seem grossly high, others are more troubling. Debtor does not list any dependents, yet provides for a monthly childcare expense of $300. Debtor provides for a monthly vehicle repair cost of $500, but no vehicle is listed on Schedule B. Additionally, Debtor lists transportation expense of $400 a month on top of the $500 for "repairs." Debtor also lists $550 a month for vehicle insurance (this results in Debtor paying more than $6,000 a year for vehicle insurance).

Debtor also is diverting $800 from creditors to help his son and grandson, though neither are asserted to be dependents. The expenses shown do not demonstrate Debtor's best efforts. 11 U.S.C. § 1325(b). He also lists additional maintenance expenses for other real property than his residence, but no other property is listed on Schedule A/B. (*See* Schedule J for expenses, Dckt. 1.)

Debtor has not provided the Chapter 13 Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). Also, the Chapter 13 Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(i); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

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

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

9.	**17-23911-E-13** **LBG-4**	**CRAIG MASON** **Lucas Garcia**	**CONTINUED MOTION TO CONFIRM PLAN** **8-20-18 [114]**

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

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

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

Sufficient Notice Provided. The court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The Motion to Confirm the Amended Plan is denied.

Craig Mason ("Debtor") seeks confirmation of the Fourth Amended Plan, no proposed plan to date having been confirmed. Dckt. 114. The Amended Plan provides for Debtor's mortgage as a Class 1 claim; estimates $19,200.00 in Class 5 claims; calls for minimum 5 percent dividend on Class 7 claims totaling $86,499.88; and provides for a $5,750.00 payment, which increases to $5,950.00 in Month 14 of the Plan. Dckt. 118. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on September 26, 2018. Dckt. 125.

The Trustee asserts that Debtor fails to indicate in Section 3.05 of the Plan whether he proposes to pay attorney fees in accordance with Local Bankruptcy Rule 2016-1(c) or will be filing a motion for fees in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017.

The Trustee further argues Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Trustee states that, because this case was filed on June 12, 2017, the Month 14 payment became due on August 25, 2018. Debtor's projected disposable income listed on his

Schedule J, and confirmed in his declaration in support of this Motion, is $5,773.00, while the Amended Plan calls for payments in Month 14 to increase from $5,750.00 to $5,950.00.

OCTOBER 16, 2018 HEARING

At the October 16, 2018, hearing, the hearing on the Motion was continued to 3:00 p.m. on November 6, 2018 to allow the Debtor to file supplemental documents addressing attorney's fees.

DISCUSSION

No supplemental pleadings have been filed.

Trustee's Opposition is well-taken. Debtor's proposed plan payments are higher than his disposable income reflected in his testimony and Schedules. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable. 11 U.S.C. § 1325(a)(6).

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed. The proposed Plan contradicts Debtor's testimony as to what payments he can actually afford and the court is without an accurate picture of his financial reality.

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

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

10. **18-23379-E-13** **WILLIAM BATTILANA, II** **MOTION TO SELL**
GW-2 **Gerald White** **10-9-18 [86]**

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

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

Below is the court's tentative ruling.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 9, 2018. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits William Battilana, II, 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 1 Glenville Circle, Sacramento, California 95826 ("Property").

The Movant states with particularity (Fed. R. Bankr. P. 9013) in the Motion the following grounds upon which the requested relief is based:

A. Debtor requests authorization to sell his residence, the Property.

B. Debtor is prosecuting a plan that include the sale of the Property as a term thereof.

C. Debtor claims a $100,000 exemption in the Property.

D. Debtor has a cash offer from an unidentified buyer to purchase the Property for $360,000.

E. Debtor valued the Property in his Schedules at $364,000.00. The Property is subject to one lien, which secures an obligation in the amount of $181,898.92.

F. Creditor with liens or security interests in the Property will be paid in full from the sales proceeds through the sale escrow.

G. Costs of sale, including escrow fees and sales commissions (unstated amounts), will be paid through the sale escrow.

H. This is an "arms length sale."

I. The net sales proceeds, in which Debtor asserts his homestead exemption, are projected to be $153,597.49.

J. For the $100,000 in proceeds in which the Debtor claims a homestead exemption, the Motion further requests that the monies be held in Debtor's Counsel's trust account pending Debtor complying with applicable state law requiring the monies be reinvested in new homestead property for the exemption to be properly claimed. (See Cal. C.C.P. 704.720(b).)

Using Movant's Exhibits, the court identifies the buyer and summarizes some of the prominent terms (which Movant did not decide to state with particularity within the Motion as grounds for relief) as follows:

A. The proposed buyer is Atish Singh.

B. The total sale price in cash is $360,000.00, with escrow closing 15 days after the signing of the purchase agreement.

C. The selling and listing agents, both RE/MAX GOLD, are each entitled to a 3 percent commission totaling $21,600.00.

The Motion recounts that Debtor, represented by his current counsel, initially commenced this case as one under Chapter 7 on May 30, 2018. After the first meeting of creditors the Chapter 7 Trustee issued a notice that this was a case in which she anticipated there being a distribution to creditors. Notice, Dckt. 11.

The Chapter 7 Trustee then sought to hire a real estate broker to market and sell the Glenville Circle Property. Motion, Dckt. 23. The Trustee's motion states that Debtor valued the property for $364,000 on the Schedules, listed it being encumbered by a $180,940 secured claim, and it also being subject to Debtor's exemption claimed in the amount of $19,536. The Trustee states that the real estate broker intends to list the property for sale at $385,000. On its face, there appeared to be a substantial non-exempt equity in the Property.

On August 2, 2018, Debtor exercised his power to convert the case to one under Chapter 13, and the case was converted. Order, Dckt. 33.

After conversion Debtor filed his Chapter 13 Plan. Dckt. 46. The plan was to be funded with payments of $325.00 monthly for 36 months. In addition, Debtor was to sell the Glenville Property (in which he was now claiming a $100,000 homestead exemption, subject to the state law requirement that it be reinvested in new homestead property) within six months of confirmation, with all non-exempt proceeds paid into the plan. Plan ¶ 7.01, Dckt. 46. Debtor will also prosecute claims against his ex-wife.

The Plan provided for payment of a 10% dividend to creditors holding general unsecured claims. No other claims were provided to be paid through the Plan.

The Chapter 13 Trustee objected to confirmation of the proposed Plan. The court had some concerns relating to the Plan, but believed they could be addressed. The hearing was continued rather than the objection sustained. Civil Minutes, Dckt. 109. The court also continued the hearing on the PHH Mortgage Corporation objection to confirmation. Civil Minutes Dckt. 108.

The court's concern included that while Debtor stated in the Plan that the property was to be sold within six month, there did not appear to be any marketing of the property - no authorization obtained to engage a real estate broker to sell the Property.

TRUSTEE'S OPPOSITION

On October 23, 2018, David Cusick (the "Chapter 13 Trustee") filed an Opposition to the Debtor's Motion on the following grounds:

A. Movant proposes the proceeds remaining after the payment of $181,898.92 to Creditor are to be paid directly to Movant and not provided through the proposed plan.

B. The Motion as proposed fails to pay sufficient funds to the Trustee to satisfy the non-exempt portion of the Property, which using Debtor's higher claimed exemption of $100,000.00 would still total $83,060.00 of the proceeds.

C. The Trustee has filed an Objection to Exemptions scheduled for November 20, 2018, which will determine whether Movant is entitled to the

$100,000.00 exemption he relies upon in this Motion or $75,000.00 as the Trustee contends.

CREDITOR'S OPPOSITION

PHH Mortgage Corporation, the creditor whose claim is secured by the Property ("Creditor") filed a Statement of Position on October 23, 2018. Dckt. 106. Creditor does not oppose the Motion, but requests in the event of a dispute as to amounts owed on its claim, that the undisputed amount of Creditor's Claim be paid at the close of the sale and for the disputed amount of Creditor's Claim to be segregated in an interest bearing account, along with an additional $10,000.00 in sale proceeds pending further Order of the bankruptcy court to allow for Creditor's potential recovery of any of its reasonable attorney's fees and costs incurred to the extent that Creditor successfully establishes its right to the disputed amount due on its Claim.

MOVANT'S RESPONSE

Movant filed a Response to Trustee's Opposition on October 30, 2018. Dckt. 114. Movant disputes Trustee's statement that Movant seeks to retain proceeds after distribution to the Creditor, pointing out that Section 7.01 of the proposed plan states "all non-exempt proceeds shall be paid into the plan." Movant asserts this provision provides all portions that would be provided in a liquidation.

Movant further argues that the dispute over Movant's claimed exemption should not result in the denial of this Motion; Movant proposes to retain $100,000.00 of the proceeds until the dispute is resolved. Movant also notes the pending objection to confirmation of the proposed plan is also not grounds for denial of this Motion.

DISCUSSION

While there is some discussion and debate over where the proceeds will be distribute and the amount (such as the pending objection to claim of exemption), there is no serious opposition to Debtor consummating the sale of the Property.

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:**XXXXXXXXXXXXXXXXXXXX**.

Real Estate Commissions

In the Motion, a general reference is made to the payment of an unstated amount of real estate commissions to unidentified parties. When continuing the hearings on the Objection to Confirmation, the court expressed concern that the Debtor, in exercising the powers of a trustee to sell property of the bankruptcy estate, had not obtained authorization to employ a real estate professional. The court's rulings note that such authorization may be obtained retroactively, but that such retroactive relief needed to be properly requested.

On October 30, 2018, Debtor's counsel filed a Motion to Employ ReMax Gold as a broker to sell the Property. Motion, Dckt. 110. The Motion to Employ requests the relief ex parte. The Motion was served on the Debtor, the Chapter 13 Trustee, and the Office of the U.S. Trustee. Cert. of Serv. Dckt. 113.

The grounds stated with particularity in the Motion (Fed. R. Bankr. P. 9013) for the employment of a real estate professional for the sale of this Property (which is property of the bankruptcy estate) are:

A. The proposed Chapter 13 Plan provides for the sale of the Property to fund the Plan (subject to the Debtor's claim of exemption).

B. Debtor entered into the Residential Listing Agreement with REmax Gold on September 5, 2018.

C. Debtor is now in contract to sell the Property for $360,000. The Contract is dated September 30, 2018, and is accepted by Debtor on September 30, 2018. Exhibit A, Dckt. 89.

It appears that the Broker and Debtor marketed this Property for less than 25 days.

D. In light of the Court's comments and concerns about there not being a broker authorized to be employed (which would then preclude the broker from being compensated for the services provided), Debtor now seeks that authorization.

E. The broker's obligations include:

1. Professionally Market the Property;

2. Advertise the Property;

3. Show the Property;

4. Represent the Debtor in Connection With the Sale;

5. Advise the Debtor With Respect to Obtaining the Highest and Best Offers Available.

6. The Broker Agrees to Provide the Services for a 6% Commission. (Which is the normal real estate commission charged by brokers for the marketing and sale of residential real property in this region.)

F. Upon the advisement of Broker, the Property was listed for $372,000. (This is close to the listing price the Chapter 7 Trustee intended to use if she had proceeded with the sale of this Property.)

G. The actual approval of the commission for Broker will be through the sale motion and not the Motion for Authorization to Employ.

H. The Broker has conducted a conflicts check and confirm that none exist other than:

1. Broker is representing Debtor's mother in a sale of her real property not related to this case, and has represented her in the past for the sale of another property not related to this case.

At this point in the Motion, the only thing missing is a simple statement of the grounds as to why the relief is requested retroactively. In reality, given that seeking such relief within 30 days of the employment beginning is treated as not being retroactive, the listing agreement having been signed on September 5, 2018 (and notwithstanding that the marketing of the property and negotiation of the sale were completed within only twenty-five days), seeking the authorization for employment in October 2018 does not require any significant retroactive relief. A simple statement that the Debtor, Broker, and Counsel were focusing on the sale and prosecuting a plan, and the filing of the motion was delayed due to inadvertence or the Broker and Counsel not appreciating a need to authorize such employment when a broker is selling property of the bankruptcy estate prior to confirmation of a plan, would have sufficed.

In addressing this issue, Counsel takes the advantage of this opportunity to address the legal issue of a Chapter 13 debtor's ability to engage the services of professionals and to pay those professionals for services rendered from property of the bankruptcy estate.

Debtor argues that there is no requirement for him to obtain authorization to obtain professionals to represent him in administering property of the bankruptcy estate. Debtor first correctly notes that 11 U.S.C. § 327 providing for the employment of professionals applies to bankruptcy trustee and not Chapter 13 debtors. Thus, no such authorization is required in this case for the Debtor in his sale of property of the bankruptcy estate.

While acknowledging that valid reasons could exist for a court to require such authorization, Debtor first notes,

> But such a requirement should be published and made obvious so that Chapter 13 debtors and the professionals they wish to employ are aware of the requirement so that they can comply. But there is nothing in the Bankruptcy Code, the Bankruptcy Rules or our Local Rules that notifies the Chapter 13 debtor that a motion to employ a real estate broker is required.

Motion, p. 4:9-13; Dckt. 110. As discussed below, asserting that there is nothing in the Bankruptcy Code or Rules telling the Debtor he "must do this" misses the issue of what tells the Debtor he has authority to hire professionals and then pay them, as a trustee would, from property of the bankruptcy estate.

Debtor then continues to make his point, addressing what could be an unfair result to brokers who are unaware that such authorization was required, stating,

> To impose that requirement without notice, and more importantly, to limit the broker's compensation because such motion is filed "late", is unfair to the professional who has provided services that benefit the debtor, the estate and creditors by obtaining a bona fide sale within 58 days of conversion of the case to Chapter 13 and 25 days from entering into the listing agreement.

Id., p. 4:13-18. From the court's perspective, there being a secret, unnoticed, after the fact requirement misses the point that when one seeks to engage in an act with property of the bankruptcy estate, it is incumbent on the party seeking to take the action to show the legal basis therefore. The contention that the "court did not tell the broker or counsel to obtain an order authorizing the employment of a professional who would seek to be paid from property of the bankruptcy estate" is not compelling.

Debtor then reports that his counsel has canvassed counsel for the Chapter 13 Trustees and that his counsel reports that they are unaware of any requirement for a debtor to obtain authorization to employ a broker as a professional to sell property of the bankruptcy estate (prior to confirmation of a plan) – other than in this department. Debtor's counsel reports that he is representing a debtor in Department A, has sold two properties, and no authorization for employment has been obtained or suggested as being required by the court. The Motion does not identify whether such sale was part of a confirmed plan which provided for such employment, was post-confirmation, or was a pre-confirmation sale of property of the bankruptcy estate.

Debtor having raised the point, the court will use this as the opportunity to check with the other judges to determine whether there is a consensus as to how the law is properly applied and a consistency in how the cases are administered. If there is a difference in opinion as to how the law is applied, discussion will insure that such is clearly documented.

For this case, the inquiry begins with the basis for the Debtor, as a Chapter 13 debtor, to sell property of the bankruptcy estate prior to confirmation. Those grounds exist pursuant to 11 U.S.C. § 1303, which states,

> § 1303. Rights and powers of debtor
>
> Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

Thus, on its face, it would appear that the Chapter 13 debtor could exercise the rights and powers of a trustee, and only such powers of a trustee, to sell property of the bankruptcy estate (whether in the ordinary court of business or outside the ordinary course of business). This has led some courts to conclude that this results in the Chapter 13 debtor having none of the other rights and powers of a trustee (such as avoiding fraudulent conveyance, preference, and other rights of the bankruptcy estate).

Fortunately, as discussed in Collier on Bankruptcy, Sixteenth Edition, ¶ 1303.01, such a limited, neutered interpretation of the Bankruptcy Code is not generally accepted, beginning with the following discussion:

¶ 1303.01 Overview of Section 1303

Section 1303 vests in the chapter 13 debtor the identical rights and powers conferred upon a liquidation trustee under section 363, relating to the use, sale and lease of property of the estate. Section 1303 grants these rights and powers, subject to the same limitations upon their exercise as are imposed by section 363, to the chapter 13 debtor, exclusive of the chapter 13 trustee. The effect of section 1303 is to prohibit the use, sale or lease of property of the estate outside of the ordinary course of business by the chapter 13 trustee.

Section 1303 does not purport to preclude provisions in a plan pursuant to section 1322 or orders of the court calling for the use, sale or lease of property of the estate by the chapter 13 trustee whether or not in the ordinary course of business. Similarly, the provisions of a confirmed plan may limit the rights and powers of the debtor to use, sell or lease property of the estate. Section 1303 operates in conjunction with other provisions of the Code, such as section 1304, pertaining to operation of the debtor's business, if applicable, and section 1306, which gives the debtor the exclusive right to possession of property of the estate, unless a confirmed plan, or order confirming a plan, provides otherwise. Thus, section 1303 is not the exclusive source of the debtor's rights with respect to property of the estate.

This non-exclusive interpretation of 11 U.S.C. § 1303 is further discussed in Collier on Bankruptcy, including a discussion of the legislative history for § 1303, as:

¶ 1303.04 Section 1303 Not Exclusive Listing of Chapter 13 Debtor's Rights and Powers

Section 1303 lists certain powers that a chapter 13 debtor has, exclusive of the chapter 13 trustee. **It is not by any means a complete listing of the chapter 13 debtor's powers.** The legislative history of the section states: "[Section 1303] does not imply that the debtor does not also possess other powers concurrently with the trustee. **For example, although section 1323 [sic] is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.**"

The legislative history of section 323 gives the same message:
[Section 323(b)] grants the trustee the capacity to sue and be sued. If the debtor remains in possession in a chapter 11 case, section 1107 gives the debtor in possession these rights of the trustee: the debtor in possession becomes the representative of the estate, and may sue and be sued. The same applies in a chapter 13 case.

Relying upon this legislative history, courts have granted chapter 13 debtors the right to bring lawsuits that are property of the estate. **They have recognized that there are many rights and powers that a chapter 13 debtor must have, simply because it would be impossible for chapter 13 to work without them.**

> Certain rights, such as the right to bring a lawsuit and the right to use property of the estate in the ordinary course of the debtor's financial affairs, are implicit in section 1306(b), which allows the debtor to retain possession of all property of the estate, except as provided in a confirmed plan or order confirming a plan. Obviously, a chapter 13 debtor must be able to continue using his or her home, car and household possessions. Section 1304(b), recognizing that some restriction is needed with respect to a debtor operating a business who may wish to use, sell or lease property out of the ordinary course of business, subjects that debtor to certain provisions of section 363(c) that are applicable to trustees and chapter 11 debtors in possession.
>
> Some courts have held that chapter 13 debtors have the same powers as a debtor in possession to assert the trustee's avoiding powers. However, other courts have rejected this view, and permitted debtors to bring avoidance actions only when permitted by section 522(h). In any event, a debtor's possible lack of standing can be cured by the addition of the chapter 13 trustee as a party or by a provision in a confirmed plan allowing the debtor to exercise the trustee's avoiding powers. Such a provision is not prohibited by the Code and therefore should be permissible under section 1322(b)(11).

Collier on Bankruptcy, Sixteenth Edition, ¶ 1303.04 (emphasis added). [FN. 1.]

FN. 1. This raises an "interesting" legal question as to how explicit a debtor needs to be in the Chapter 13 plan to incorporate various powers of a trustee that can be exercised in performance of a plan after confirmation.

Here, the Chapter 13 Debtor is utilizing the powers of a trustee to sell property of the bankruptcy estate. To do so, the Chapter 13 Debtor needs to use the powers of a trustee to hire a professional to market and sell the property. The trustee has the power to so employ a professional – as provided in 11 U.S.C. § 327. So employing the professional, the trustee can then pay the professional for the services rendered in selling property of the bankruptcy estate. To have the power of the trustee to use property of the estate to pay a professional for services rendered, such as a broker assisting in the power of the bankruptcy estate, the Chapter 13 Debtor must properly exercise, and obtain the authority to exercise, such powers.

Debtor has offered the court no other basis for employing a professional to sell property of the bankruptcy estate and then use property of the bankruptcy estate (the sales proceeds) to pay the professionals.

Because the court is granting the *ex parte* motion, retroactively, to employ, the broker does not need to fear not being paid reasonable commission for the services provided to the Chapter 13 Debtor exercising the powers of a trustee to sell property of the bankruptcy estate. However, in light of there being only twenty-five days of marketing effort, and the employment being subject to the provisions of 11 U.S.C. § 328, the court will delay disbursement of the commission for twenty-one days to allow the Chapter 13 Trustee, U.S. Trustee, and creditors an opportunity to consider whether such marketing is consistent with

a six percent commission, or instead represents a quick-sale price to accommodate a debtor who is not concerned with obtaining the fair market value for the property because any additional monies "will just go to the darn creditors." [FN. 2.]

FN. 2. The Broker, Debtor, Counsel, Chapter 13 Trustee, U.S. Trustee, or any creditors should not view the above discussion or delay in disbursement to be an indication that the court believes that grounds exist by which a commission of less than 6% is proper. Rather, the discussion is included consistent with the bankruptcy process being an open process in which parties are given the opportunity to participate before the fact, and not merely litigate over their "heartburn" later. This also insures that Chapter 13 debtor's fulfill their fiduciary duties in administering property of the bankruptcy estate. The Broker may well have identified the right buyer, pushed the right buyer to the fair market value, convinced that buyer to pull the trigger now, and has allowed the estate to "bank the bucks."

Approval of Sale

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will satisfy all monetary encumbrances on the Property, including those of PHH Mortgage Corporation, real property taxes, costs of sale through escrow. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by William Battilana, II, the Chapter 13 Debtor ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that William Battilana, II, the Chapter 13 Debtor is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f)(3) to Atish Singh or nominee ("Buyer"), the Property commonly known as 1 Glenville Circle, Sacramento, California 95826 ("Property"), on the following terms:
>
> A. William Battilana, II, the Chapter 13 Debtor, ("Chapter 13 Debtor") is authorized as provided in 11 U.S.C. § 1303 to sell the real property commonly known as 1 Glenville Circle, Sacramento, California ("Property"), to Atish Singh ("Buyer") for a cash purchase price of $360,000.00, on the terms and conditions set forth in the Residential Purchase Agreement and Joint Escrow Instructions (Exhibit A, Dckt. 89), and this Order;

B. The Chapter 13 Debtor is authorized to execute all documents, instructions, deeds necessary to consummate the sale of the Property as authorized by the court.

C. The sale proceeds shall first be applied to closing costs, real estate commissions (subject to the provisions below), prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

D. Subject to further order of the court issued on the Motion to Employ Real Estate Broker, the Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount not to exceed six percent (6%) of the actual purchase price upon consummation of the sale, which is computed to be $21,600. The commission, in the amount subsequently determined in connection with the Motion to Employ, shall be paid to ReMax Gold, the Chapter 13 Debtor's real estate broker. The commission may be divided with the buyer's broker, if any, as agreed by the parties without further order of the court. The $21,600.00 shall be held in the sale escrow pending further order of the court determining the amount to be disbursed for the commission.

E. $100,000.00 of the net sales proceeds, after payment of the above liens, costs, and expenses, and withholding $21,600.00 for the real estate commissions, shall be disbursed directly from escrow to Gerald White, Esq., Counsel for the Debtor in Possession to be deposited into his client trust account and held therein until disbursement is authorized by further order of the court. Debtor's homestead exemption attached to the $100,000.00 of sale proceeds disbursed for deposition in Counsel's client trust account, in full force and effect as provided under applicable California and federal exemption law.

F. The remaining net sales proceeds after all of the above payments, retention in escrow, and disbursements, shall be disbursed directly from escrow to the Chapter 13 Trustee for distribution through a Chapter 13 Plan in this case or as otherwise provided under bankruptcy law if a plan is not confirmed.

G. Within fourteen (14) days of the close of escrow, the Debtor shall provide to the Chapter 13 Trustee the final escrow closing statement.

11. **18-25233-E-13** **CAROLYN LAWSON** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Pro Se** **PLAN BY DAVID P. CUSICK**
10-3-18 [21]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*) on October 3, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor failed to appear at the 341 Meeting of Creditors.

B. Debtor has not commenced plan payments and is delinquent $123.

C. Debtor has not provided the required tax returns.

D. Debtor indicates income from family support in the amount of $2,500, but has provided no evidence.

E. Debtor lists BDM Mortgage as a Class 4 in the proposed plan, but Debtor's Statement of Financial Affairs indicates the property securing that debt has been foreclosed. Treatment of BDM Mortgage is therefore unclear.

Trustee's objections are well-taken.

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

Debtor is $123 delinquent in plan payments, and has not yet commenced payments under the plan. Before the hearing, another plan payment will be due. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

Debtor's plan proposes to treat BDM Mortgage as a Class 4 under the proposed plan where the claim is not secured (the subject property having been foreclosed). Furthermore, Debtor has not provided evidence to verify her income which is wholly in the form of family support. From the foregoing, Debtor's plan does not appear feasible. 11 U.S.C. § 1325(a)(6).

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

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

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

12. **17-28248-E-13** **SHAUN TAYLOR** **MOTION TO MODIFY PLAN**
TLA-1 **Thomas Amberg** **10-1-18 [32]**

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

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

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

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

The Motion to Confirm the Modified Plan is denied.

Shaun Taylor ("Debtor") seeks confirmation of the Modified Plan to address mortgage payment fluctuations and costs associated with the Debtor's mother's cancer treatment. Dckt. 34. The Modified Plan provides for a total payment of $13,568.00 from January through September 2018, and then payments of $1,940.00 from October 2018 through December 2022. Dckt. 36. The Modified Plan also provides for the supplemental claim of Freedom Mortgage, requiring payments of $100.00 after attorney's fees are paid in this case. *Id*. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed an Response on October 17, 2018. Dckt. 42. The Chapter 13 Trustee asserts that Debtor is creating a Post-Petition claim for ongoing delinquent monthly installments in Class 1 of the plan in the amount of $3,600.00. Debtor has not provided information

regarding that amount. Dckt. 42. The Chapter 13 Trustee further notes that Debtor is delinquent one monthly post-petition payment in the amount of $1,352.70. *Id*.

DISCUSSION

Debtor is $1,352.70 delinquent in plan payments, which represents slightly less that one monthly payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Furthermore, Debtor is creating a Post-Petition claim for ongoing delinquent monthly installments in Class 1 of the plan in the amount of $3,600.00. Debtor has not provided information regarding this amount, and the court is unable to determine if the Modified Plan is feasible. 11 U.S.C. § 1325(a)(6).

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

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

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

13. **18-24872-E-13 JHW-1** | **KEITH/LAKEISHA STEWART** **Richard Kwun** | **MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY** **10-4-18 [43]**

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

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

Below is the court's tentative ruling.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 4, 2018. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and the court: (1) Confirms that no stay has gone into effect as to Debtor LaKeisha Stewart in this joint bankruptcy case, and (2) Confirms that the automatic stay has terminated as to Debtor Keith Stewart pursuant to 11 U.S.C. § 362(c)(3)(A)(i) only, and not as to the bankruptcy estate.

Santander, a creditor holding a secured claim in this case ("Movant") filed this Motion To Confirm Termination Or Absence Of Stay on October 4, 2018 seeking to confirm there is no stay in effect as to debtors Keith Anthony Stewart and LaKeisha Michelle Stewart FKA La Keisha Michelle Matlock ("Debtor").

Movant argues Co-Debtor Lakeisha Stewart ("Debtor One") has filed 3 bankruptcy cases since 2017, the oldest (Case no. 17-26708) being dismissed October 26, 2017 and the instant case having been filed August 1, 2018. Therefore, Debtor has had two cases pending in the past year before filing this case.

Movant argues further Co-Debtor Keith Stewart ("Debtor Two") has filed two cases in the prior year, having filed a case (No. 18-20612) that was dismissed July 30, 2018 and filing this case August 1, 2018.

Movant requests confirmation that no stay exists in this case.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to this Motion on October 17, 2018. Dckt. 55. Trustee does not oppose the motion, and merely notes that Debtor's Motion to Extend Automatic Stay (Dckt. 36) was denied.

APPLICABLE LAW

On request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect. 11 U.S.C. § 362(c)(4)(A)(ii).

Two Prior Filings in Prior Year

Where a Debtor has filed two prior cases in the past year, both having been dismissed, the stay under 11 U.S.C. § 362(a) shall not go into effect upon the filing of the later case. 11 U.S.C. § 362(c)(4)(A)(i). When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4), a party in interest may request within 30 days of filing that the stay take effect as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B).

For purposes of subparagraph (B), a case is presumptively filed not in good faith as to all creditors if:

> (I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;
>
> (II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial

> excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or
>
> (III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; . . .

11 U.S.C. § 362(c)(4)(D).

One Prior Filing in the Past Year

Where a Debtor has filed one prior case in the past year, that case having been dismissed, the stay under 11 U.S.C. § 362(a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case. 11 U.S.C. § 362(c)(3)(A). Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

Filing in Good Faith

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

A. Why was the previous plan filed?

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

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

DISCUSSION

Keisha Stewart, Debtor One, has filed 3 bankruptcy cases since 2017, two of which were dismissed within one year of the commencement of the current case on August 1, 2018:

Case No. 17-27331 dismissed July 30, 2018, and

Case no. 17-26708 dismissed October 26, 2017.

There having been two prior cases pending and dismissed within the two years prior to the commencement of the current case, the provision of 11 U.S.C. § 362(c)(4)(A)(i) (emphasis added) by operation of law provides:

> (4) (A) (i) if a single or **joint case is filed by or against a debtor** who is an individual under this title, and if **2 or more single or joint cases of the debtor were** pending **within the previous year** but **were dismissed**, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), **the stay** under **subsection (a) shall not go into effect upon the filing of the later case**; . . .

Keith Stewart, Debtor Two, has not been as prolific a bankruptcy filer as LaKeisha Stewart, having only one prior bankruptcy case that was pending and dismissed within one year prior to the commencement of the current case:

Case No. 18-20612 dismissed on July 30, 2018.

Relief against Debtor Keith Stewart is made pursuant to 11 U.S.C. § 362(c)(3)(A)(i) which provides for termination of the stay as to the "debtor," not termination of the stay in the bankruptcy case.

These two debtors commenced the current joint bankruptcy case on August 1, 2018. Previously, the two debtors had engaged in a series of individual bankruptcy cases dating back to 2007. The Bankruptcy Code provides for the commencement of a joint case in 11 U.S.C. § 302, stating:

> (a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.
>
> (b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

As noted in 11 U.S.C. § 302(b), while a debtor and spouse may file a joint case, their two bankruptcy estates are not automatically consolidated. This is discussed in Collier on Bankruptcy, Sixteenth Edition, ¶ 302.01, (emphasis added) stating:

> ¶ 302.01 Overview of Section 302
>
> Section 302 of the Bankruptcy Code provides that a joint bankruptcy petition may be filed by an individual and the individual's spouse. Section 302(a) authorizes the commencement of a joint case by the filing of a single petition under chapter 7, 11, 12 or 13. Section 302(a) also provides that, similar to the filing of a voluntary non-joint case under the Code, the commencement of a joint case is an order for relief. Section 302(b) requires the court to determine the extent, if any, to which the debtors' estates will be consolidated and the court must separately order the consolidation of assets and liabilities. **Thus, the filing of a joint petition does not in and of itself create a single pool of assets out of which all creditors of the two individuals will be paid, but merely allows the two estates to be jointly administered.**

Therefore, while terminated as to the Second Debtor, it has not been terminated as to the second Debtor's estate and property of that 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 Confirm Termination Or Absence Of Stay filed by Santander ("Creditor") holding a secured claim] having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion To Confirm Termination Or Absence Of Stay is granted; pursuant to 11 U.S.C. § 362(c)(4)(A)(i) , no stay has gone into effect as to the Estate of Debtor Keisha Stewart ("Debtor One").
>
> **IT IS FURTHER ORDERED** that pursuant to 11 U.S.C. § 362(c)(3)(A)(i) and thirty days having elapsed since filing, the stay has terminated only as to Debtor Keith Stewart ("Debtor Two") and not Debtor Two's Estate.

14. **15-23769-E-13 PLC-6** **COREY LEE COLEMAN** **Peter Cianchetta** **MOTION TO VACATE DISMISSAL OF CASE** **10-22-18 [89]**

DEBTOR DISMISSED: 10/15/2018

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 22, 2018. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Vacate is granted, the order granting Trustee's Motion to Dismiss (Dckt. 81) is vacated, and the hearing on the Motion to Dismiss is continued to December 4, 2018 at 3:00p.m.

Corey Lee Christopher Coleman ("Debtor") filed the instant case on May 8, 2015. Dckt. 1. A plan was confirmed on February 23, 2016, and an order confirming the plan was entered on March 8, 2016. Dckt. 77 & 80.

On September 12, 2018, David Cusick ("the Chapter 13 Trustee") filed a Motion to Dismiss the Case due to failure to make Plan payments. Dckt. 81. On October 10, 2018, a hearing on the Motion to Dismiss was held, and the Motion was granted. Dckt. 86. The ruling was final because Debtor did not file any opposition.

On October 22, 2018, Debtor filed this instant Motion to Vacate, Debtor's counsel submitted his Declaration stating that a new plan had been prepared along with a motion to confirm. However, Debtor's counsel was hospitalized for several days and was unable to execute the required documents.

Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on October 25, 2018. Dckt. 99. Trustee notes that while Debtor has now filed an Amended Plan (Dckt. 96), Debtor appears $1,000.00 delinquent and received a loan modification not authorized by the court.

APPLICABLE LAW

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

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

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

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

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

DISCUSSION

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

The sole ground for the Motion to Dismiss was delinquency in plan payments. As a motion under Local Bankruptcy Rule 9014-1(f)(1), Debtor and Debtor's counsel were required to oppose the Motion in writing no later than fourteen days prior to the hearing.

However, Debtor's counsel has explained he was in the emergency room and therefore unable to execute the documents necessary for a new plan or opposition to the Trustee's Motion to Dismiss. Therefore, in light of the foregoing, the Motion is granted, and the order granting Trustee's Motion to Dismiss (Dckt. 81) is vacated.

The court shall continue Trustee's Motion to Dismiss to December 4, 2018 at 3:00p.m to be heard alongside the Motion to Confirm Amended Plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate filed by Corey Lee Christopher Coleman ("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, granting Trustee's Motion to Dismiss (Dckt. 81) is vacated.

IT IS FURTHER ORDERED that the hearing on the Motion to Dismiss is continued to December 4, 2018 at 3:00p.m to be heard alongside the motion to confirm.

15.	**18-25269-E-13** **DPC-1**	**JOSEPH BERTOLINO** **Seth Hanson**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-26-18 [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 Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on September 26, 2018. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Joseph Bertolino ("Debtor") is delinquent $10,800.00 and a second payment of $10,800.00 became due on October 25, 2018.

B. Debtor cannot make plan payments or comply with the Plan because he is now separated from his spouse, no longer operating Yellow Brick Homes,

LLC, and he is now working as an independent contractor for Keller Williams—none of this is reflected in Debtor's Schedule I and the Trustee has received no documentation supporting the transfer of this asset of the Estate. Furthermore, the bank statement's for Debtor's business account demonstrate Debtor regularly has a negative balance and cannot support a plan.

C. Debtor has not disclosed all assets. Debtor's Bank of America business account for JB Land Co. Inc #841 and Bertolino Real Estate #2845 increased from $31.44 before filing to $381.44 the day after filing. Debtor has not accounted for this increased balance on Schedule A/B.

D. Claim No. 2-1 filed by the Franchise Tax Board indicates that Debtor has not filed tax returns in 2014, 2015, 2016, or 2017.

E. Debtor has failed to file the six months of profit and loss statements for all businesses the Debtor had an interest in prior to filing, further failing to file his tax returns for 2016 and 2017.

DISCUSSION

Debtor is $10,800.00 delinquent in plan payments, which represents one month of the $10,800.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's business account demonstrates a regular negative balance. Furthermore, Debtor may have recently become unemployed and separated from his spouse. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Franchise Tax Board filed Proof of Claim, No 2 indicating Debtor has not filed returns for 2014 through 2018. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

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

A. Two years of tax returns,
B. Six months of profit and loss statements, and
C. Six months of bank account statements.

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

CONCLUSION

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

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

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

16. **18-24173-E-13** **FERRIC/STACY COLLONS** **MOTION TO VALUE COLLATERAL**
PGM-2 **Peter Macaluso** **OF WELLS FARGO DEALER SERVICES**
10-6-18 [68]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral and Secured Claim of Wells Fargo Bank ("Creditor") is granted, with the value of the secured claim determined to be $21,368.00.

The Motion filed by Ferric J. and Stacy C. Collons ("Debtor") to value the secured claim of Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2015 Ford F150, VIN ending in 19494 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $20,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S RESPONSE

David P. Cusick, ("the Chapter 13 Trustee") filed a Response to Debtor's Motion to Value Collateral on October 18, 2018. Dckt. 89. The Chapter 13 Trustee reports that Creditor filed a secured claim on September 8, 2018 (Claim #14-1), which indicates the value of the property to be $29,500.00. *Id.*

CREDITOR'S OPPOSITION

Creditor filed an Opposition to Debtor's Motion on October 23, 2018. Dckt. 93. Creditor disputes the valuation of the Vehicle, asserting the Vehicle should be valued at $29,500.00. Creditor requests the court find its claim is therefore fully secured for the $25,222.13 owing.

In support of its Opposition, Creditor filed the Declaration of Jessica Rapp (Dckt. 101) and a properly authenticated copy of the NADA Guide. Exhibit C, Dckt. 95.

DEBTOR'S REPLY

Debtor filed a Reply to Creditor's Opposition on October 30, 2018. Dckt. 103. Debtor argues (1) Creditor's evidence is hearsay because the Jessica Rapp lacks personal knowledge as to the Vehicle and therefore is inadmissable, (2) Debtor's valuation is based on personal knowledge of the Vehicle and its condition, (3) because Creditor's evidence is inadmissable there is no dispute of fact, and (4) Debtor requests Creditor perform a personal inspection appraisal to assess the value of the Vehicle.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on August 31, 2015, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $25,222.13.

Debtor's assertion that Creditor has not provided any evidence is not well-taken. Creditor 's NADA Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

However, Debtor has stated in its Declaration several defects which are not reflected in the NADA Report, that are:

A. Broken Windshield
B. Damaged Rear Bumper
C. Damaged left Rear Quarter Panel
D. Damages throughout body needing paint job
E. Windshield wipers inoperable
F. Tires in poor condition
G. Motor runs rough
H. Interior carpets worn
I. Rear seats in poor condition

In its statement of disputed facts, Creditor does not dispute the existence of any of the above damage. Statement, Dckt. 94. In the Opposition, Creditor does not state that it seeks to conduct any discovery or to have its expert inspect the vehicle.

Creditor requests (politely demands) that the court ignore the above damage and summarily conclude that its NADA valuation for the retail (showroom ready) car dealer sales price controls for this significantly damaged vehicle.

Based on the evidence presented, the court determines that the value of the vehicle is $21,368.00. The court allows for the repair and replacement costs for the above, necessary repairs to get the vehicle to the retail (showroom ready) car dealer sales price value advanced by Creditor.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by Ferric J. Collons and Stacy C. Collons ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Creditor") secured by an asset described as 2015 Ford F150, VIN ending in 19494 ("Vehicle") is determined to be a secured claim in the amount of $21,368.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $21,368.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

17. **18-25186-E-13 APN-1** **ROSEMARY MENDOZA AQUINO** **Seth Hanson** **OBJECTION TO CONFIRMATION OF PLAN BY TOYOTA MOTOR CREDIT CORPORATION** **9-20-18 [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 Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 20, 2018. By the court's calculation, 47 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

Toyota Motor Credit Corporation ("Creditor") holding a secured claim opposes confirmation of the Plan on the bases that:

A. The Plan proposes 4.50 percent interest on the 2016 Toyota 4Runner, the subject property of its secured claim, which is less than the prime rate of interest and not in conformance with the law.

B. Rosemary Aquino ("Debtor") fails to classify Creditor's claim as a purchase money security interest. As a result, Debtor failed to make adequate protection payments pending confirmation of her proposed Plan.

Creditor requests an order denying confirmation of the plan, or in the alternative amending the plan to provide for Creditor's secured claim as a purchase money security interest in the amount of $31,702.92, an interest rate of 6.5 percent per annum, and pre- and post-confirmation adequate protection payments of $615.00.

DISCUSSION

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 4.50 percent. Creditor's claim is secured by a 2016 Toyota 4Runner. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Because the creditor has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 5.00 percent, plus a 1.25 percent risk adjustment, for a 6.25 percent interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

Creditor points out that its claim is actually a purchase money security interest. Therefore, Debtor is required to provide for adequate protection payments not later than 30 days after the date of filing of the plan. See 11 U.S.C. § 1326(a)(1)(C). However, the Plan appears to incorrectly state that this is not a purchase money security interest. Therefore, the Trustee has not been making the required (even if slightly smaller in amount) which Creditor has been entitled to receive. If the Plan is confirmed and the Trustee disburses the moneys for the past months, this defect would be resolved. Attached to Proof of Claim No. 4 filed by Creditor is a copy of the Retail Installment Contract for this claim.

Debtor has not filed an opposition addressing the issues raised by the Creditor, including the deficient interest rate proposed. 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 Toyota Motor Credit Corporation ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

18. **18-25287-E-13 DPC-1** | **MALIK JOHNSON** **Kyle Schmacher** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-3-18 [12]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on October 3, 2018. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Malik Johnson ("Debtor") is delinquent $305.00 and has failed to pay into the Plan to date; further, another payment of $305.00 became due on October 25, 2018.

B. The Plan does not appear to pay unsecured creditors what they would receive under Chapter 7. Debtor claims exemptions totaling $7,392.00,

which he might not be entitled to. The proposed plan provides for only a 1 percent dividend to unsecured claims, totaling $12,833.00.

C. The Plan relies on an as-yet unfiled Motion to Value and the Plan does not have sufficient monies to pay the claim in full.

D. Debtor has failed to provide the Trustee with his 2017 Federal Income Tax Return or any statement that such documentation does not exist.

DISCUSSION

Debtor is $305.00 delinquent in plan payments, which represents one month of the $305.00 plan payment. Before the hearing, another plan payment will be due. The Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Additionally, Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that, while Debtor has reported non-exempt assets in the amount of $11,829.00, and Debtor is proposing a 1.00 percent dividend to unsecured claims, nonexempt equity exceeding that amount exists.

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

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

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

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

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

19. **18-24490-E-13 TAG-3** **DONNA BROUSSARD** **Aubrey Jacobsen** **MOTION TO CONFIRM PLAN** **9-20-18 [35]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 20, 2018. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

Donna Broussard ("Debtor") seeks confirmation of the Amended Plan, which would be the first Confirmed Plan in this case. The Amended Plan provides for payments of $5,650.00 for 60 months. Dckt. 39. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick (the "Chapter 13 Trustee") filed an Opposition on October 9, 2018. Dckt. 55. The Trustee asserts the Plan improperly relies on a Motion to Value, which if not granted would preclude Debtor's compliance with the Plan and ability to afford plan payments. Additionally, the Trustee alleges the Plan would require more than 60 months to complete because of the claim of mortgage arrearages totaling $75,416.80 filed on September 25, 2018 by Faye Servicing, LLC where Debtor lists the arrearages as 68,182.00. This deficit would cause the Plan to complete in 61 months.

DEBTOR'S REPLY

Debtor filed a Reply to Trustee's Opposition on October 30, 2018. Dckt. 67. Debtor asserts that the Motion to Value was resolved by Stipulation (Dckt. 58) which was approved by the court. Dckt. 59.

Debtor agrees that the proposed plan would extend to 61 months, and requests the court increase the monthly payment by $45 to address the issue in the order confirming.

DISCUSSION

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Ford Motor Credit Company. Debtor has already filed a Motion to Value the Secured Claim of Ford Motor Credit Company, which was granted on October 23, 2018 after a stipulation between the parties. Dckt. 59. However, the claim was valued at $21,778.00, not $20,693.00 as listed in the Plan thus necessitating further amendment to the Plan.

Additionally, Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 61 months due to disparity in mortgage arrearages as claimed by Faye Servicing, LLC relative to what Debtor provides for in the Plan. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

CONCLUSION

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Donna Broussard ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on September 20, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

20.	**17-27397-E-13** **GEL-3**	**GEVORG POLADYAN AND ARMINE ASATRYAN** **Gabriel Liberman**	**MOTION TO APPROVE TOLLING AND DEFERMENT AGREEMENT** **10-16-18 [101]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 16, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion To Approve Tolling And Deferment is granted.

Debtors Gevorg George Poladyan and Armine Asatryan ("Debtor") filed the instant Motion To Approve Tolling And Deferment Agreement on October 16, 2018. Dckt. 10. Debtor seeks an order approving the tolling agreement (the "Agreement") between Debtor and secured creditor Outsourced Legal Support ("Creditor").

Creditor is the holder of two promissory notes executed on October 10, 2012 and April 1, 2013. Creditor recorded both Deeds of Trust and filed a UCC-1 Financing Statement against Debtor's business to secure repayment of its two notes.

Debtor and Creditor desire and agree to toll the applicable statute of limitations applicable to Debtors or if the case is converted back to chapter 7, a court appointed chapter 7 trustee, for possible claims against Outsourced Legal under 11 U.S.C. § 547, 548 and other sections of the bankruptcy code and

common law. Additionally, Debtor has requested and Creditor has agreed to forbear and defer payments of the 2012 Promissory Note and 2013 Promissory Note in Debtor's Bankruptcy Case and forthcoming Chapter 13 Plan, which allows Debtors to pay 100% of its allowed general unsecured claims.

By this Motion, the Debtor wishes to preserve potential causes of action for avoidance under 11 U.S.C. §§ 544, 545, 547, 548, and 553, and avoid the running of any applicable statutes of limitation sufficiently in advance thereof.

The following terms and conditions of the Agreement are summarized by the court (the full terms of the Agreement are set forth in Exhibit A in support of the Motion, Dckt. 104):

1. All applicable statutes of limitations and other timebased defenses (including the limitations set forth in 11 U.S.C. § 546) to the Avoidance Actions, are hereby tolled as of the Effective Date for a period to and including June 7, 2023, as to any Avoidance Action which would not have been barred had any such Avoidance Action been properly filed in a court of competent Jurisdiction.

2. Creditor agrees to defer payments on the 2012 Promissory Note and 2013 Promissory Note during Debtor's Bankruptcy Case. Subject to the terms and conditions of this Agreement and the 2012 Promissory Note and 2013 Promissory Note, the Parties hereby agree to extend the "Due Date" stated in the 2012 and 2013 Promissory Notes to the Termination Date. Debtors acknowledges and agrees that as of the Effective Date interest shall accrue on the unpaid principal balance of the 2012 Promissory Note and 2013 Promissory Note at the rate of 5.00%.

3. This Agreement will automatically terminate upon the earlier of i) June 7, 2023 at 5:00 p.m. Pacific Standard Time unless extended by written agreement of the Parties; or ii) the time Debtor's Bankruptcy case is closed or dismissed.

APPLICABLE LAW

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

DISCUSSION

Debtor has proceeded with the Motion as though it were a use of property. It does have that Character. Additionally, Debtor and Creditor are compromising, modifying, and extending various rights they have. The court interprets the Motion to also be in the nature of a request for approval of compromise.

Debtor argues that the Agreement is in the best interest of the Estate and creditors because it will allow Debtor time to work out a settlement of the avoidance issues without jeopardizing the Debtor's right to later bring avoidance claims.

Tolling is not the typical compromise assessed by the *Woodson* factors. That test examines whether the ultimate resolution of the claims is in the better interest of the Estate and creditors than pursuing the claims fully on the merits. Nevertheless, the court finds that the ultimate consideration of *A & C Props* and *Woodson* (what is in the best interest of the Estate and creditors) is met by this Agreement. Therefore, the Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion To Approve Tolling And Deferment Agreement filed by debtors Gevorg George Poladyan and Armine Asatryan ("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 Approve Tolling And Deferment Agreement between Debtor and Outsourced Legal Support ("Creditor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Tolling Agreement filed as Exhibit A in support of the Motion (Dckt. 104).

21. 18-24479-E-13 VLADIMIR TISKIY **MOTION TO VACATE DISMISSAL OF CASE**
Pro Se **10-22-18 [41]**

DEBTOR DISMISSED: 10/15/2018

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

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.

Notice was provided via the Trusteeship's mail room personnel. The court issued an Order setting this Motion for hearing November 6, 2018, at 3:00p.m. Dckt. 45.

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

The Motion to Vacate ~~is denied~~.

Vladimir Tiskiy, Debtor in *Pro Se* ("Debtor") filed the instant case on July 18, 2018. Dckt. 1.

On September 5, 2018, David Cusick ("the Chapter 13 Trustee") filed a Motion to Dismiss the Case due to Debtor's failure to appear at the 341 Meeting, delinquency in proposed plan payments, failure to provide tax returns, failure to provide business documents, failure to provide Class 1 Checklist, and for failure to file all Chapter 13 documents. Dckt. 28. On October 10, 2018, a hearing on the Motion to Dismiss was held, and the Motion was granted. Dckt. 37. Debtor presented no opposition to Trustee's Motion to Dismiss.

On October 22, 2018, Debtor filed this instant Motion to Vacate. Debtor asserts in the Motion that emergency medical reasons prevented Debtor from submitting the required documents to the Trustee. Once Debtor recovered, he immediately provided necessary documents to the Trustee.

Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Civil Procedure 60(b).

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition to this Motion on October 24, 2018. Dckt. 42. Trustee argues no evidence has been provided as to possible medical reasons preventing Debtor from submitting documents.

While Debtor has provided documents to Trustee, Trustee argues that the grounds for dismissal have not been resolved. Debtor has not addressed his failure to appear at the 341 Meeting. Furthermore, Trustee does not know whether Debtor is paying his two mortgages outside his plan, as the $125 plan payment is insufficient to cover those amounts.

Trustee argues further that Debtor's proposed plan treats two mortgages as Class 1, but does not provide sufficient payment, and that Debtor is delinquent $125 in plan payments.

APPLICABLE LAW

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

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

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

Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

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

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

DISCUSSION

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

The Motion to Dismiss was granted for serious deficiencies in Debtor's filing of this Chapter 13 case. Serious deficiencies still remain. Furthermore, while Debtor was apparently too ill (no evidence having been provided) to oppose the Trustee's Motion heard October 16, 2018, Debtor was able to prepare the majority of the necessary documents giving grounds for Trustee's Motion to Dismiss and submit them October 16, 2018.

In considering whether to vacate an order dismissing a case, the court consider whether it appears that Debtor is prosecuting the case consistent with the Bankruptcy Code (the "success" at this early date is just Debtor merely showing he can move forward with prosecuting the bankruptcy case).

The proposed Chapter 13 Plan requires a $125.00 a month plan payment for sixty months. Plan ¶¶ 2.01, 2.03. For Class 1, Debtor lists two creditors. The first is "SPS," with a $23,000 pre-petition arrearage, no arrearage payment to be made, and a $550.00 current post-petition payment being made through the plan. The second secured claim is for "Rashmore," with a $30,000 pre-petition arrearage, no arrearage payment to be made, and a $650 current post-petition payment being made through the Plan. Plan ¶ 3.07, Dckt. 17 at 3.

The two post-petition current monthly payments total $1,200.00–these two alone well in excess of the $125.00 plan payment.

There are no other creditors of Debtor, with none or $0 stated for all other classes of claims in the Plan.

On Schedule D Debtor lists "SPS" having a secured claim for $310,000, which is secured by the Atherton Place Property, which Debtor states has a value of $310,000. Schedule D, Dckt. 15 at 15. No other secured claims are listed on Schedule D.

On Schedule E/F Debtor lists "Rushmore Loan Management Services, LLC having a "First Mortgage" claim in the amount of $417,000.00. *Id.* at 20. Another claim in the amount of $8,200.00 is listed for a creditor named "City." *Id.*

On Schedule I Debtor states that he is self employed, with monthly net income of $4,950.00 from his business. Ida t 28-29.

On Schedule J Debtor lists one dependent, a granddaughter. *Id.* at 30. Debtor's expenses on Schedule J total $2,520. *Id.* at 30-32. No mortgage or property tax expenses are shown in Schedule J. *Id.* at 30. Debtor does list a $50.00 a month home maintenance expense. *Id.*

Though having $4,950.00 in monthly net self-employed business income, no provision is made for the payment of federal income taxes, state income taxes, or any self-employment taxes on Schedule J.

On the Statement of Financial Affairs Debtor states having $34,650 in "gross" income for the first six months of 2018; $39,100 in gross income in 2017, and $38,900 in gross income in 2016. In 2016 and 2017 Debtor's gross income was approximately $3,250 a month. Even if this was actually the net income and not gross, it is substantially less than Debtor now asserts having. Statement of Financial Affairs Question 4, *Id.*

Two secured proofs of claim have been filed. The first is by Wells Fargo Bank, N.A., Proof of Claim No. 2. Wells Fargo Bank, N.A. asserts that its secured claim is in the amount of $535,563.68, with a pre-petition arrearage of $276,694.61. Proof of Claim No. 2, Dckt. 2. From the attached loan documents, it appears that the Atherton Court property secures this claim.

The second has been filed by Wilmington Savings Fund Society, FSB, Trustee - Proof of Claim No. 3. This claim is filed in the amount of $657,686.41, and the collateral identified as the Cosmos Court Property. Proof of Claim No. 3, p. 2. The pre-petition arrearage is stated to be $265,192.87. *Id.*

It appears that Debtor has many challenges facing him. His "plan" in proposing a $125 a month Plan is grossly inadequate. The Plan makes no provision for paying even the arrearage amount stated by Debtor. The Plan grossly under funds even making the current post-petition mortgage payments on the two secured claims listed in Class 1 of the Plan.

Debtor's medical condition may have delayed his providing documents to the Trustee, but that does not explain the grossly deficient plan. Debtor may have the ability to propose and perform a plan, but he has not demonstrated the ability to do that in *pro se* - at least in this case. To vacate the dismissal would drop the Debtor back into a non-productive Chapter 13 situation.

~~Therefore, upon consideration of the Motion to Vacate, the filles in this case, the information provided in the Schedules, and the Chapter 13 Plan Debtor is seeking to pursue, the Debtor has not show~~

sufficient grounds to vacate the dismissal of this case. That dismissal, may if Debtor actively seeks the assistance of counsel, may work to Debtor's benefit. If Debtor has assets he can preserve through a plan, he may be able to so do - with the assistance of counsel.

The Motion to Vacate is denied.

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

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

The Motion to Vacate filed by Vladimir Tiskiy ("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.

22. **18-23420-E-13** **HECTOR CAVAZOS** **CONTINUED MOTION TO CONFIRM PLAN**
PGM-2 **Peter Macaluso** **8-7-18 [44]**

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

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

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

Sufficient Notice Provided. The court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The Motion to Confirm the Amended Plan is denied.

Hector Arnoldo Cavazos ("Debtor") seeks confirmation of the Amended Plan. Dckt. 44. Debtor states the Amended Plan proposes payments of $3,700.00 for 3 months, with payments of $4,100.00 for 57 months starting . Dckt. 44. Debtor indicates he can make the increased payments because his nonfiling spouse is ceasing voluntary 401K deductions and Debtor and his nonfiling spouse will be contributing $3,600.00 per year in tax refunds. Dckt. 47. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on August 24, 2017. Dckt. 57.

Trustee notes the Additional Provisions of the Amended Plan call for the Class 1 claim of Cooper to be paid $50 for 3 months, $335.00 for 57 months, and for a lump sum of $3,600.00 to be paid in June of each year from the tax refund. Trustee argues there may be issues with Trustee's payment software resulting in misdisbursement of funds to creditors, as an early payment would be would be normally disbursed to other creditors and a late payment would result in reduced payments to other creditors as the software attempts

to make the lump sum amount. To reduced undue burden, Trustee asserts Debtor should be required to advise Trustee the lump sum is to be paid only to the Class 1 claim, and to seek, personally, any funds misdisbursed to creditors due to failure to comply with the notice requirement.

Trustee also argues Debtor may not be able to make the Plan payments because Debtor filed Amended Schedules I and J (Dckt. 50) without providing evidence explaining the changes. Trustee provides a list of the changes on Schedule J:

Expenses	Original Schedule J	Amended Schedule J
Water and Sewer	$93	$157.34
Clothing	$50	$100
Personal Care	$50	$100
Entertainment	$3.53	$173.53
Charity	$0	$16.34
Vehicle Insurance	$266.66	$33.34
Auto Expenses	$953	$0
Feed/Fertilizer/Seed/Spray	$0	$400

SEPTEMBER 11, 2018 HEARING

At the September 11, 2018 hearing, the court continued the hearing on the Motion to November 6, 2018. Dckt. 68. Trustee indicates his grounds for opposition have not been resolved. Debtor was to file supplemental Schedules I and J and to date has not.

TRUSTEE'S STATUS REPORT

Trustee filed a Status Report on October 23, 2018. Dckt. 69.

DISCUSSION

The Trustee's arguments are well-taken. The Declaration supporting Debtor's Amended Schedules I and J states:

> 3. I am making amendments to my income and expenses to correct some discrepancies at the time of filing. Since filing, my wife and I both signed up as independent contractors for Door Dash, a food delivery service, because we were not able to afford our monthly expenses and were told about an opportunity to make extra money. We are paid for delivering and together gross about $2,000.00 per month. We are personally responsible

for all of our expenses while using our own cars for deliveries. Thus expenses include our gas, insurance, and maintenance for our cars.

4. The following are changes to my income: the stoppage of my wife's voluntary retirement funds in the amount of $500.00, thus allowing us to have a disposable income of $4,100.00 per month allowed by law, and I am not surrendering any property securing such claim to such holder.

Dckt. 51. Debtor does not explain what caused these "discrepancies," which leaves the court to question whether the Amended Schedules provide accurate expenses.

Debtor states he and his nonfiling spouse have started working as independent contractors for DoorDash. Dckt. 47. The court is confused by the Debtor's decision to list most of his vehicle expenses as business expenses (Amended Schedule I, Dckt. 50 at 6) for two reasons. First, Debtor still lists transportation costs of $180.00 and vehicle insurance costs of $33.34 as non-business expenses on Amended Schedule J. Second, Debtor has not alleged that he is using his vehicle entirely for the business and not mingling in personal use. Even if Debtor made this claim in his Declaration, Debtor's statements would be subject to the court's determination as to their credibility.

Inaccuracy as to Schedules I and J leave the court uncertain whether Debtor is able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

To the extent providing lump sum payments hinders the plan payments from being made timely, the feasibility of the Amended Plan is again in question. 11 U.S.C. § 1325(a)(6). Moreover, the court is not required to confirm a plan providing for secured claims in a manner other than equal monthly payments. 11 U.S.C. § 1325(a)(5)(B)(iii)(I).

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

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

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

23. 18-22819-E-13 RANDY TURNER MOTION TO CONFIRM PLAN
RK-1 9-23-18 [57]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, the U.S. Attorney for the IRS, the U.S. Department of Justice, and Office of the United States Trustee on September 23, 2018. By the court's calculation, 23 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

Randy Lee Turner ("Debtor") seeks confirmation of the Amended Plan to provide for ongoing HOA fees, attorney's fees, previously unscheduled priority claims, and unsecured claims. Dckt. 62. The Amended Plan provides for payments of $2,945.00 from months 4 to 14, $2,280 for the remaining 46 months, and a 100 percent dividend to unsecured claims totaling $2,969.00. Dckt. 60. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on October 18, 2018. Dckt. 64. The Trustee opposes confirmation on the following grounds:

1. The Plan does not provide for future tax refunds, despite Debtor indicating in response to Trustee's last Objection (Dckt. 32) that any new plan would provide for future tax refunds. Debtor also failed to provide proof of reduced tax deductions.

2. Debtor cannot make the payments under or comply with the proposed Amended Plan. Debtor has not provided for the secured claim of the United Trustee Services (Proof of Claim, No. 6), listed the claim on Schedule D, or included the claim as an expense on Schedule J. Debtor's proposed Amended Plan does not authorize payments totaling $2,450.00 Trustee has already paid to Bay Area Property Management. Furthermore, Debtor's proposed Amended Plan changes the designation of Travis Credit Union claim from a purchase money security interest to a non purchase money security interest.

3. The Plan is silent as to any fees Debtor's attorney has received from U.S. Legal.

DISCUSSION

Debtor filed a response to Trustee's first Objection to Confirmation (Dckt. 23) wherein Debtor stated "Debtor is working on drafting an amended [plan] that will . . . provide for the future tax refunds." Dckt. 32. Despite Debtor's prior statements, the proposed Amended Plan does not account for future tax refunds.

While Debtor has reduced payroll tax deductions, no explanation has been provided. Therefore, it appears Debtor is not providing all disposable income into the plan.

Trustee asserts the plan does not account for the secured claim of United Trustee Services. Proof of Claim, No. 6 identifies that Creditor as Bay View Villas Condominium Owners Assoc c/o United Trustee Services. That creditor's claim is stated to be $6,197.29, and is for condominium owner association fees. In Section 3.08 of the plan, Debtor provides for the secured claim of "Bay Area Property Management," a secured creditor with a claim of $6,180.00. Amended Plan, Dckt. 60. Debtor's Schedule D lists the same creditor, and describes the claim as one for Home Owner Association fees. Schedule D, Dckt. 11. It appears likely that Debtor's plan merely misidentifies the creditor here.

AMENDED/SUPPLEMENTAL SCHEDULES I AND J [FN. 1]

FN. This is actually the third amended (see Dckts. 34, 59) and first Amended/Supplemental (Dckt. 70) Schedules I and J.

On October 31, 2018, Debtor filed Amended and Supplemental ("Amd/Supp") Schedules I and J. Dckt. 70. These documents state (under penalty of perjury) that they "amend" the original schedules to correct errors and state the Debtor's income and expenses since the May 7, 2018 commencement of this case, and simultaneously only state changes in income and expenses from July 28, 2018 and forward.

On Amd/Supp Schedule I Debtor lists having $9,680.00 in monthly gross income ($8,488.00 wages and $1,192.00 in Workers' Compensation). *Id.* at 2. Debtor further states that he has a non-debtor

spouse who is employed, but lists $0.00 for income. *Id.* at 2-3. This was the same as stated on Original Schedule I. Dckt. 11 at 22-23.

On Amd/Supp Schedule J, Debtor lists having $4,067.20 in monthly expenses. Dckt. 70 at 5-6. This is a 40% increase over the $2,914 stated on Original Schedule I. Dckt. 11 at 24-25. On both, Debtor lists two dependents - his wife and an adult daughter.

Comparing the changes in expenses:

Expense Item	Original Schedule J	Amd/Supp Schedule J	Increase/(Decrease)
Home Maintenance	$0.00	$20.00	$20.00
HOA Dues	$0.00	$490.00	$490.00
Electricity, Heat, Natural Gas	$90.00	$141.00	$51.00
Food, Housekeeping Supplies	$400.00	$640.00	$240.00
Clothing	$0.00	$75.00	$75.00
Personal Care Products	$0.00	$75.00	$75.00
Medical, Dental	$50.00	$75.00	$25.00
Transportation	$243.00	$350.00	$107.00
Entertainment	$0.00	$70.00	$70.00
			$1,153.00

On both Original and Amd/Supp Schedule J, Debtor states having a monthly alimony, maintenance, or support payment in the amount of $550.00. On the Statement of Financial Affairs Debtor states:

1. He is married. Statement of Financial Affairs Question 1, Dckt. 11 at 27.

2. No income is listed for his employed wife. Statement of Financial Affairs Question 5, 6; *Id.* at 27-28.

3. Debtor has been making a monthly alimony payment of $550.00. Statement of Financial Affairs Question 7, *Id.* at 29.

4. No pending legal actions, such as dissolution proceedings, are listed. Statement of Financial Affairs Question 9, *Id.* at 30.

On Schedule H, Debtor lists three co-debtors: two with the last name Turner (living at the same address as Debtor) and a third with the last name Ray (living at a different address, and being the person named as the alimony obligee). Dckt. 11 at 20.

In his Declaration, Dckt. 68, Debtor testifies that the increase in food, clothing, and personal care are made to "more accurate figure for my household of 4." Declaration ¶ 4, Dckt. 68. But on the Original and Amd/Supp Schedules J, Debtor shows having a household of only three (3) persons, not four.

In looking at the increases in expenses, to make them "more accurate," they generally seem to be made in non-specific block amounts, as if stated to generate a predetermined net monthly income figure for funding a plan.

Debtor also fails to authorize payments already made to Bay Area Property Management, and does not explain why Travis Credit Union's claim was redesignated as a nonpurchase money security interest. Debtor's failure to correctly identify creditors, characterize their claims, and authorize payments already paid suggest the plan is not feasible. 11 U.S.C. § 1325(a)(6).

REVIEW OF PLAN, FINANCES AND STATED DEPENDENTS

Debtor has had the benefit of a recent Chapter 7 bankruptcy and discharge (Bankr. E.D. Cal. 14-31322), and therefore has nominal general unsecured claims - listed as $2,969.00 on the Amended Plan ¶ 3.14. Dckt. 60 at 5. The plan is sixty months in duration, but it is not clear if this very modest amount of unsecured claims is spread out over sixty months interest free or will be paid sooner and the sixty months being necessary only for the secured claims (paid with interest) that are being reamortized.

In looking at the "more accurate" statement of expenses, the court notes that in the Chapter 13 Plan Debtor's adult daughter (who is a dependent and makes no contribution for the household expenses) has adequate disposable income to not only make a $560.00 car payment, but $287.00 a month for Disney Polynesian Villas & Bungalows monthly. Plan Class 4, ¶ 3.10; *Id.* These are for obligations for which she is a co-debtor with Debtor.

From the information provided, the court is unsure how the adult daughter is a "dependent," who makes no contribution for the household expenses for which she is a "dependent," but has the excess monies for a $560 a month car payment and $287.00 for a vacation timeshare.

Also, though repeatedly stating that Debtor's wife is employed, and listed as a "dependent," no information is provided as to her income. Looking at the Chapter 13 Plan, the first debt being addressed is the $15,894 arrearage on the residence in which the "dependent" wife resides with the Debtor. Plan Class 1, ¶ 3.07(c); *Id.* The Plan, in Class 2, then provides for curing $6,280.00 to the HOA for the residence in which the "dependent" wife resides, as well as $2,100 of debt for jewelry. Plan ¶ 3.08, *Id.* at 4.

The credibility of Debtor's testimony under penalty of perjury is strained. It has taken four opportunities to get the "accurate" expenses. But to get there, Debtor repeatedly makes the same increase in expenses to reduce the projected disposable income. Debtor's wife, who is claimed as a dependent, has income, but it repeatedly is not disclosed. Debtor's adult daughter, who is claimed as a dependent, has sufficient income to make a $560 a month car payment and pay for a vacation timeshare, but does not contribute to the household income.

Debtor could, and should, be able to confirm a good faith, reasonable plan. Debtor should be able to provide credible testimony as to income and expenses. But he has not.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Randy Lee Turner ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Amended Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

24. **18-24364-E-13** **CLYDE HUGHES** **CONTINUED MOTION FOR SUBSTITUTION**
MS-2 **Mark Shmorgan** **9-15-18 [26]**

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the 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—Final Hearing.

Sufficient Notice Provided. The court set the matter The court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The Court continued the matter for final hearing.

The Motion to Substitute is Denied.

The Debtor, Clyde Hughes ("Debtor") filed the present case on July 12, 2018. Teresa Monroe, the caretaker for Debtor ("Movant"), filed this Motion seeking an order approving the Motion for Substitution of the Debtor on the grounds Debtor is not competent. This Motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 7025 and Federal Rules of Civil Procedure 25.

Movant states within her Motion that she has known Debtor since 1995, working as his caretaker only since Debtor's wife passed six years ago. Dckt. 26, ¶ 4. Movant states further she is in control of all financial instruments necessary to continue to prosecute this case.

The Motion is supported by Movant's Declaration. Dckt. 28. The Declaration states the following as to Debtor's condition:

> My patient filed this Chapter 13 case on July 12, 2018. He was actively interacting with his bankruptcy counsel and participated in the drafting of his

bankruptcy schedules, statement of financial affairs, and Chapter 13 plan. Dckt. 28, ¶ 4.

On August 8, 2018 he became ill and his conditioned worsened and he was forced to miss his first meeting of creditors scheduled for August 23, 2018.*Id*., ¶ 6

On August 25, 2018 debtor was hospitalized. *Id.*, ¶ 7 at p. 2:11.5.

Upon leaving the hospital, debtor's overall condition worsened. He is now wheelchair bound and his progressive dementia has worsened dramatically. *Id.*, ¶ 8.

Given debtor's progressive age, he will be 90 years old in November, and his mental condition worsening since his illness began, it is unlikely debtor will be able to give competent testimony in the near future. *Id*., ¶ 7 at p. 2:20-23.5.

Movant's Declaration identifies her qualifications to determine Debtor's competency as the following:

I am the longtime caretaker of the debtor in this case. Dckt. 28, ¶ 2.

I have known the debtor since 1995. I originally worked as his late wife's care taker until her passing six years ago. Thereafter, I began to look after the debtor, and as his medical conditioned declined, I moved into his residence to take care of him full time, 24 hours a day. *Id*., ¶ 8.

Debtor has no immediate family and no children that can assist him. I am really all he has left. *Id*., ¶ 9.

TRUSTEE'S OBJECTION TO CONFIRMATION

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Objection to Confirmation of the proposed plan on August 28, 2018. Dckt. 22. The Trustee's grounds were failure to attend the 341 Meeting of Creditors - not because Debtor failed to attend, but because he did not appear competent enough to provide testimony at the Meeting.

OCTOBER 2, 2018 HEARING

At the hearing, the parties did not present the court with any medical testimony from Debtor's doctors or from Adult Protective Services. The court continued the hearing on the Motion to November 6, 2018, allowing Debtor to present evidence supporting the Motion.

October 15, 2018 Meeting of Creditors

The Trustee's Report of the 341 Meeting of Creditors held October 15, 2018 indicates Debtor did not attend.

APPLICABLE FEDERAL LAW TO DETERMINE LEGAL COMPETENCY OF PARTY

California Probate Code §§ 810 et seq.

§ 810. Legislative findings and declarations regarding legal capacity

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

§ 811. Unsound mind or incapacity

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decision making process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

§ 812. Capacity to make decision

> Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:
>
> (a) The rights, duties, and responsibilities created by, or affected by the decision.
>
> (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.
>
> (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The Due Process in Competence Determinations Act, Prob. Code, §§ 810 to 813, 1801, 1881, 3201, and 3204, offers a wide range of potential mental deficits that may support a determination that a person is of unsound mind or lacks the capacity to make a decision or to do a certain act. *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 640 (Cal. App. 4th Dist. 2013).

In California, a party is incompetent if he or she lacks the capacity to understand the nature or consequences of the proceeding, or is unable to assist counsel in the preparation of the case. *See* Cal. Prob. Code § 1801; *In re Jessica G.*, 93 Cal. App. 4th 1180, 1186 (2001); *Elder-Evins v. Casey*, 2012 U.S. Dist. LEXIS 92467 (N.D. Cal. July 3, 2012).

Substitution

Where a Debtor is incompetent in a Chapter 13 case, 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. FED. R. BANKR. P. 1016. Federal Rule of Civil Procedure 25, providing for substitution for incompetency, applies in adversary proceedings and contested matters. FED. R. BANKR. P. 7025, 9014(c). In relevant part, the Federal Rules of Civil Procedure provide:

> (b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

Fed. R. Civ. P. 25.

DISCUSSION

On the facts presented to the court, it appears there are serious questions as to Debtor's competency to represent himself in this Chapter 13 case. However, the Motion fails to state grounds upon

which the court can make such a determination. The Motion indicates Debtor has a progressively worsening dementia. Dckt. 26, ¶ 5. However, Movant also represents that Debtor was competent when filing this case and completing the requirements for his financial management course in July 2018. *Id*., 2.

Movant has identified herself as Debtor's caretaker, but it is unclear what her qualifications are with respect to determining the state of Debtor's mental capacity and whether he understands the nature of these proceedings and can effectively assists counsel in the Chapter 13 case.

No declarations have been provided by Debtor's doctors or those not responsible for his finances.

In her declaration Ms. Monroe states that "Debtor has no immediate family and no children that can assist him." Declaration ¶ 9, Dckt. 28. The way this is worded, it appears that Debtor does have immediate family and children, but whom just cannot "assist him." In reviewing the Certificate of Service for this Motion, the Motion does not appear to have been served on anyone other than the narrow group of creditors listed in this case.

No supplemental filings have been made since the prior hearing.

Ruling

The court has continued the hearing to afford the Debtor, the proposed personal representative, and Debtor's counsel the opportunity to document the disability and the ability of the proposed representative to fulfill the fiduciary duties of that position. Though a Motion has passed since the prior hearing on October 2, 2018, (Civil Minutes, Dckt. 34), the proposed personal representative and Debtor's counsel have been strangely silent. As noted in the Civil Minutes, this motion to substitute was not served on any of the Debtor's family members.

It appears that Debtor is in a very difficult situation. On Schedule I Debtor states having income of only $1,347.00 a month. Dckt. 1 at 31. On Schedule J Debtor lists expenses, excluding a mortgage or rent payment, of $1,347.00. *Id.* at 34-35. This leaves Debtor $260.00 a month to fund a plan.

To get to this $260.00 a month, Debtor states that he has only $15 a month in home maintenance expenses, $300.00 for food and housekeeping supplies, $65 for transportation, $80 for vehicle insurance, and $15 for vehicle registration.

The Plan provides for curing a $5,565.06 arrearage on the claim secured by Debtor's residence. Plan ¶ 3.07(c); Dckt. 5 at 3. No post-petition monthly installment is provided for in Class 1 or Class 4. However, on Schedule D Debtor lists there being a $232,469.00 claim secured by the residence, having a value of $323,663.00. Dckt. 1 at 23. Proof of Claim 2 filed by Champion Mortgage Company states that this is a reverse mortgage. The arrearage on Proof of Claim No. 2 is stated to be $6,678.80, with the interest rate on this obligation being 5.6250%. Proof of Claim No. 2, p. 2.

The Statement attached to Proof of Claim No. 2 indicates that the arrearage is property taxes (dating back to 2014) and forced plan insurance (dating back to 2015). *Id.* at 6-8. It appears that Debtor has been struggling financially for some time.

Taken at face value, Debtor has $100,000 in equity in the property. Though having equity in the real property, Debtor's income is so limited that he cannot pay for the expenses relating to the property. Debtor, and those assisting over the past four or five years have elected/been forced to spend Debtor's limited income on expenses other than those relating to the property.

Debtor's counsel has, most likely, taken this case on as a probably pro bono venture, attempting to assist Debtor notwithstanding the likelihood that he cannot perform the plan and fund the arrearage and attorney's fees. The total claims to be paid through the plan are $11,218. Counsel has deferred payment of all of his fees, totaling $4,000, to be made through the plan. That totals, without including the interest on the secured claims, of $15,218, in principal debt to be paid. With Chapter 13 Trustee fees (estimated at 8%), that amount to be paid (without including interest) is $16,435. Amortized over sixty months, that requires payments of $274. See Plan, Dckt. 5, and Proof of Claim no. 2.

Debtor's proposed plan payment $260.00 is insufficient to fund the proposed plan. Even at $260.00 the budget was razor thin, and appears likely to be one that slips to the bleeding edge (as opposed to the cutting edge).

If Debtor has now become too incompetent to continue in the prosecution of this case, he may well be incapable of handling his finances, his assets, and his rights in general. Debtor has a substantial asset, $100,000 of equity in the real property that he has been unable to pay the property taxes on and is at risk of losing over a "mere" $6,000 arrearage for advances on his reverse mortgage.

Schedule A/B discloses that Debtor has no other significant assets.

The proposed personal representative is the person who has been assisting the Debtor during the period that has led to this bankruptcy. It may be that Debtor has, stubbornly overruled this person attempting to assist him, effectively insisting on losing his one significant asset. Or it may be that Debtor and the person attempting to assist him have been equally unable to address the economic realities. Or there may be other factors at work.

Based on the evidence (and lack thereof) provided, the motion is denied without prejudice. It may be the propose representative may be the right person. She may not be the right person. But before finally making that determination the court affords her the opportunity to work with Debtor's counsel (who owes his fiduciary duty to Debtor) and doctors.

Before the court steps in and orders this be sent to Adult Protective Services (as it has in several other unrelated cases), the court affords Debtor's counsel the chance to address the situation with Debtor's doctors, public and private agencies providing support and oversight for persons in Debtor's situation, and the U.S. Trustee to move this a positive resolution.

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 Teresa Monroe ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is Denied without prejudice.

The Clerk of the Court shall forward a copy of this Order and the Civil Minutes for the November 6, 2018, to the attention of Jeffery Lodge, Esq., Office of the U.S. Trustee, as a referral to that office for review of this case and taking such action, including referral to such federal or state agencies whose duties include providing services or oversight for someone in Debtor's situation.

25. **18-24364-E-13 DPC-1** | **CLYDE HUGHES** **Mark Shmorgan** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **8-28-18 [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.

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—Final Hearing.

Sufficient Notice Provided. The court set the matter The court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The court continued the matter for further hearing on November 6, 2018.

The Objection to Confirmation of Plan is sustained.

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

A. Debtor failed to appear at the First Meeting of Creditors held on August 23, 2018.

OCTOBER 2, 2018 HEARING

At the hearing, the parties did not present the court with any medical testimony from Debtor's doctors or from Adult Protective Services.

The court continued the hearing on the Motion to be heard November 6, 2018, in conjunction with the Motion for Appointment of a Personal Representative for the Debtor.

October 15, 2018 Meeting of Creditors

The Trustee's Report of the 341 Meeting of Creditors held October 15, 2018 indicates Debtor did not attend.

Debtor's Possible Lack of Competency

The Chapter 13 Trustee's Report indicates Debtor appeared, but was unable to give competent testimony. The Chapter 13 Trustee noted that Debtor appeared incoherent and that Debtor's attorney would file a Motion to seek to appoint Debtor's daughter-in-law on behalf of Debtor.

Debtor filed a Notice of Incompetency and Motion for Substitution on September 15, 2018, wherein Debtor moved to substitute Teresa Monroe in place of Debtor. Dckt. 26. That motion is set to be heard on the same day as the hearing on the present Motion.

RULING

The court has continued the hearing to afford the Debtor, the proposed personal representative, and Debtor's counsel the opportunity to document the disability and the ability of the proposed representative to fulfill the fiduciary duties of that position. Though a Motion has passed since the prior hearing on October 2, 2018, (Civil Minutes, Dckt. 34), the proposed personal representative and Debtor's counsel have been strangely silent. As noted in the Civil Minutes, this motion to substitute was not served on any of the Debtor's family members.

It appears that Debtor is in a very difficult situation. On Schedule I Debtor states having income of only $1,347.00 a month. Dckt. 1 at 31. On Schedule J Debtor lists expenses, excluding a mortgage or rent payment, of $1,347.00. *Id.* at 34-35. This leaves Debtor $260.00 a month to fund a plan.

To get to this $260.00 a month, Debtor states that he has only $15 a month in home maintenance expenses, $300.00 for food and housekeeping supplies, $65 for transportation, $80 for vehicle insurance, and $15 for vehicle registration.

The Plan provides for curing a $5,565.06 arrearage on the claim secured by Debtor's residence. Plan ¶ 3.07(c); Dckt. 5 at 3. No post-petition monthly installment is provided for in Class 1 or Class 4. However, on Schedule D Debtor lists there being a $232,469.00 claim secured by the residence, having a value of $323,663.00. Dckt. 1 at 23. Proof of Claim 2 filed by Champion Mortgage Company states that this is a reverse mortgage. The arrearage on Proof of Claim No. 2 is stated to be $6,678.80, with the interest rate on this obligation being 5.6250%. Proof of Claim No. 2, p. 2.

The Statement attached to Proof of Claim No. 2 indicates that the arrearage is property taxes (dating back to 2014) and forced plan insurance (dating back to 2015). *Id.* at 6-8. It appears that Debtor has been struggling financially for some time.

Taken at face value, Debtor has $100,000 in equity in the property. Though having equity in the real property, Debtor's income is so limited that he cannot pay for the expenses relating to the property. Debtor, and those assisting over the past four or five years have elected/been forced to spend Debtor's limited income on expenses other than those relating to the property.

Debtor's counsel has, most likely, taken this case on as a probably *pro bono* venture, attempting to assist Debtor notwithstanding the likelihood that he cannot perform the plan and fund the arrearage and attorney's fees. The total claims to be paid through the plan are $11,218. Counsel has deferred payment of all of his fees, totaling $4,000, to be made through the plan. That totals, without including the interest on the secured claims, of $15,218, in principal debt to be paid. With Chapter 13 Trustee fees (estimated at 8%), that amount to be paid (without including interest) is $16,435. Amortized over sixty months, that requires payments of $274. See Plan, Dckt. 5, and Proof of Claim no. 2.

Debtor's proposed plan payment of $260.00 is insufficient to fund the proposed plan. Even at $260.00 the budget was razor thin, and appears likely to be one that slips to the bleeding edge (as opposed to the cutting edge).

If Debtor has now become incompetent to continue in the prosecution of this case, he may well be incapable of handing his finances, his assets, and his rights in general. Debtor has a substantial asset, $100,000 of equity in the real property that he has been unable to pay the property taxes on and is in risk of losing over a "mere" $6,000 arrearage for advances on his reverse mortgage.

Schedule A/B discloses that Debtor has no other significant assets.

The court denied the Motion for Appointment of the proposed personal representative without prejudice. See Civil Minutes for November 6, 2018 hearing on Motion for Appointment (DCN: MS-1).

October 15, 2018 Meeting of Creditors

The Trustee's Report of the 341 Meeting of Creditors held October 15, 2018 indicates Debtor did not attend.

As discussed above, Debtor's Plan is insufficiently funded. Further, the Plan does not appear feasible. Debtor now has at risk over a very small monetary arrearage (though it appears to be of Mount

Everest magnitude for Debtor given his income and other assets) his one substantial asset - the stated $100,000 equity in his residence.

The proposed plan does not comply with 11 U.S.C. §§ 1322 and 1325, the objection is sustained, and the proposed plan is not confirmed.

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

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

FINAL RULINGS

26.	**18-25149-E-13** **PSB-2**	**JOHN STAHLECKER** **Paul Bains**	**MOTION TO CONFIRM PLAN** **9-14-18 [27]**

Final Ruling: No appearance at the November 6, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 14, 2018. By the court's calculation, 53 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. John Stahlecker ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on October 18, 2018. Dckt. 32. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by John Stahlecker ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on September 14, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

27. 18-25226-E-13 DPC-1 | **RONALD GREGORY** **Justin Kuney** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **9-26-18 [17]**

Final Ruling: No appearance at the November 6, 2018 Hearing is required.

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The Trustee filed a "Notice of Dismissal" on November 2, 2018, Dckt. 31, stating that the Objection to Confirmation was dismissed by the Trustee prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041. No opposition to the Objection Motion was filed.

The Objection to Confirmation having been dismissed without prejudice, the matter is removed from the calendar.

28. **18-25141-E-13 DPC-1** **BLAKE HARBIN** **Chad Johnson** **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 9-26-18 [19]**

Final Ruling: No appearance at the November 6, 2018 Hearing is required.

- - - - - - - - - - -

Local Rule 9014-1(f)(2) Objection—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on September 26, 2018. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. Debtor's plan fails to provide for the secured portion of the Amended Claim (Proof of Claim, No. 1) filed by the IRS totaling $51,959.00. Failure to provide treatment for a secured claim reflects on the feasibility of the plan.

B. Debtor has exempted equity in an insurance claim on Schedule C under CCP section 704.020, which is not the correct exemption for this asset. (An Amended Schedule C was filed on October 21, 2018. Dckt. 32.)

Trustee's objections are well-taken.

The IRS asserts a claim of $66,756.86 in this case, with $51,959.00 asserted to be secured. The IRS' secured claim is not provided for in the plan.

Trustee alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of the IRS' secured claim portion. *See* 11 U.S.C. § 1325(a)(6).

Filing of Amended Plan and Motion to Confirm

On October 22, 2018, Debtor filed an Amended Plan (Dckt. 28) and Motion to Confirm (Dckt. 23). Debtor has also filed a Motion to Value the Secured Claim of the Internal Revenue Service. Dckt. 29.

The Amended Plan and Motion to Confirm is effectively a dismissal or abandonment of the prior plan.

The Objection is sustained and the Plan is denied confirmation, 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 Objection to the Chapter 13 Plan filed by [The Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed, without prejudice.

29. 18-25287-E-13 MALIK JOHNSON
DPC-2 Kyle Schmacher

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
10-3-18 [16]

Final Ruling: No appearance at the November 6, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 3, 2018. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

David Cusick (the "Chapter 13 Trustee") objects to Malik Johnson's ("Debtor") claimed exemptions under California law because Debtor has not been domiciled in California for the 730 continuous days preceding the filing of this petition, or in the alternative, the 180 plurality of days prior to the 730 days required. 11 U.S.C. § 522(a)(3)(A). Debtor claims exemptions pursuant to California Code of Civil Procedure sections 703.140(b)(3) and (b)(5).

On Debtor's Statement of Financial Affairs (Statement of Financial Affairs, Question 2, Dckt. 1 at p. 33), Debtor reports his prior address as 3414 Greenwich Street, Colombus, Ohio from 2016 through 2017.

Debtor has not opposed this Objection.

The Chapter 13 Trustee's Objection is sustained, and the claimed exemptions are disallowed.

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

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

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

IT IS ORDERED that Objection is sustained, and the claimed exemptions for various personal property for household use under California Code of Civil Procedure § 730.140(b)(3) and (b)(5) are disallowed in their entirety.

30. 18-23365-E-13 JB-1 | **TENA ROBINSON** **Jason Borg** | **CONTINUED MOTION TO VALUE COLLATERAL OF BOSCO CREDIT, LLC 7-19-18 [29]**

Final Ruling: No appearance at the November 6, 2018, hearing is required.

Sufficient Notice Provided. The court set the matter the court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The hearing on the Motion to Value Collateral and Secured Claim of Bosco Credit LLC ("Creditor") is continued to November 20, 2018 at 3:00 p.m.

The Judge who has presided over this matter thus far has a conflict and cannot appear at the November 6, 2018 hearing. In light of the case history, the court shall continue the case to November 20, 2018 at 3:00 p.m. to allow the past presiding Judge to again hear the matter.

The Motion to Value filed by Tena Robinson ("Debtor") to value the secured claim of Bosco Credit LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real

property commonly known as 5611 34th Avenue, California ("Property"). Debtor seeks to value the Property at a fair market value of $237,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

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

TRUSTEE'S RESPONSE

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

CREDITOR'S OPPOSITION

Bosco Credit LLC ("Creditor") filed an Opposition to Debtor's Motion on August 7, 2018. Dckt. 60. Creditor asserts that Debtor has improperly based her valuation on her own research. *Id.* at 2:17-21. Creditor also argues that the Senior mortgage holder entered into a loan modification with Debtor that prejudicially added to the principal of the senior lien in the amount of $51,000.00, the amount of which should therefore be treated as junior to Creditor's Second Deed of Trust. *Id.* at 3:28-4:13. After the

prejudicial amount is treated as a junior lien, there is sufficient equity in the Property such that Creditor's claim should not be wholly unsecured. *Id.* at 4:13-16.

Creditor concludes that Debtor's Motion should be denied in its entirety as the existence of equity prevents valuation or avoidance in any way. *Id*. at 5:13-15. Creditor requests in the alternative that an appraisal should be obtained to ensure an accurate valuation. *Id.* at 5:17-18. [FN. 1]

FN. 1. As discussed below, Creditor advances the argument that a dispute exists as to the validity, extent, and priority as between itself and the creditor who is the beneficiary under the senior deed of trust. As Creditor and its counsel are well aware, such determinations must be made through an adversary proceeding. Fed. R. Bankr. P. 7001(2). In light of Creditor asserting its rights to have a portion of the claim of the senior lien creditor subordinated to its junior lien, it is for Creditor to commence that necessary adversary proceeding (if it intends to prosecute any such asserted subordination rights). As of the court's November 3, 2018 review of this court's files, no such adversary proceeding has been commenced by Creditor to prosecute its asserted right of subordination.

DEBTOR'S REPLY
TO CREDITOR'S OPPOSITION

Debtor filed a Reply to Creditor's Opposition on August 16, 2018. Dckt. 64. Debtor asserts that her Declaration is based on her personal knowledge, which she obtained from personal research. *Id.* at 1:23-26. Debtor argues further that the senior lienholder only received through modification what it was entitled to as interest payments that Debtor had not been making. *Id.* at 2:4-8. Debtor adds that the modification reduced the interest rate to 2% for the first 5 years, 3% in year 6, and 3.375% from years 7-22, whereas the original interest rate was and adjustable 5.99% to 12.99% rate. *Id.* at 2:8-12. Debtor concludes that Creditor is not in a worse position, may be in a better position because the modification prevented a foreclosure that would have left Creditor's claim largely unsecured, and therefore the Motion should be granted. *Id.* at 2:12-17.

AUGUST 21, 2018 HEARING

At the August 21, 2018 hearing, the court decided to continue the hearing to allow Creditor the opportunity to obtain an appraisal. Dckt. 66. The court made clear to Creditor that the sole purpose for continuing the hearing was to allow the introduction of evidence as to the value of the Property. The court noted during the hearing several deficiencies in Creditor's opposing arguments, and did not grant a continuance for the purpose of allowing Creditor to relitigate issues already before the court.

The court's Order stated explicitly:

> **IT IS ORDERED** that the hearing on the Motion pursuant to 11 U.S.C. § 506(a) to value the secured claim of Bosco Credit LLC ("Creditor"), a second in priority deed of trust, is continued to 3:00 p.m. on November 6, 2018. On or before October 16, 2018, **Creditor shall file and serve its evidence of value**, and Replies,

if any, filed and served on or before October 30, 2018. **No other or further supplemental pleadings are authorized in this contested matter.**

Order, Dckt. 72 (emphasis added).

CREDITOR'S SUPPLEMENTAL OPPOSITION AND EVIDENCE OF VALUE

Creditor filed supplemental pleadings on September 21, 2018. Dckts. 81-83. The first is the Declaration of Appraiser Robb Roberts. Dckt. 83. Attached as Exhibit 1 to the Declaration is a 36 page appraisal report. [FN. 2]

FN.2. Under the Local Bankruptcy Rules, a motion, opposition, each declaration, and the exhibits (which may be combined into one exhibit document) are to be filed as separate documents. L.B.R. 9004-1, 9004-2. The court is confident that future pleadings will be in compliance with these Rules.

Creditor also filed other/further supplemental pleadings, including a request for judicial notice of Proof of Claim, No. 1 (Dckt. 82) and a Supplemental Opposition. This was filed notwithstanding the court expressly ordering Creditor to file and serve its evidence of value and expressly ordering:

> **No other or further supplemental pleadings are authorized in this contested matter.**

Order, Dckt. 72. Notwithstanding the court's expressly order, Creditor has apparently "overruled" the court and issued its own authorization to file further supplemental pleadings. [FN. 3]

FN. 3. Any issues and corrective action to be taken relating to the violation of this court's order will be addressed in separate proceedings.

In large part, the Supplemental Opposition that Creditor authorized itself to file notwithstanding the court's order merely rehashes what has already been argued in the Opposition. Some of the arguments include:

1. Creditor's valuation should stand over Debtor's because evidence from an expert is more weighty than that of a Debtor. Dckt. 81 at 3:1-5.

2. Debtor obtained a modification in 2012 with respect to the senior lien on the Property. *Id*. at 13.5-14.5. When the terms included in the modification are applied to the five factors used to determine if a modification is prejudicial, Specialized's modification is prejudicial to Respondent. Even though many of the changes in the modification executed by the senior

lienholder are not considered "prejudicial", the remaining terms are. Now, the bulk of the loan is due at maturity. $233,927.11. *Id*. at 4:20-24.

3. If the senior lienholder's claim is subordinated due to prejudice of the modification, between $51,000.00 and $233,927.11 of the senior lienholder's claim would be subordinate to that of Respondent, thereby rendering all or part of Creditor's claim secured. *Id*. at 5:1-2.

4. Based on the foregoing, Creditor respectfully requests that the Court value the subject property at $245,000.00. Further, Creditor respectfully requests that all or a portion of the senior lienholder's claim be determined to be subordinate to Creditor. *Id*. at 5:5-7.

As show in the rehashing of the prior arguments, Creditor prevailing will in large part (given senior lien creditor's Proof of Claim No. 1 being filed in the amount of $241,164.68) turn on Creditor filing and successfully prosecuting an adversary proceeding subordinating a significant part of senior lien creditor's claim.

DEBTOR'S REPLY TO CREDITOR'S SUPPLEMENTAL OPPOSITION

Debtor filed a Supplemental Reply on October 30, 2018. Dckt. 90. As a part of its Reply, Debtor filed the Declaration of appraiser Wesley Clesi (Dckt. 91) and his appraisal report identified as Exhibit A. Dckt. 92. Debtor's new evidence asserts the Property had a value of $195,000.00 as of the date of filing.

The Debtor's Supplemental Reply argues Creditor's claim, under either Debtor's personal or expert valuations, is completely unsecured. Debtor's Supplemental Reply argues further that the modification obtained in 2012 was not prejudicial to the Creditor, as the loan modification did not give the senior lienholder any more money than what was originally owed and actually provided for lower interest.

DISCUSSION

Creditor improperly seeks to litigate asserted subordination rights against a ghost party–HSBC Bank USA, N.A. not being a party to a motion to value the secured claim of Creditor. The court must have the real party in interest whose rights are being adjudicated before it.

To adjudicate the claim lien priority dispute between HSBC Bank USA, N.A. and Creditor (which are a core, plan confirmation and claim matters), there must be an adversary proceeding that has the real parties in interest - HSBC Bank USA N.A. and Creditor - before the court having their respective rights as creditors having interests in property of the bankruptcy estate adjudicated.

Absent such an adjudication, the record deeds of trust show HSBC Bank USA, N.A. having the senior lien claim on the property securing the two claims.

No Evidence as to Debtor's Primary Residence

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

However, as Creditor states, this proposition requires that the Property is Debtor's primary residence. On Debtor's Petition, she identifies her residence as 3350 Y Street, Sacramento, California (the "Y Street Property"). Dckt. 1. In its own proof of service for its Opposition, Creditor provides notice to Debtor at the Y Street Property. Dckt. 61. Creditor has not offered any evidence (and in its supplemental pleadings has not addressed the issue) to show that the Property and not the Y Street Property is Debtor's primary residence. From the only evidence available to the court, it appears Debtor's principal residence is the Y Street Property. Therefore, Debtor is permitted under 11 U.S.C. § 506(a) to bifurcate the unsecured and unsecured portions of Creditor's claim.

Impaired Exemption Calculation

While this Motion is not for lien avoidance, Creditor still felt compelled in its initial Opposition to address the issue. Creditor concludes that the existence of any equity prevents its claims from being valued or avoided in any way. Dckt. 60 at 5:14-15. Creditor's conclusion seems to muddy valuation with avoidance of judicial liens under 11 U.S.C. § 522(f)(1). That formula requires adding all liens, the Debtor's exemptions, and the judicial lien to determine whether the judicial lien impairs the exemption [FN.4.]. 11 U.S.C. § 522(f)(2)(A). Proof of Claim 1–1 filed by HSBC indicates a First deed of trust for $241,164.68, and Proof of Claim 2–1 filed by Bosco Credit LLC Second deed of trust for $153,184.89. These liens total $394,349.57. For purposes of an impaired exemption analysis, it is unclear how Creditor is perceiving its "judicial lien" for $79,227.45 is not wholly unsecured.

FN.4. The court notes again the Creditor does not have a judicial lien, and the avoidance analysis is entirely inapplicable to Creditor's consensual lien. The analysis provided is for the benefit of Creditor's counsel.

Conclusion

The various values asserted for the Property now include $237,000.00 (Debtor's personal valuation), $195,000.00 (Debtor's appraisal), and $245,000.00 (Creditor's appraisal). HSBC Bank USA, N.A. Trustee's senior lien amounts to $241,164.68. If the court were to average only Debtor's original valuation with Creditor's valuation, the Property would have a value of $241,000.00. Creditor's claim is entirely unsecured in all but the most deferential valuation.

In light of the case history, the court shall continue the case to November 20, 2018 at 3:00 p.m. so the Judge who presided over the prior hearing can continue to hear the matter.

At the November 20, 2018, hearing the court will conduct a Scheduling Conference for this contested matter. Counsel for Creditor shall report on the status of the filing of a Complaint and the prosecution of any asserted rights of subordination that it will prosecute against any senior lien holders.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim of Bosco Credit, LLC ("Creditor") filed by Tena Robinson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Value Collateral is continued to November 20, 2018 at 3:00 p.m., at which time the court will conduct a scheduling conference.
>
> **IT IS FURTHER ORDERED** that Kristin A Zilberstein, Esq. And Jennifer R. Bergh, Esq., counsel for Creditor in this Contested Matter, and Jason Borg, Esq., and each of them shall appear at the November 20, 2018 – No Telephonic Appearances Permitted. Counsel for Creditor shall report on the status of the filing of a Complaint and the prosecution of any asserted rights of subordination that it will prosecute against any senior lien holders.
>
> **IT IS FURTHER ORDERED** that the court suspends the application of Federal Rule of Civil Procedure 41(a)(1)(A)(i), as incorporated into Federal Rules of Bankruptcy Procedure 7041 and 9014, in this Contested Matter.

31. **18-23365-E-13** **TENA ROBINSON** **CONTINUED MOTION TO CONFIRM PLAN**
JB-4 **Jason Borg**
7-23-18 [44]

Final Ruling: No appearance at the November 6, 2018 Hearing is required.

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

Sufficient Notice Provided. The court set the matter The court set the matter for hearing November 6, 2018 at 3:00 p.m.

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

The hearing on the Motion to Confirm Plan is continued to 3:00 p.m. on November 20, 2018.

The Judge who has presided over this matter thus far has a conflict and cannot appear at the November 6, 2018 hearing. In light of the case history, the court shall continue the case to November 20, 2018 at 3:00 p.m. to allow the past presiding Judge to again hear the matter.

Tena H. Robinson ("Debtor") seeks confirmation of the Amended, which would be the first Confirmed Plan in this case. The Amended Plan provides for monthly payments of $2,450.00 for a 37 month plan term, and a 0 percent dividend to unsecured creditors. Dckt. 43. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR'S OPPOSITION

Bosco Credit, LLC ("Creditor") holding a secured claim filed an Opposition on October 9, 2018. Dckt. 85. Creditor argues the Motion should be denied because (A) the plan impermissibly modifies Creditor's rights as a secured creditor, (B) the plan does not provide for payments for Creditor's secured claim and therefore is not feasible, (C) Creditor's claim is not wholly unsecured, and (D) Debtor's motion to value should be denied.

DEBTOR'S REPLY

Debtor filed a Reply to Creditor's Opposition on October 18, 2018. Dckt. 87. Debtor points out in its Reply that Creditor's grounds for opposition all depend on the Debtor's motion to value will being denied. If that motion is granted, Creditor's claim will be entirely unsecured.

DISCUSSION

Creditor asserts as an objection possible rights it may have against the HSBC Bank USA, N.A., who holds the senior deed of trust, to subordinate part of claim secured by the senior deed of trust. In this opposition and the opposition to value Creditor's secured claim, Creditor improperly seeks to litigate asserted subordination rights against a ghost party - HSBC Bank USA, N.A. – which is not being a party to a motion to value the secured claim of Creditor. The court must have the real party in interest whose rights are being adjudicated before it.

To adjudicate the claim lien priority dispute between HSBC Bank USA, N.A. and Creditor (which are a core, plan confirmation and claim matters), there must be an adversary proceeding (Fed. R. Bankr. P. 7001(2)) that has the real parties in interest - HSBC Bank USA N.A. and Creditor - before the court having their respective rights as creditors having interests in property of the bankruptcy estate adjudicated.

Absent such an adjudication, the record deeds of trust show HSBC Bank USA, N.A. having the senior lien claim on the property securing the two claims.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Tena H. Robinson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion is continued to 3:00 p.m. on November 20, 2018.

32. 18-20143-E-13 SLE-4 LAURO/DANELLE AVILA MOTION TO CONFIRM PLAN 9-25-18 [82]

Final Ruling: No appearance at the November 6, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on September 25, 2018. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Lauro and Danelle Avila ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on October 19, 2018. Dckt. 91. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by Lauro and Danelle Avila("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on September 25, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed

order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

33. 18-21247-E-13 SLE-2 — CHARLES HERNANDEZ — Steele Lanphier — MOTION TO CONFIRM PLAN — 9-27-18 [59]

Final Ruling: No appearance at the November 6, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 27, 2018. By the court's calculation, 40 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Charles Hernandez ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on October 18, 2018. Dckt. 65. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

IT IS ORDERED that the Motion is granted, and Debtor's Amended Chapter 13 Plan filed on September 27, 2018, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.