

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**Notice**

**The court has reorganized the cases, placing all of the Final Rulings in the second part of these Posted Rulings, with the Final Rulings beginning with Item 14.**

**The court has also reorganized the items for which the tentative rulings are issued, Items 1–13, attempting to first address the items in which short oral argument is anticipated.**

**December 5, 2017, at 3:00 p.m.**

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1.	<a href="#"><u>17-26704-E-13</u></a>	<b>SHERRY BERCU</b>	<b>MOTION TO CONFIRM PLAN</b>
	<b>CYB-1</b>	<b>Candace Brooks</b>	<b>10-24-17 <a href="#"><u>[15]</u></a></b>

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2017. By the court’s calculation, 42 days’ notice was provided. 42 days’ notice is required. FED. R. BANKR. P. 2002(b); 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

**December 5, 2017, at 3:00 p.m.**

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, as amended at the hearing, is granted.**

Sherry Bercu (“Debtor”) seeks confirmation of the Amended Plan because Debtor is reclassifying the Ally Financial claim and revised Schedule J to now include her vehicle payment as well as increasing her expected transportation expenses and medical costs for her son. Dckt. 15. The Amended Plan continues to classify the Internal Revenue Service as priority Class 5 creditor, and changes Class 7 claims from receiving 29% to 13%. 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 November 14, 2017. Dckt. 24. The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

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

On Schedule I, Debtor states that she is making a \$200.00 per month voluntary retirement contribution. Debtor bases her \$283.00 Net Monthly Income left after making that contribution. However, Debtor admitted at the First Meeting of Creditors on November 9, 2017, that she increased her contribution \$100.00 (it having been only \$100.00 per month), the Chapter 13 Trustee stating that the reason for the increase stated by Debtor was so that she could “recoup financial loss during her divorce proceeding.” Opposition, p. 2:1–4.5; Dckt. 24.

On Schedule B, Debtor lists having a CalPERS pension and a 457 Plan Deferred Comp Plan, with Debtor’s portion of the 457 Plan being \$2,000.00. Dckt. 1 at 13.

On Schedule I, Debtor lists her employer as the State of California, having been employed there for ten years. Dckt. 1 at 31. She further lists her monthly income as being \$9,000.00. *Id.* From that, \$678.96 is withheld as Debtor’s mandatory retirement contribution to CalPERS. On top of that, Schedule I lists the additional \$200.00 per month voluntary, additional contribution. *Id.* at 32.

On Schedule J, Debtor states that her Monthly Net Income is \$1,027.00. *Id.* at 34. Debtor’s monthly expenses on Schedule J are stated to be \$4,252.66.

On October 24, 2017, Debtor filed an Amended Schedule J on which her expenses are increased to \$4,996.66, with her Monthly Net Income reduced to the \$283.00 that Debtor now uses in this Plan. Dckt. 20 at 3. The increase comes from Debtor identifying that she now has \$160.00 in monthly child care expenses and a \$486.39 monthly car payment (2017 Hyundai). *Id.*

In a Reply filed on November 29, 2017, Debtor states that she accepts the Chapter 13 Trustee's suggestion and agrees to amend her plan payments to increase them to \$383.00 per month. Dckt. 27.

The Amended Plan, with payments increased to \$383.00 per month, does comply 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 Sherry Bercu ("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 granted, and the proposed Chapter 13 Plan, as amended by Debtor to increase the monthly plan payment to \$383.00 per month is confirmed. Counsel for Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order, with the above amendment, confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 27, 2017. By the court's calculation, 39 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

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

Irma Quiambao ("Debtor") seeks confirmation of the Modified Plan because Debtor experienced a medical emergency that required her to be hospitalized, resulting in lost wages. Dckt. 81. The Modified Plan changes the monthly plan payments from \$650.00 to \$700.00 per month for the next thirty-four months, and then nine monthly payments of \$934.00 per month. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 17, 2017. Dckt. 92. The Chapter 13 Trustee notes that the Modified Plan provides for a 0% interest rate to Class 2 A.1 "Check into Cash," while the initial confirmed plan accounted for a 4.75% interest rate. Debtor has already paid \$335.04 that is not authorized by the Modified Plan.

The Chapter 13 Trustee does not oppose correcting the interest rate in the order confirming.

## **DEBTOR'S REPLY**

Debtor filed a Reply on November 28, 2017, indicating that Debtor inadvertently filed her Modified Plan without the 4.75% interest rate included. Debtor asserts that this error does not affect the feasibility of the Plan and that no creditors have objected. Therefore, Debtor proposes for the court to issue an order with amended text indicating the 4.75% interest rate and new dividend amount.

## **RULING**

The Modified Plan, as amended to correct the interest rate, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan, as modified to state that the Class 2 A. 1. interest rate is 4.75%, filed on October 27, 2017, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick ("the Chapter 13 Trustee") for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on November 8, 2017. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

- A. Richard Bailon and Barbara Bailon ("Debtor") proposed a Plan that is not Debtor's Best Effort under 11 U.S.C. § 1325(b); and
- B. Debtor has not clearly listed prior bankruptcy cases.

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of

the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The Plan proposed payments of \$345.00 per month for thirty-six months with a 1% dividend to unsecured creditors, totaling \$821.00. However, the Plan also proposes to pay Auto America 10% interest on its \$6,634.20 secured claim. The Chapter 13 Trustee argues that this interest rate could be reduced under the Supreme Court's holding in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, the Court determined that debtors may adjust contractually based interest rate if it is greater than national prime rate. 541 U.S. 465, 478–79. Therefore, Debtor's interest rate of 10% can be adjusted down so that Debtor may increase the amount of disposable income paid to unsecured claims under 11 U.S.C. § 1325(b)(2).

In addition, the Chapter 13 Trustee reports that while Debtor listed a prior bankruptcy case from Arizona (Case No. 13-16896), it is not clear if Debtor received a discharge in that case. Consequently, the Chapter 13 Trustee is unable to ascertain if Debtor is entitled to a discharge in this current bankruptcy case.

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

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

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

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

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

4.

**17-26156-E-13**  
**DPC-1**

**THOMAS FOX**  
**Diana Cavanugh**

**OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK**  
**11-1-17 [16]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on November 1, 2017. 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.**

David Cusick ("the Chapter 13 Trustee") opposes confirmation of the Plan on the basis that the Plan relies on an unfiled motion to value.

The Chapter 13 Trustee's objection is well-taken. A review of Thomas Fox's ("Debtor") Plan shows that it relies on the court valuing the secured claim of Wheels Financial Group, LLC. Debtor has failed to file a Motion to Value the Secured Claim of Creditor, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

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

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



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

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

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

5. [17-26462-E-13](#)      **ABRAHAM RUELAS**      **OBJECTION TO CONFIRMATION OF**  
**DPC-1**      **David Foyil**      **PLAN BY DAVID P. CUSICK**  
11-8-17 [\[21\]](#)

**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).**

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on November 8, 2017. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

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

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

A. Abraham Ruelas (“Debtor”) is delinquent and has not made any plan payments;

- B. Debtor has not provided pay advices;
- C. The Plan relies upon a pending motion to value; and
- D. Debtor cannot afford the plan payment.

## **DEBTOR'S OPPOSITION**

Debtor filed an Opposition on November 17, 2017. Dckt. 27. Debtor states that he paid \$720.00 to cure the delinquency on November 10, 2017, and is now current under the Plan. He also states that his attorney sent pay advices to the Chapter 13 Trustee. He notes that a hearing on a motion to value was scheduled for November 21, 2017, and he states that he amended Schedules I & J to remove unemployment income.

## **CHAPTER 13 TRUSTEE'S STATUS REPORT**

The Chapter 13 Trustee filed a Status Report on November 28, 2017. Dckt. 32. He states that the delinquency has been cured, that pay advices have been provided, and that the pending motion to value was granted.

The Chapter 13 Trustee continues to assert that Debtor cannot afford the plan payment. Specifically, the Chapter 13 Trustee notes that Debtor removed unemployment income from Schedule I and added or increased four expenses on Schedule J. Debtor increased medical and dental from \$47.00 to \$540.00, taxes from undisclosed to \$200.00, lawyer fees from undisclosed to \$388.00, and recreational expenses from \$0.00 to \$100.39. *See* Dckt. 26.

## **RULING**

The Chapter 13 Trustee's remaining objection is well-taken. Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Chapter 13 Trustee has noted four areas where expenses have increased without explanation, and he has pointed out that Debtor's only explanation is that Debtor has "reduced [his] recreational expenses by twenty-four and 61/100 dollars (\$24.61)." Dckt. 28 at 2 6–7. Debtor's statement is incorrect and is the tip of a larger problem with Amended Schedule J.

A review of Amended Schedule J shows that there are additional changes other than mentioned already, and they include:

- A. Telephone, cell phone, internet, satellite, and cable services decreased from \$378.38 to \$333.00;
- B. Clothing, laundry, and dry cleaning increased from \$0.00 to \$90.00;
- C. Personal care increased from \$60.00 to \$80.00;

- D. Transportation decreased from \$577.50 to \$502.50;
- E. Vehicle insurance increased from \$182.01 to \$186.00;
- F. Union dues was added at \$18.00;
- G. Postage was added at \$5.00; and
- H. Work lunches was added at \$15.00.

Dckt. 26.

Despite the various changes to income and expenses, the original and amended Schedule J arrive at the same monthly net income: \$720.00. *Compare* Dckt. 1, *with* Dckt. 26. One or two small changes to income and expenses could arrive at the same net monthly income without raising too much concern, but when twelve expenses change, the net monthly income should not be exactly the same. Debtor's Amended Schedule J appears to be constructed with a result in mind and Debtor listing whatever numbers he has to reach his desired net monthly income.

The "made as instructed" nature of the Amended Schedule J expenses to achieve a preconceived \$720.00 net monthly income is heightened by several other expenses. One is that in Debtor's household of one adult and four children (including two teenagers), there is only \$500.00 per month expense for food and housekeeping supplies. If the court allows only \$75.00 per month for housekeeping supplies, there would be \$425.00 for food. That works out to be \$0.94 per person per meal in a thirty-day month.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

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

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 13, 2017. By the court’s calculation, 22 days’ notice was provided. 21 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice).

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

<p><b>The Motion to Sell Property is granted.</b></p>
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The Bankruptcy Code permits Kevin Mooney and Eleanor Mooney, 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 3349 Adam Court, Rescue, California (“Property”).

The proposed purchaser of the Property is Brandon Reinhardt, and the terms of the sale are:

- A. Purchase price of \$625,000.00, with a deposit of \$6,250.00.
- B. Payment of approximately \$480,000.00 from the proceeds of sale to HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc. Mortgage Loan Trust, Series 2007-1, Mortgage Pass-Through Certificates N.102-4201.NF in satisfaction of its lien.
- C. Payment of approximately \$13,287.54 from the proceeds of sale to California Service Bureau, Inc., in full satisfaction of its claim.

- D. Real estate agent commission of \$18,750.00 to Polly Rathe, who represents both the buyer and seller and who is charging 3% to represent the seller and 0% to represent the buyer.
- E. Property taxes of approximately \$3,053.00 paid from escrow to El Dorado County Tax Collector.
- F. Other closing costs of \$2,500.00 include a home warranty, an unsecured tax lien, title and escrow fees, and transfer tax.
- G. Movant will receive approximately \$107,000.00 in net proceeds from the sale.

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

David Cusick ("the Chapter 13 Trustee") filed a Non-Opposition on November 14, 2017. Dckt. 91.

### **DISCUSSION**

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it pays two claims fully while netting roughly \$107,000.00 for Movant. This sale will complete the Plan.

Movant requests that the court waive the fourteen-day stay of enforcement listed in Federal Rule of Bankruptcy Procedure 6004(h). Movant has not presented any grounds for that request, though, and the court does not grant it.

Movant has estimated that a three percent broker's commission from the sale of the Property will equal approximately \$18,750.00. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker a three percent commission.

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 Kevin Mooney and Eleanor Mooney ("Chapter 13 Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Kevin Mooney and Eleanor Mooney, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Brandon Reinhardt or nominee (“Buyer”), the Property commonly known as 3349 Adam Court, Rescue, California (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$625,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 90, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
- C. The Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. The Chapter 13 Debtor is authorized to pay a real estate broker’s commission in an amount equal to three percent of the actual purchase price upon consummation of the sale. The three percent commission shall be paid to Chapter 13 Debtor’s agent, Polly Rathe.
- E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on October 20, 2017. All creditors have not been served. By the court's calculation, 46 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has not been set properly 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.

<p><b>The Motion to Confirm the Amended Plan is denied without prejudice.</b></p>
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Federal Rule of Bankruptcy Procedure 2002(b) requires that service be provided to all creditors so that they may file objections and be made aware of the confirmation hearing for a Chapter 13 plan. Here, Felita Toney ("Debtor") did not list any creditors in the proof of service for this Motion, even though numerous creditors are listed on the master address list. *Compare* Dckt.3, *with* Dckt. 19. There is no evidence that creditors have been notified of the proposed amended plan. The Motion is denied without prejudice.

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

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

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

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

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR PROVIDES SERVICE TO ALL CREDITORS**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Felita Toney (“Debtor”) has provided evidence in support of confirmation. David Cusick (“the Chapter 13 Trustee”) filed a Non-Opposition on October 30, 2017. Dckt. 20. 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 Felita Toney (“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 October 12, 2017, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to David Cusick (“the Chapter 13 Trustee”) for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.



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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*) on November 1, 2017. 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 -----.

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

- A. Michael Hitchcock ("Debtor") is \$405.08 delinquent in plan payments, not having paid anything yet;
- B. Debtor has not provided the most recent tax returns to the Chapter 13 Trustee;
- C. Debtor has not provided the Class 1 Checklist and Authorization to Release Information forms;
- D. The Plan will not complete within sixty months;
- E. The arrears payment listed in Class 1 is incorrect;

- F. Class 2 includes a duplicate claim from Class 1 and a claim that should be listed in Class 7;
- G. Section 2.15 of the Plan does not list a total amount for unsecured debt and the percentage to be paid on those debts; and
- H. The Plan fails the liquidation analysis.

The Chapter 13 Trustee's objections are well-taken. The Chapter 13 Trustee asserts that Debtor is \$405.08 delinquent in plan payments, which represents one month of the plan payment. According to the Chapter 13 Trustee, the Plan in § 1.01 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).

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); 11 U.S.C. § 1325(a)(9); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. That is a ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor has not provided the Class 1 Checklist and Authorization to Release Information forms to the Chapter 13 Trustee in violation of Local Bankruptcy Rule 3015-1(b)(6).

Debtor is in material default under the Plan because the Plan will not complete in sixty months. According to the Chapter 13 Trustee, the Plan needs to increase payments from \$405.08 to \$3,180.00 per month to complete timely. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Class 1 of the Plan lists \$0.00 for a monthly dividend to mortgage arrears, but the minimum amount should be \$1,562.00.

Class 2B and 2C include a duplicate claim for Selene Finance listed in Class 1. Additionally, Class 2C lists a student loan debt that should be included in Class 7 instead.

Section 2.15 of the Plan does not state a total amount for unsecured debt, and it does not include what percentage will be paid on those unsecured debts.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that there are non-exempt assets of \$122,015.78, but the Plan does not list a dividend for unsecured claims. There may be additional equity that would be available to pay unsecured claims in Chapter 7, as opposed to what has been proposed in the Plan.

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

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

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

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

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

9.	<a href="#"><u>17-26420-E-13</u></a> <b>DPC-1</b>	<b>MARK TURPIN</b> <b>Mohammad Mokarram</b>	<b>OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK</b> <b>11-8-17 [15]</b>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on November 8, 2017. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

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

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

- A. Mark Turpin (“Debtor”) has not provided proof of his Social Security number;
- B. The mortgage payment amount listed in Class 4 is incorrect; and
- C. The Plan is not Debtor’s best effort.

The Chapter 13 Trustee’s objections are well-taken. Debtor failed to provide proof of his Security Number at the first Meeting of Creditors on November 2, 2017, as required. At that same meeting, Debtor admitted that the mortgage payment listed in Class 4 should be \$1,202.00, not \$1,400.00.

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

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

The Plan proposes to pay a three percent dividend to unsecured claims, but there may be additional disposable income to fund the Plan. First, Schedule I may have underestimated Debtor’s monthly income at \$6,224.00 because an income statement that Debtor provided for his business indicates that over the last eight months, the average amount was closer to \$11,640.62.

Second, Debtor’s bank statements from Wells Fargo indicate that his business earns \$14,518.32 per month, but Debtor has not provided bank statements from Golden One Credit Union. Third, the 2016 Corporate Tax Return for Debtor’s business shows \$152,595.00 spent on salaries, \$31,496.00 on day labor, and \$9,821 on subcontractors. Debtor listed on the Business Case Questionnaire that he has no employees, though. That average monthly amount is \$12,716.26.

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

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

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

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

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

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 22, 2017. By the court's calculation, 44 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); LOCAL BANKR. R. 3015-1(d)(1).

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

<p><b>The Motion to Confirm the Amended Plan is denied.</b></p>
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Richard Cruz ("Debtor") seeks confirmation of the Amended Plan because he has removed income and expenses for his non-filing spouse. Dckt. 159. The Amended Plan proposes plan payments of \$1,260.00 for sixty months with a 0.00% dividend to unsecured claims. 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 November 17, 2017. Dckt. 165. The Chapter 13 Trustee asserts that Debtor is \$485.00 delinquent in plan payments, which represents less than one month of the \$1,260.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

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

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date

of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The Plan proposes to pay a zero percent dividend to unsecured claims, which total \$183,852.00, though Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals \$5,801.53. Thus, the court may not approve the Plan.

The Chapter 13 Trustee also raises a concern that this plan may not have been filed in good faith. 11 U.S.C. § 1325(a)(3). He notes that there is a motion not set for hearing for a boat and that the transaction has been misrepresented as an arms' length transaction. He also notes that Debtor has omitted S-Corp income and has failed to provide numerous documents regarding dissolution, spousal support, and taxes.

Concerning the S Corp, Debtor does not list an income from said corporation, but only a monthly salary of \$9,000.

## **RULING**

In addition to the above, requests for Special Notice in this case were filed by: (1) Wells Fargo Bank, N.A., as Trustee (Dckt. 70); (2) HSBC USA, N.A., as Trustee (Dckt. 15); and (3) Synchrony Bank (Dckt. 10). The Certificate of Service for the present Motion (Dckt. 162) does not reflect service being made on these three requesting parties, and if made, not at the address as requested (Synchrony Bank notice having been sent to a post office box in Florida and not to counsel as directed).

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 Richard Cruz ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 20, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Impose 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.

**The Motion to Impose the Automatic Stay is denied.**

Kenneth Tabor ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) imposed in this case. This is Debtor's third bankruptcy petition pending in the past year with the prior two cases having been dismissed. Debtor's prior bankruptcy cases (Nos. 16-21854 and 16-27948) were dismissed on September 7, 2017, and December 19, 2016, respectively. *See* Order, Bankr. E.D. Cal. No. 16-21854, Dckt. 149, September 7, 2017; Order, Bankr. E.D. Cal. No. 16-27948, Dckt. 11, December 19, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(4)(A)(i), the provisions of the automatic stay did not go into effect upon Debtor filing the instant case.

Here, Debtor states that the instant case was filed in good faith as an emergency filing to prevent foreclosure on his residence. Debtor states that he will file the remaining pleadings missing from this admitted skeletal filing "well before the hearing." Dckt. 13 at 2:3. Previously, the court extended the deadline to file documents until December 4, 2017, and as of the court's review, those documents have not been filed.

## CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 28, 2017. Dckt. 19. The Chapter 13 Trustee states that he is unable to determine if Debtor's circumstances have changed such that this filing would be in good faith. The Chapter 13 Trustee emphasizes, as Debtor admits, that this is a skeleton filing. He also notes that Debtor discloses a sale of property that has not been approved by the court and by which Debtor expects to receive \$230,096.43 in net proceeds.

## RULING

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

Debtor's prior cases were dismissed after Debtor failed to make plan payments (No. 16-21854) and after Debtor failed to file documents (No. 16-27948). Debtor's only argument that this case was filed in good faith is that it was filed to prevent foreclosure.

A review of the docket in this case and in the immediately prior case shows that the court has not approved a possible sale of real property. Debtor has provided a copy of a Seller's Estimated Closing Statement, however, and it is dated as being prepared on November 9, 2017, after this case was filed. *See* Exhibit A, Dckt. 16. Neither the Motion nor Debtor's Declaration disclose whether such a sale has occurred.

The court summarizes Debtor's various bankruptcy cases as follows. The first was a Chapter 13 case filed on February 17, 2016. Bankr. E.D. Cal. No. 16-20881. Debtor was represented by counsel in that case. It was dismissed on March 17, 2017, due to Debtor failing to file Schedules and Statement of Financial Affairs. No Plan was filed.

Debtor, with the assistance of another attorney filed his second Chapter 13 case on March 25, 2016. Bankr. E.D. Cal. No. 16-21854. Debtor filed his Schedules and Statement of Financial Affairs in the second bankruptcy case. Debtor confirmed a Plan in the second case. The second bankruptcy case was dismissed on September 7, 2017, due to Debtor's default in the plan payment.

Debtor, *in pro se*, then filed his third Chapter 13 case on December 1, 2016. Bankr. E.D. Cal. No. 16-27948. It was dismissed on December 19, 2016, due to Debtor's failure to file Schedules and Statement of Financial Affairs. No plan was filed in the third bankruptcy case. Debtor commenced the third bankruptcy case while his second case was pending. The case was filed because the second bankruptcy case had been dismissed, that dismissal was vacated, and the second case continued until it was re-dismissed on September 7, 2017 (nine months later).

In the present Motion, Debtor assures the court there is no reason for concern as he has a cash sale pending for undeveloped property in Granite Bay. This bankruptcy case was filed on November 6, 2017. Now, twenty-five days later (when the court reviewed the Docket on December 1, 2017), no motion



for authorization for Debtor to sell property has been filed. While Debtor may believe that there is a sale pending, he is not authorized to sell property of the bankruptcy estate. 11 U.S.C. § 363. Twenty-five days after the case was filed no Schedules have been filed, no Statement of Financial Affairs has been filed, and no Chapter 13 plan has been filed.

Debtor has not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior cases for the court to impose the automatic stay. Debtor is not actively prosecuting this case.

The Motion is denied.

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

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

The Motion to Impose the Automatic Stay filed by Kenneth Tabor (“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.

12. [14-25350](#)-E-13      **MATTHEW O'DONNELL AND**      **MOTION TO MODIFY PLAN**  
**CA-2**      **JANICE VALDEZ O'DONNELL**      **10-24-17 [41]**  
                         **Michael Croddy**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 24, 2017. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

<b>The Motion to Confirm the Modified Plan is denied.</b>
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Matthew O'Donnell and Janice O'Donnell ("Debtor") seek confirmation of the Modified Plan because Debtor's rent was increased by \$400.00 per month, and Debtor needs to adjust monthly payments. Dckt. 41. The Modified Plan changes the \$1,344.00 monthly payments for sixty months to paying \$51,077.00 by month 41 of the Plan, and then \$944.00 per month for the remaining 19 months of the Plan. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

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

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 17, 2017. Dckt. 50. The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the value of the property to be distributed under the plan on account of

such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Debtor has not provided the Chapter 13 Trustee with employer payment advices as required by 11 U.S.C. § 521(a)(1)(B)(iv). The most recent Schedule I indicates Debtor's pay advices were submitted May 21, 2014, in which both debtors disclosed their employment, and that Matthew O'Donnell was employed with the State of California Air Resources Board at \$8,136.00 monthly, or \$97,632.00 annually. A recent search conducted by the Chapter 13 Trustee of state worker salary database discloses the 2016 salary of Matthew O'Donnell to be \$103,000.00 annually. As such, the Chapter 13 Trustee cannot discern whether or not Debtor is contributing all of disposable income to unsecured claims, as required under 11 U.S.C. § 1325(b).

In addition, Debtor's plan and filings are inconsistent. Debtor reports in § 3.02 of the Plan a regular payment of \$1,400.00 to David Valerio for the lease of 1658 Country Club Dr. Dckt. 43. However, Debtor's motion and declaration both state there was an increase of rent by \$400.00 per month (for a current monthly rent payment of \$1,800), Supplement Schedule J reflects this rent increase.

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 Matthew O'Donnell and Janice O'Donnell ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 9, 2017. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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<p><b>The Motion to Extend the Automatic Stay is denied.</b></p>
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Melissa Smith ("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 pursuant to 11 U.S.C. § 362(c)(3)(B). This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior bankruptcy case (No. 16-27700) was dismissed on November 5, 2017, after Debtor failed to make plan payments and failed to provide documents. *See* Order, Bankr. E.D. Cal. No. 16-27700, Dckt. 139, November 5, 2017. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because there was difficulty locating a successor to a deceased creditor, and this case proposes to sell real property instead of retain it.

## CHAPTER 13 TRUSTEE'S OPPOSITION

David Cusick (“the Chapter 13 Trustee”) filed an Opposition on November 28, 2017. Dckt. 28. The Chapter 13 Trustee is unsure whether there has been a change in Debtor’s financial circumstances. Debtor made three payments in the prior case and then missed four payments. Based upon Debtor’s declaration in this case that her income fluctuates month-to-month, the Chapter 13 Trustee questions whether she can afford plan payments, especially because income is “not as anticipated” in this case. *Id.* at 2:4.5.

The Chapter 13 Trustee notes that there is no statement about Debtor taking actions to stabilize her income or about why expenses have risen by \$4,608.00 in the two months since the prior case.

Additionally, the proposed plan in this case does not propose an arrearage dividend in Class 1, and the additional provisions appear to incorrectly identify real property, 102 Oak Rock Circle, Folsom, California, to be sold.

## DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). 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 not sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. While explaining some of the delay in the prior case, Debtor has not shown in this case why she will be more likely to prosecute a successful Chapter 13 Plan. As the Chapter 13 Trustee notes, expenses have risen by \$4,608.00 since the prior case without any explanation, and Debtor maintains that her income fluctuates month-to-month, which means that she may end up in default on plan payments again. Possibly the saving point for Debtor is that she proposes a plan that calls for selling real property to satisfy three debts. The plan provisions for that sale, though, list a property that is not disclosed on Schedule A or in Class 1 of the Plan.

In reviewing the Schedules filed in this case, the court notes the following. On Schedule I, Dckt. 26 (it appears that Schedule I was filed twice, first as Dckt. 25 and then as Dckt. 26), Debtor lists income for both Debtor and a non-debtor spouse as being generated from self-employed. For Debtor, her gross monthly income is \$858.33, from which she deducts (\$523.26) for expenses, yielding \$335.07 in average monthly income. Dckt. 26 at 3. Looking at the business expenses, no provision is made for paying self-employment taxes or income taxes. While Debtor's income may be small in absolute dollar amount, when placed on top of non-debtor spouse's income, it will be taxed significantly. Debtor's greatest expense is \$400.00 per month for continuing education for her avocation, which is stated to be "Massage Therapist" on Schedule I. Dckt 26 at 2, 3. This annual expense of \$4,800.00 for the five years of the Plan, which would total \$24,000, is not explained.

On the Schedule I form, Debtor lists having monthly income of \$2,525.07 from her business and investments. Schedule I does not list any other business or source of income for Debtor other than the \$335.07 from her work as a Massage Therapist. On Schedule B, Debtor lists having only her massage business. No other source of income appears on Schedule B that could be the source of an additional \$2,200 per month in income for Debtor.

However, on the Statement of Financial Affairs, Debtor lists having gross rental income of \$9,750 in 2015, \$19,500 in 2016, and 2017 year-to-date of \$11,250. No such rental business is stated on Schedule I. No income and expense statement is attached to Schedule I for such business.

On Schedule I, non-debtor spouse's monthly net income is stated to be \$12,322.37. Dckt. 26 at 4. That is computed from monthly gross self-employment income of \$18,627.75 and expenses of (\$6,305.00). *Id.* The monthly expense amount includes (\$3,000) for taxes and (\$1,925) for "1099 payment/Producer." *Id.*

On Schedule A, Debtor lists owning an interest in only one parcel of real property, a single family home. Dckt. 1 at 11. However, she lists her residence on her Petition as the Folsom Property that is identified in the Plan to be sold. *Id.* at 2. On Schedule B, Debtor lists having a rental security deposit of \$3,100.00 with a "Landlord." *Id.* at 15. The court is unsure as to why Debtor has a rental security deposit with someone. On Schedule H, Debtor lists "Derrick Smith" as a co-debtor on unidentified obligations, whose address is listed as the Folsom Property to be sold under the Plan.

Going to Schedule J, Debtor lists having nine children as dependants. Dckt. 26 at 5. The expenses for the family unit of eleven persons is stated to be (\$12,087). *Id.* at 7. The expenses include: (1) (\$2,500) for mortgage/rent; (2) (\$500) for home maintenance and repairs; (3) (\$2,500) for food and

housekeeping supplies (which are for eleven people); and (4) (\$780) for transportation expenses (not including insurance). One expense item that stands out in light of Debtor's financial distress is a (\$1,000) per month charitable contribution. *Id.*

In the prior bankruptcy case, Debtor stated under penalty of perjury that the charitable contributions were (\$300) per month. 16-27700; Dckt. 118 at 4.

Debtor's Chapter 13 Plan provides for a monthly plan payment of \$2,770.00 Dckt. 8. From that, there is to be made a monthly mortgage payment of \$1,856.00 for a property in Sutter Creek, California. Additionally, there is a \$17,251.00 arrearage on the debt secured by the Sutter Creek Property, but the Plan fails to provide for an arrearage cure payment.

In the additional provisions of the Plan Debtor, states that she is "in the process of selling her real property located at 102 Oak Rock Circle in Folsom, California." Plan, Section 6; *Id.* at 6. On Schedule A in this case, Debtor has stated under penalty of perjury that the only real property in which she has an interest is the Sutter Creek Property. Schedules A and G, Dckt. 1 at 11 and 36; and 16-27700, Schedules A and G, Dckt. 23 at 3 and 27; Amended Schedules A and G, Dckt. 39 at 3 and 15; Second Amended Schedule A, Dckt. 56 at 4; Third Amended Schedule A, Dckt. 100 at 4.

Though stating under penalty of perjury that the only property in which she has an interest is the Sutter Creek Property, it appears that Debtor has an interest in other real property that she intends to fund the Plan. Such property is property of the bankruptcy estate. 11 U.S.C. § 541(a). Further, such property has to be truthfully and accurately disclosed on the Schedules. This raises the specter of what other assets Debtor and the non-debtor spouse have that they have "neglected" to disclose.

This also raises the specter that the income and expense information is not truthful or accurate. While purporting to have additional income from some business or rental, no source is identified. No expenses are listed if there is a rental property—such as property taxes, insurance, and repairs. Though both Debtor and non-debtor spouse are self-employed, no provision is made for payment of self-employment taxes.

If the identification of the Folsom property as being that of Debtor to be sold is a typographical error and it is really the Sutter Creek residence to be sold, other problems arise. Given that the three lien creditors for the property to be sold are those listed on Schedule D, such an error appears likely. Debtor states that she intends to do a short sale, with the automatic stay to remain in effect until such a short sale is accomplished. Plan, Additional Provisions, Dckt. 8 at 6.

The three secured claims for which the Sutter Creek Property is the collateral are stated on Schedule D to be the following:

- A. First Deed of Trust, Select Portfolio Servicing.....(\$381,801)  
(Loan Servicer, Not Creditor Appears to be Identified)
- B. Second Deed of Trust, Alle Kehl.....(\$ 90,000)

C. Third Deed of Trust, Colleen Ellis.....(\$ 84,000)

Those secured claims total (\$555,801). Debtor states under penalty of perjury that the Sutter Creek Property is worth only \$500,000. Assuming that Debtor could sell it for the testified fair market value and normal costs of sale being estimated at 8% of the sales price (\$40,000), there will be only \$460,000 in sales proceeds, (\$95,800) short of paying the lien claims in full. Based on Debtor's value, there would be no money for the claim secured by the third deed of trust, with \$80,000 to pay the \$90,000 debt secured by the second deed of trust.

In her Declaration, Debtor testifies that the purpose in filing the prior bankruptcy case and the current case was to stop the foreclosure sale on the Debtor's "Real Property" (which term is not identified in the Declaration). Declaration ¶ 3, Dckt. 14. The purported purpose testified to by Debtor of obtaining the benefit of the automatic stay was to "cure the mortgage arrears." *Id.*

Debtor next testifies that rather than "cure" the arrearage (as debtors due to retain property and continue to make payments under the contract), she seeks to sell the "Real Property" at some nonspecific time in the future. *Id.*, ¶ 4.

The proposed Chapter 13 Plan states that it will make the current monthly payment due on the debt secured by the First Deed of Trust, and no payments on the (\$17,251.00) arrearage. No provision is made for payments to be made to the claims secured by the Second Deed of Trust or Third Deed of Trust.

The Additional Provision merely states that when, and if, Debtor were to sell the Folsom Property, then whatever available funds may exist pay to the junior lien holders.

The Plan provides for a sixty-month term, which indicates that Debtor intends to have sixty months in which to consider a possible sale of the Property.

Interestingly, in the prior bankruptcy case, no proof of claim was filed by either the holder of the First Deed of Trust or Third Deed of Trust. 16-2770, Claims Register. Such is very unusual for a commercial creditor, which the holder of the First Deed of Trust is stated to be by Debtor.

The proof of claim for the holder of the claim secured by the Second Deed of Trust in the prior case was filed by counsel for Debtor—not the creditor. *Id.*, Proof of Claim No. 7. To the extent that Select Portfolio Servicing is a creditor, the Mailing Matrix filed by Debtor lists only a Post Office Box address in Utah. The Plan appears to alter the secured claim, giving Debtor five years of arrearage deferment without making any payments to "cure" the arrearage.

Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92–93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").



This case may be ripe for conversion to Chapter 7 for an independent fiduciary for the bankruptcy estate, the Chapter 7 trustee, to investigate and recover all of the assets of the bankruptcy estate. Debtor's prior bankruptcy case was filed as one under Chapter 7, in which she pleaded poverty and requested that the court waive the Chapter 7 filing fee. 16-27700; Motion for Fee Waiver, Dckt. 5. Debtor stated under penalty of perjury and subject to the certifications of Federal Rule of Bankruptcy Procedure 9011 that her income was \$1,200 per month and the non-debtor spouse's income was \$10,000 per month. The Motion for Fee Waiver was denied. *Id.*, Dckt. 9.

Debtor then engaged the services of her current counsel for the prior case. Counsel filed a motion to convert the Chapter 7 case to one under Chapter 13. The Amended Schedules showing no interest in any real property other than the Sutter Creek Property were prepared with the assistance of counsel. Counsel filed a motion to convert the case to one under Chapter 13 so Debtor could reorganize her finances. *Id.*, Dckt. 41. In that motion, Counsel characterized Debtor as the "honest but unfortunate debtor," who now with the assistance of counsel could navigate a Chapter 13 case. (Given the court's discussion above, the "honest" characterization appears to be in question.)

Debtor maintained the prior bankruptcy case on life-support, surviving a series of motions to dismiss by the Chapter 13 Trustee. The Chapter 13 Trustee and court gave Debtor the benefit of the doubt in her efforts purported to be in good faith to try to prosecute a Chapter 13 case to save the one piece of real property (the Sutter Creek residence) in which Debtor had an interest.

Ultimately, on November 5, 2017, the court issued the order dismissing the prior case. *Id.*; Order, Dckt. 139. The motion, when filed, was based on Debtor being \$4,740.00 delinquent in Plan payments. *Id.*, Civil Minutes, Dckt. 138.

Debtor rebounded from the defaults and dismissal, filing the current case two days later.

Debtor's declaration in support of the present Motion reflects a disconnect with the reality of the prior case and her duties under the Bankruptcy Code. Debtor testifies under penalty of perjury that the prior case was dismissed because the trustee asserted that she failed to cooperate with him—asserting that she did so cooperate. Declaration, ¶ 2; Dckt. 16. That ignores the express findings of the court that the prior case was dismissed due to Debtor's substantial monetary defaults. The Chapter 13 Trustee's Motion to Dismiss the prior case, for which such relief was granted, was not based on failure to provide documents, but on monetary delinquencies. As set forth in the court's Civil Minutes on the hearing on the Motion to Dismiss the prior case:

The Chapter 13 Trustee seeks dismissal of Debtor's case based on the following:

A. Debtor is delinquent in plan payments in the amount of \$4,740.00. Debtor has paid \$9,850.00 into the plan to date.

B. Debtor has not provided Trustee with copies of her 2016 tax return and other documents requested.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

16-22770; Civil Minutes, Dckt. 138.

Debtor has failed to rebut the presumption of bad faith with this second filing. Debtor's "flexible" statements under penalty of perjury cause the court great concern. Further, Debtor is apparently attempting to sell property of the estate without obtaining the necessary authorization as required in 11 U.S.C. § 363.

The Motion is denied.

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

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

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

**IT IS ORDERED** that the Motion to extend the automatic stay, which terminates only as to Debtor pursuant to 11 U.S.C. § 362(c)(3)(A) thirty days after the commencement of this case, is denied. No determination is made by the court to the other provisions of 11 U.S.C. § 362(a) that apply to property of the bankruptcy estate.

## FINAL RULINGS

14. [16-21102-E-13](#) LARRY VINCELLI CONTINUED MOTION TO DISMISS  
DPC-7 Bonnie Baker CASE  
10-4-17 [[109](#)]

**Final Ruling:** No appearance at the December 5, 2017 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, and Office of the United States Trustee on October 4, 2017. By the court’s calculation, 28 days’ notice was provided. 28 days’ notice is required.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

**The Motion to Dismiss is denied without prejudice.**

David Cusick (“the Chapter 13 Trustee”) seeks dismissal of the case on the basis that Larry Vincelli (“Debtor”) is \$2,246.90 delinquent in plan payments, which represents multiple months of the \$1,123.98 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

In addition, the Chapter 13 Trustee argues that Debtor filed a Modified Plan on September 1, 2017 but has yet to file a motion to confirm the Modified Plan. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

### DEBTOR’S RESPONSE

Debtor filed a Response on October 23, 2017, asserting that his financial struggles are due to unforeseen delay in receiving his nursing license after a university professor was fired and refused to turn over his records, which resulted in Debtor enrolling for the same course again. Dckt. 113. Debtor also argues that he faced delays due to medical complications surrounding cancer treatment in his kidney. Debtor requests a continuance so that he may file a modified plan and set it for hearing.

### NOVEMBER 1, 2017 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on December 5, 2017, for Debtor to have either cured the default or to have filed a modified plan and set it for hearing. Dckt. 117.

## FILING OF MODIFIED PLAN

Debtor filed a Modified Plan and Motion to Confirm on November 3, 2017. Dckts. 119, 123. The court has reviewed the Motion to Confirm the Modified Plan and the Declaration in support filed by Debtor. Dckts. 123, 125. The Motion appears to comply with Federal Rule of Bankruptcy Procedure 9013 (stating grounds with particularity), and the Declaration appears to provide testimony as to facts to support confirmation based upon Debtor's personal knowledge. FED. R. EVID. 601, 602.

Debtor appearing to be actively prosecuting this case, the Motion to Dismiss is denied without prejudice.

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

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

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

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

15.	<a href="#"><u>17-23504</u></a> -E-13 THS-3	<b>JOSEPH GAITHER</b> <b>Timothy Stearns</b>	<b>MOTION TO CONFIRM PLAN</b> <b>10-5-17 [64]</b>
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**Final Ruling:** No appearance at the December 5, 2017 hearing is required.  
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The case having previously been dismissed, the Motion is dismissed as moot.

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

**IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

**Final Ruling:** No appearance at the December 5, 2017 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 31, 2017. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(g) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

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

<p><b>The Motion to Confirm the Modified Plan is granted.</b></p>
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11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Shaun Staudinger and Amanda Staudinger (“Debtor”) have filed evidence in support of confirmation. David Cusick (“the Chapter 13 Trustee”) filed a Response indicating non-opposition on November 17, 2017. Dckt. 89. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on October 31, 2017, 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.

17. [16-28316-E-13](#)      **SHARRY STEVENS-GOREE**      **MOTION TO CONFIRM PLAN**  
**FF-9**      **Gary Fraley**      **10-17-17 [107]**

**Final Ruling:** No appearance at the December 5, 2017 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 17, 2017. By the court's calculation, 49 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b); 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.

<p><b>The Motion to Confirm the Amended Plan is granted.</b></p>
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11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Sharry Stevens-Goree ("Debtor") has provided evidence in support of confirmation. David Cusick ("the Chapter 13 Trustee") filed a Response indicating non-opposition on November 6, 2017. Dckt. 117. 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 Sharry Stevens-Goree (“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 October 17, 2017, 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.

18.	<a href="#"><u>17-26458</u></a> -E-13 DPC-1	<b>ISMAEL GUERRA AND ROSA PROA Thomas Gillis</b>	<b>OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 11-8-17 <a href="#"><u>16</u></a></b>
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**Final Ruling:** No appearance at the December 5, 2017 hearing is required.

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David Cusick (“the Chapter 13 Trustee”) having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Confirmation was dismissed without prejudice, the matter is removed from the calendar, and the Chapter 13 Plan filed on September 28, 2017, is confirmed.**

Counsel for Ismael Guerra and Rosa Proa (“Debtor”) shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**Final Ruling:** No appearance at the December 5, 2017 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, and Office of the United States Trustee on October 18, 2017. By the court’s calculation, 48 days’ notice was provided. 28 days’ notice is required.

The Motion for Denial of Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 for Denial of Discharge is granted.**

David Cusick, the Chapter 13 Trustee, (“Objector”) filed the instant Motion for Denial of Debtor’s Discharge on October 18, 2017. Dckt. 17.

Objector argues that Philip Roberts (“Debtor”) is not entitled to a discharge in the instant bankruptcy case because Debtor previously received a discharge in a Chapter 7 case.

Debtor filed a Chapter 7 bankruptcy case on March 31, 2015. Case No. 15-22534. Debtor received a discharge on July 13, 2015. Case No. 15-22534, Dckt. 21.

The instant case was filed under Chapter 13 on September 8, 2017.

11 U.S.C. § 1328(f)(1) provides that a court shall not grant a discharge if a debtor has received a discharge in a case filed under chapter 7 or 11 within four years before the filing date of the instant case. 11 U.S.C. § 1328(f)(1).



Here, Debtor received a discharge under 11 U.S.C. § 727 on July 13, 2015, which is less than four years preceding the date of the filing of the instant case. Case No. 15-22534, Dckt. 21. Therefore, pursuant to 11 U.S.C. §1328(f)(1), Debtor is not eligible for a discharge in the instant case.

Therefore, the Motion is granted. Upon successful completion of the instant case (Case No.17-25975), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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

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

The Motion for Denial of Discharge 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 Motion for Denial of Discharge is granted, and upon successful completion of the instant case, Case No. 17-25975, the case shall be closed without the entry of a discharge.