UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

December 8, 2015 at 3:00 p.m.

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1. 15-24401-E-13 CINDY GRAHAM — MOTION TO MODIFY PLAN
SJS-3 Scott Johnson — 11-2-15 [42]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 2, 2015. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

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

Cindy Grahan ("Debtor") filed the instant Motion to Confirm the Modified Plan on November 2, 2015. Dckt. 42.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the

instant Motion on November 23, 2015. Dckt. 51. The Trustee opposes the Motion on the following grounds:

1. The Debtor may not be able to make the plan payments or the plan is not the Debtor's best efforts. The Trustee argues that the Debtor proposes to surrender the real property commonly known as 501 Gibson Drive #1614, Roseville, California. The confirmed plan calls for the mortgage to be paid through the plan. The Debtor is proposing to continue to pay homeowner's association dues but surrender the real property. The Debtor is below median income and claims a $600.00 expense per month in rent. According to the Trustee's records, the Debtor's address remains that of the real property and there is no change of address provided. The Trustee argues that either the Debtor has not moved, in which case $1,800.00 in rent has not been incurred, or the Debtor has not filed a change of address.

2. The Debtor may not be able to make the plan payments or the plan is not the Debtor's best efforts. According to the Debtor's amended budget, it appears that the Debtor has increased personal care products and services from $0.00 to $100.00. Additionally, the Debtor has increased her transportation expenses from $100.00 to $250.00. The Trustee argues that this total change of $250.00 is in the same amount that was previously objected to by the Trustee but was classified as "Homeowner's association or condominium dues." The Trustee states that the Debtor has not explained if they are currently incurring these debts, are still paying homeowner's dues as proposed in the previous plan, or doing something else.

DISCUSSION

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

The Trustee's objections are well-taken. As to the Trustee's first objection, the intention of the Debtor, the proposed plan, and the Debtor's financial reality does not appear to correlate. Namely, the Debtor appears to have either moved and surrendered the real property or has remained which is in conflict with the Debtor's intention of surrendering. The court's review of the instant plan and the previously confirmed plan highlights that there is a discrepancy in the proposed treatment which raises concerns over whether the schedules filed by the Debtor accurately reflect the Debtor's financial situation. The reality of the Debtor, which appears to still be occupying the residence she is proposing to surrender, and the indication in the plan that she is surrendering the plan, makes it impossible to determine if the plan is feasible or viable when the court is unsure of the actual financial situation of the Debtor.

As to the Trustee's second objection, the court is also concerned about the potential bad faith in the proposed changes to the expenses. It does seem odd to the court that the exact amount of the homeowner's association dues that led to the denial of the previous plan has been recalculated into the budget, just in the form of other expenses. The Debtor does not provide the court with any explanation as to why both personal care and transportation increased from

the prior budget to the instant. The court concurs that the Debtor's plan does not appear to be her best efforts.

As the court mentioned in the civil minutes from the prior denial of the proposed plan:

> The proposed plan does not appear to increase any payments once the property is surrendered, if it has not been surrendered to date. Without the Debtor's Schedule J properly reflecting real and actual expenses, the court, Trustee, and any other party in interest cannot determine whether the Debtor is committing all of her disposable income as well raises concerns over whether the proposed Schedules and plan are a proper reflection of the Debtor's financial reality.

Dckt. 32. None of the pleadings provided by the Debtor has provided evidence that this concern has been rectified.

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

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

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

2. 14-31903-E-13 MARK GARCIA
DPC-3 Peter Macaluso

OBJECTION TO CLAIM OF OLD REPUBLIC SURETY COMPANY, CLAIM NUMBER 6
10-19-15 [57]

Final Ruling: No appearance at the December 8, 2015 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on October 19, 2015. By the court's calculation, 50 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim number 6-1 of Old Republic Surety Company is sustained and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of Old Republic Surety Company ("Creditor"), Proof of Claim No. 6-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $4,320.10. Objector asserts that the Claim has not been timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is April 22, 2015. Notice of Bankruptcy Filing and Deadlines, Dckt. 13.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual

basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The deadline for filing a Proof of Claim in this matter was April 22, 2015. The Creditor's Proof of Claim was filed September 22, 2015. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety as untimely. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Old Republic Surety Company, Creditor filed in this case 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 Proof of Claim Number 6-1 of Old Republic Surety Company is sustained and the claim is disallowed in its entirety.

3. 12-21207-E-13 JIM LEDESMA **MOTION TO MODIFY PLAN**
PGM-1 Peter Macaluso **10-30-15 [89]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 30, 2015. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Jim Ledesma ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 30, 2015. Dckt. 89.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 23, 2015. Dckt. 103. The Trustee opposes on the following grounds:

1. Peter Macaluso, who filed the instant Motion on behalf of the Debtor, has not yet been substituted in as the Debtor's attorney. The Trustee opposes the Motion as the plan is ambiguous where it refers to "Debtor's attorney's fees" to be paid in the plan.

2. The Debtor's proposed plan indicates a 2.00% distribution to unsecured creditors while the Debtor's declaration indicates a 0.00% dividend. The confirmed plan has a distribution of 2.00% and the Trustee has disbursed 2.00% to date. The Trustee opposes the modification if it is attempting to reduce the amount to unsecured claims below what was previously paid.

3. Debtor does not provide an explanation as to why the proposed plan payment is for an amount that is less than his monthly net income or why the Debtor proposes to reduce the plan payment in month 53. Debtor proposes a plan payment of $79,945.61 total paid in through October 2015 (month 45), $2,675.00 for 7 months, then $2,425.00 for 8 months to complete the plan. The Debtor's supplemental Schedule J and J reflects a monthly net income of $2,765.84. Dckt. 96.

4. The Trustee is uncertain whether the Debtor has the ability to make the plan payments unless other people are paying for some of Debtor's expenses. The Debtor's declaration state that his expenses increased because the Debtor's son now lives with him full time. However, the Debtor's original Schedule J and the supplemental Schedule J indicates a reduction in expenses from $2,065.66 to $812.00. Debtor budgets $0.00 for electricity, heat, natural gas, water, sewer, and garbage collection. The Debtor's childcare expenses remain $0.00, food was reduced from $500.00 to $300.00, and clothing was reduced from $50.00 to $40.00. Additionally, the Trustee notes that the Debtor's supplemental Schedule I indicates that the Debtor now is employed by the State of California and receives income from rent or business which was previously not disclosed. The Debtor does not provide explanation of this additional income nor does the Debtor's Statement of Financial Affairs include business information.

DEBTOR'S REPLY

The Debtor, through Mr. Macaluso, filed a reply to the Trustee's opposition on November 30, 2015. Dckt. 106. The Debtor, through Mr. Macaluso, responds as follows:

1. The Debtor allegedly signed the substitution of counsel and that the order approving the substitution is pending court approval.

2. The percentage to unsecured claims was intended to remain 2.00%.

3. The reduction in expenses is due to the assistance of his new girlfriend who has afford to contribute $1,000.00 to the Debtor towards plan payments. The reply states that the contribution is for the next seven months. The assistance is based on expenses which are projected to increase by a total of $250.00 after seven months, to include further needs of the children.

DISCUSSION

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

The Trustee's objections are well-taken.

First, the Trustee is correct that no substitution has been entered yet for Debtor's counsel. To date, Mr. Hughes remains the Debtor's attorney of record. No Notice of Association has been filed. While Mr. Macaluso may be correct in stating that there is a pending order approving the substitution, Mr. Macaluso has yet to provide the court with evidence of the substitution, i.e. a copy of the signed retainer agreement. The pending nature of the substitution does not allow Mr. Macaluso to file on behalf of the Debtor. In the eyes of the court, Mr. Hughes remains the counsel of record until the court signs an order pursuant to Local Bankr. R. 2017-1. This has not been done to date. Therefore, the Debtor's instant Motion and proposed plan have not been properly filed and therefore the court cannot entertain confirming the plan.

Even reviewing the reply filed by Mr. Macaluso although it was improper, the explanation as to the expense reduction and the supplemental assistance is insufficient to confirm the plan, even if Mr. Macaluso was properly substituted in as the attorney of record. The reply states that the Debtor's girlfriend has agreed to contribute to expenses during the next seven months. However, the Debtor does not provide the declaration of the "girlfriend" which states under penalty of perjury her willingness to contribute to the household. Even more, though, the reply admits that the expenses and the proposed plan is not an actual representation of the Debtor's financial reality. Instead, it is a "hypothetical" budget that does not account for the contribution from the "girlfriend" but rather reduces expenses that the Debtor actually has and then having a step down in payments after the contribution ends. This financial "mirage" makes it impossible for the court to determine whether the plan is actually feasible.

Rather than providing this information at the time the Motion was filed, with accurate declarations and accurate supplemental budgets, Mr. Macaluso, who at this time is not the attorney of record for the Debtor, filed a proposed plan premised on contribution from the girlfriend and the expected reduction in expenses. This is inappropriate.

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

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

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

4. 15-26213-E-13 LEILANI NOVAL — MOTION TO CONFIRM PLAN
RWH-3 Ronald Holland — 10-23-15 [52]

Final Ruling: No appearance at the December 8, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 23, 2015. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 19, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed

order to the court.

5. 15-21423-E-13 ELINA MACHADO — MOTION TO MODIFY PLAN
MC-1 Muoi Chea — 10-21-15 [49]

Final Ruling: No appearance at the December 8, 2015 hearing is required.

The Debtor having filed a Withdrawal of the Motion to Modify Plan, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Modify the Plan is dismissed without prejudice, and the matter is removed from the calendar.**

6. 13-34027-E-13 EILEEN MOFFITT — MOTION TO INCUR DEBT
JMC-4 Joseph Canning — 11-16-15 [95]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 16, 2015. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion to Incur Debt was properly set for hearing on the notice

required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Incur Debt is granted.

The motion seeks permission to purchase a 2014 Dodge Grand Caravan SXT, which the total purchase price is $17,596.70, with monthly payments of $327.26. The Debtor notes that she is seeking to exercise her option to purchase the vehicle due to the expiration of her lease on the vehicle. This is the only vehicle held by the Debtor and her only means of transportation.

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on December 1, 2015.

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

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. The proposed purchase allows for the Debtor to reduce her monthly car payment from $1,014.00 to $327.26. The confirmed plan provides for a 100% dividend to all creditors.

There being no opposition from any party in interest and the terms being reasonable, the motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Eileen Moffitt ("Debtor") are authorized to incur debt pursuant to the terms of the agreement, Exhibit A, Dckt. 98.

7. 13-22028-E-13 FAITH EVANS **MOTION TO MODIFY PLAN**
BLG-6 Chad Johnson **10-27-15 [114]**

Final Ruling: No appearance at the December 8, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 27, 2015. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 27, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so

approved, the Chapter 13 Trustee will submit the proposed order to the court.

8. 13-22028-E-13 FAITH EVANS
BLG-8 Chad Johnson

MOTION FOR COMPENSATION BY THE LAW OFFICE OF BANKRUPTCY LAW GROUP, PC FOR CHAD M. JOHNSON, DEBTOR'S ATTORNEY(S)
11-10-15 [122]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on November 10, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

Bankruptcy Law Group, the Attorney ("Applicant") for Faith Evans, the Chapter 13 Debtor ("Client"), makes a Request for the Allowance of Fees and Expenses in this case.

On March 3, 2013, Bruce Dwiggins filed a Disclosure of Attorney Compensation. Dckt. 12. That disclosure notes that Mr. Dwiggins, an attorney of Applicant's law firm, was paid $1,500.00 pre-petition and was owed $2,500.00, for total compensation of $4,000.00. *Id.*

Applicant now applies for compensation for the period of March 3, 2013, through November 10, 2015. Applicant requests fees in the amount of $31,442.50 and costs in the amount of $246.10.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or
> (ii) services that were not--
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including general case administration, significant motions and contested matters, and adversary proceedings. As discussed below, significant litigation was required to recover and protect property of the estate. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 12.2 hours in this category. Applicant assisted Client by communicating with the Client, preparing the petition, and reviewing various documents. Applicant mentions that $1,500.00 was paid February 13, 2013. Dckt. 122 Exh A.

Significant Motions and Other Contested Matters: Applicant spent 25.7 hours in this category. Applicant filed motions for relief from stay, responded to an objection to confirmation of plan, filed a motion to sell property, responded to a motion to dismiss, filed objections to various claims, and filed this fee motion. *Id.*

Adversary Proceedings: Applicant spent 55.6 hours in this category. Applicant filed a case to determine the ownership of funds held by attorneys

David Brown and Harrison Goodwin and the proceeds of a liquor license sale, and pursued an exemption for Debtor-Plaintiff. *Id.*

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Chad M. Johnson, Attorney	47.6	$350.00	$16,660.00
Bruce Dwiggins, Attorney	22.3	$350.00	$7,805.00
Patricia Wilson, Attorney	11.3	$350.00	$3,955.00
Pauldeep Bains, Attorney	4.7	$350.00	$1,645.00
Tina Perez, Paralegal	7.4	$185.00	$1,369.00
Vanessa Vlenzuela, Paralegal	0	$185.00	$0.00
Anna Chesser, Office Staff	0.1	$85.00	$8.50
Total Fees For Period of Application			$31,442.50

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $246.10 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Photocopy	$0.05 per page	$74.20
Postage		$76.17
Fed Ex		$95.73
		$0.00
Total Costs Requested in Application		$246.10

Dckt. 125, Exh. A. FN.1.

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of $31,442.50 are approved pursuant to 11 U.S.C. §§ 330 and 331, and authorized to be paid by the Trustee from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Costs and Expenses

The First Interim Costs in the amount of $246.10 are approved pursuant to 11 U.S.C. §§ 330 and 331, and authorized to be paid by the Trustee from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees	$31,442.50
Costs and Expenses	$246.10

pursuant to this Application as First Interim fees pursuant to 11 U.S.C. §§ 331, subject to final allowance pursuant to 11 U.S.C. § 330, in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Bankruptcy Law Groups ("Applicant"), Attorney for the Trustee 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 Bankruptcy Law Groups is allowed the following fees and expenses as a professional of the Estate:
>
> Bankruptcy Law Groups, Professional Employed by Chapter 13 Debtor
>
> Fees in the amount of $31,442.50
> Expenses in the amount of $246.10,
>
> The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the $1,500.00 previously paid

to counsel shall be first applied, and then the Trustee under the confirmed plan is authorized to pay the balance of the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

9. 15-28234-E-13 SNM-1 GREGORY/OTHELLA JONES Stephen Murphy

MOTION TO VALUE COLLATERAL OF U.S. BANK, N.A.
10-28-15 [8]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on October 28, 2015. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of U.S. Bank National Association, as Trustee ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Gregory and Othella Jones ("Debtor") to

value the secured claim of U.S. Bank national Association, as Trustee ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 3241 Seminole Circle Fairfield, California ("Property"). Debtor seeks to value the Property at a fair market value of $617,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 23, 2015. Dckt. 24. The Trustee simply argues that because the Creditor has not filed a claim in the case, the Trustee is uncertain if the Debtor can value the property when there is no allowed claim on file. The Trustee cites only to 11 U.S.C. § 502(a).

DISCUSSION

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

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

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

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

As to Trustee's objection, the court is not persuaded that a proof of claim is necessary in order for the court to value the secured claim of a debtor. First, the Trustee's "opposition" does not provide any argument or legal authorities (other than referencing the Bankruptcy Code proof of claim sections) as to why the mere fact a secured claim does not have a proof of claim why a Motion to Value is inappropriate.

A creditor is not required to file a proof of claim for a secured claim. Rather, the Debtor has to address the secured claim, or continue to have the collateral saddled by the lien. As the Supreme Court has found, a lien

continues through the bankruptcy case unaffected, subject to the ability of a debtor to modify the rights of the holder of the lien under the provisions of the Bankruptcy Code. *Dewsnup v. Timm*, 502 U.S. 410 (1992).

The mere failure to file a proof of claim not affecting the lien rights and the creditor having a "secured claim, is recognized in 11 U.S.C. § 506(d):

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
>
> > (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
> >
> > **(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.**

Therefore, § 506(d) allows for liens to pass through the bankruptcy case unaffected. The lien being unaffected by the bankruptcy case itself, therefore, means that the discharge injunction does not stip the lien. Even reviewing the plain language of § 506(d), the Code expressly states that a secured claim is not void "due only to the failure of any entity to file a proof of such claim under section 501 of this title."

Applying these foundations to the Trustee's argument, the assertion that a proof of claim is necessary for the court value the creditor's secured claim pursuant to § 506(a) is not supported by the Bankruptcy Code.

Looking outside of § 506, Fed. R. Bankr. P. 3002 outlines the rules for filing a proof of claim or interest. Pursuant to Fed. R. Bankr. P. 3002(a):

> (a) Necessity for Filing: Unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed. . . .

The canon of construction *expressio unius est exclusio alterius*, when one or more things of a certain classification are expressly mentioned, others of the same classification is excluded, applies directly to the instant objection. Here, the rules promulgated explicitly require that an unsecured creditor must file a proof of claim in order for their unsecured claim to be deemed allowed. Fed. R. Bankr. P. 3002 excludes secured claims from such requirements. As such, and under the canon, the failure of an entity to file a proof of claim for a secured claim does not deem it disallowed.

While the court is cognizant of the literal reading advanced by the Trustee, the substantial case law and legislative history surrounding § 506 valuations support the conclusion that a proof of claim is not necessary for a § 506(a) motion. This is further emphasized by Fed. R. Bankr. P. 3004 and 3006. While Fed. R. Bankr. P. 3003(c)(3) provides for an exclusive period within which a creditor may file a proof of claim, Fed. R. Bankr. P. 3004 allows for a trustee or debtor to file a proof of claim on behalf of a creditor if that creditor fails to timely file a proof of claim. In comparison, Fed. R. Bankr. P. 3006 deals with the withdrawal of claims. Specifically, the Rule permits a creditor, as a matter of right, to withdraw a claim prior to any objection being filed. The Rule, however, does not extend that same right to

a trustee or debtor.

The Trustee's suggestion that a proof of claim is necessary for the debtor to value a secured claim would lead to a very troubling dysfunctional in the Bankruptcy Code. A creditor, as the only entity who has the authority to withdraw claims, could preclude a debtor confirming a plan and having the creditor's secured claim properly valued by withdrawing any proof of claim filed by the Debtor or trustee pursuant to Fed. R. Bankr. P. 3006.

Additionally, the Trustee's premise would also mean that the bankruptcy trustees in this District would have been improperly been disbursing funds to any creditor with a secured claim provided for in a plan which did not file a proof of claim, regardless of whether its claim was valued under § 506(a) or not. The two page "opposition" of the Trustee implicates a larger issue than just whether the Debtor could file a Motion to Value without a proof of claim. This is clearly not the contemplated nor actual outcome intended by Congress.

Therefore, the Trustee's opposition is overruled.

The senior in priority first deed of trust secures a claim with a balance of approximately $674,885.00. Creditor's second deed of trust secures a claim with a balance of approximately $156,562.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Gregory and Othella Jones ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of U.S. Bank, National Association, as Trustee, secured by a second in priority deed of trust recorded against the real property commonly known as , California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $617,000.00 and is encumbered by senior liens securing claims in the amount of $674,885.00, which exceed the value of the Property which is subject to Creditor's lien.

10. 15-27236-E-13 JAMES/KARI BIRDSEYE **MOTION TO VALUE COLLATERAL OF**
RHM-1 Robert McConnell **DELL FINANCIAL SERVICES**
10-23-15 [20]

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

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

Below is the court's tentative ruling.

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on October 23, 2015. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Dell Financial Services ("Creditor") is denied without prejudice.

The Motion filed by James and Kari Birdseye ("Debtor") to value the secured claim of Dell Financial Services ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a Dell laptop computer ("Asset"). The Debtor seeks to value the Asset at a replacement value of $50.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Asset secures a purchase-money loan.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the

instant Motion on November 23, 2015. Dckt. 24. The Trustee simply argues that because the Creditor has not filed a claim in the case, the Trustee is uncertain if the Debtor can value the property when there is no allowed claim on file. The Trustee cites only to 11 U.S.C. § 502(a).

DISCUSSION

Trustee's Opposition

As to Trustee's objection, the court is not persuaded that a proof of claim is necessary in order for the court to value the secured claim of a debtor. First, the Trustee's "opposition" does not provide any argument or legal authorities (other than referencing the Bankruptcy Code proof of claim sections) as to why the mere fact a secured claim does not have a proof of claim why a Motion to Value is inappropriate.

A creditor is not required to file a proof of claim for a secured claim. Rather, the Debtor has to address the secured claim, or continue to have the collateral saddled by the lien. As the Supreme Court has found, a lien continues through the bankruptcy case unaffected, subject to the ability of a debtor to modify the rights of the holder of the lien under the provisions of the Bankruptcy Code. *Dewsnup v. Timm*, 502 U.S. 410 (1992).

The mere failure to file a proof of claim not affecting the lien rights and the creditor having a "secured claim, is recognized in 11 U.S.C. § 506(d):

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
>
> > (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
> >
> > **(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.**

Therefore, § 506(d) allows for liens to pass through the bankruptcy case unaffected. The lien being unaffected by the bankruptcy case itself, therefore, means that the discharge injunction does not stip the lien. Even reviewing the plain language of § 506(d), the Code expressly states that a secured claim is not void "due only to the failure of any entity to file a proof of such claim under section 501 of this title."

Applying these foundations to the Trustee's argument, the assertion that a proof of claim is necessary for the court value the creditor's secured claim pursuant to § 506(a) is not supported by the Bankruptcy Code.

Looking outside of § 506, Fed. R. Bankr. P. 3002 outlines the rules for filing a proof of claim or interest. Pursuant to Fed. R. Bankr. P. 3002(a):

> (a) Necessity for Filing: Unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed. . . .

The canon of construction *expressio unius est exclusio alterius*, when one or more things of a certain classification are expressly mentioned, others of the same classification is excluded, applies directly to the instant objection. Here, the rules promulgated explicitly require that an unsecured creditor must file a proof of claim in order for their unsecured claim to be deemed allowed. Fed. R. Bankr. P. 3002 excludes secured claims from such requirements. As such, and under the canon, the failure of an entity to file a proof of claim for a secured claim does not deem it disallowed.

While the court is cognizant of the literal reading advanced by the Trustee, the substantial case law and legislative history surrounding § 506 valuations support the conclusion that a proof of claim is not necessary for a § 506(a) motion. This is further emphasized by Fed. R. Bankr. P. 3004 and 3006. While Fed. R. Bankr. P. 3003(c)(3) provides for an exclusive period within which a creditor may file a proof of claim, Fed. R. Bankr. P. 3004 allows for a trustee or debtor to file a proof of claim on behalf of a creditor if that creditor fails to timely file a proof of claim. In comparison, Fed. R. Bankr. P. 3006 deals with the withdrawal of claims. Specifically, the Rule permits a creditor, as a matter of right, to withdraw a claim prior to any objection being filed. The Rule, however, does not extend that same right to a trustee or debtor.

The Trustee's suggestion that a proof of claim is necessary for the debtor to value a secured claim would lead to a very troubling dysfunctional in the Bankruptcy Code. A creditor, as the only entity who has the authority to withdraw claims, could preclude a debtor confirming a plan and having the creditor's secured claim properly valued by withdrawing any proof of claim filed by the Debtor or trustee pursuant to Fed. R. Bankr. P. 3006.

Additionally, the Trustee's premise would also mean that the bankruptcy trustees in this District would have been improperly been disbursing funds to any creditor with a secured claim provided for in a plan which did not file a proof of claim, regardless of whether its claim was valued under § 506(a) or not. The two page "opposition" of the Trustee implicates a larger issue than just whether the Debtor could file a Motion to Value without a proof of claim. This is clearly not the contemplated nor actual outcome intended by Congress.

Therefore, the Trustee's opposition is overruled.

Improper Service

The only address served for Creditor was a post office box. Service upon a post office box is plainly 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.").

Failure to Provide Evidence of Date Debt Was Incurred

Unfortunately, the Debtor does not provide evidence of when the loan

was incurred. Neither the declaration nor the Motion state when the debt was incurred. Pursuant to 11 U.S.C. § 1325(a) hanging paragraph, in order for the Debtor to be able to value the secured claim of Creditor for an asset that is not a personal vehicle, the debt must have been incurred more than a year prior to the filing of the petition. Without this information, the court cannot determine if the claim can be valued.

Therefore, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by James and Kari Lynn Birdseye ("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.

11. 09-44339-E-13 GLEN PADAYACHEE — CONTINUED MOTION FOR CONTEMPT
PLC-16 Peter Cianchetta — 7-28-15 [213]

Stipulation filed 12/1/15 - dkt. 236
Continued from 11/17/15

Final Ruling: No appearance at the December 8, 2015 hearing is required.

The court having previously ordered that the Motion for Civil Contempt to be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) (Dckt. 238), **the Motion for Contempt is removed from the calendar.**

12. 15-27341-E-13 ROBERT LEACH **OBJECTION TO CONFIRMATION OF**
DPC-1 Pro Se **PLAN BY DAVID P. CUSICK**
11-12-15 [35]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on November 12, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Debtor failed to appear at the First Meeting of Creditors on November 5, 2015.

2. The Debtor failed to provide the Trustee with a tax transcript or a copy of the Federal Income Tax Return with attachments for the most recent pre-petition tax year.

3. Debtor is $200.00 delinquent in plan payments. The Debtor has

paid $0.00 into the plan to date.

4. Debtor's petition only lists on prior case (No. 14-25416). The Trustee alleges that a search on PACER reveals an additional three cases not disclosed: (1) No. 09-28946; (2) 14-26770); and (3) 14-27958.

5. The Debtor's plan contains errors:

   a. One West Bank/Mortgage is listed as a Class 1 claimant but the plan fails to list the monthly dividend to be paid to the mortgage arrears and lists the ongoing payment as $100.00 per month.

   b. Class 1 of the plan also lists a debt to 800 Loan Mart/Car Loan. Schedule D indicates this debt is for a title loan on 2008 Honda Civic. The Trustee believes that this debt should be listed in Class 2A.

   c. The plan fails to list the total of unsecured debts and the percentage to unsecured creditors.

6. The plan will not complete within 60 months based on the proposed plan payment.

7. Debtor has failed to use the correct Statement of Monthly Income.

The Trustee's objections are well-taken.

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

The basis for the Trustee's objection is that the Debtor is $200.00 delinquent in plan payments. The Debtor has failed to make any plan payments to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The Trustee next argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the tax transcript. These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

While the Debtor's recent bankruptcy case has implications for the duration of the automatic stay, *see* 11 U.S.C. § 362(c)(3), it is not by itself reason to deny confirmation. However, given the other issues raised by the Trustee, the failure to accurately list all prior cases does raise concerns over whether the proposed financial information provided by the Debtor is accurate.

Debtor is in material default under the plan because the plan will complete in more than the permitted 60 months. According to the Trustee, the plan will complete after the 60 month period due to the Debtor failing to provide for all necessary claim payments in the plan and failing to provide for all the secured claimants. This exceeds the maximum 60 months allowed under 11 U.S.C. § 1322(d). Therefore, the objection is sustained.

Lastly, the Trustee's remaining objections deal with the accuracy and appropriateness of the Debtor's plan and other filings. First, the Debtor's plan is not properly completed. The Debtor failed to provide necessary information such as accurate arrearages of the secured creditors or the amount of unsecured claims and the dividend for them. The court nor any other party in interest can determine if the plan is viable or feasible when the plan is facially incomplete. The financial information provided by the Debtor has not been submitted on proper forms nor does it accurately reflect the Debtor's debt. Without the plan and schedules to properly and accurately reflect the Debtor's finances, the plan cannot be confirmed.

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

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

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

13. 15-27341-E-13 MDE-2 **ROBERT LEACH Pro Se** **OBJECTION TO CONFIRMATION OF PLAN BY CIT BANK, N.A. 11-4-15 [31]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee and Office of the United States Trustee on November 4, 2015. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

CIT Bank, N.A. ("Creditor"), opposes confirmation of the Plan on the basis that:

1. The plan fails to provide for the curing of the default and proper maintenance payments on the Creditor's secured claim.

2. The Plan fails to provide how the Debtor will be able to comply with the terms of the plan when the Debtor's monthly net income reflects only $137.00 and the plan calls for $200.00 a month.

3. The plan is not proposed in good faith because this is the Debtor's fourth bankruptcy and part of a scheme to delay, hinder, and defraud creditors.

The Creditor's objections are well-taken.

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

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

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

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

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

Here, the Debtor does provide for the Creditor's claim except it undervalues the amount of arrears owed on the claim and does not provide for sufficient payment. The plan proposes an arrearage amount of $36,547.00 when the actual arrearage owed is $47,811.99. The Debtor's plan only provides for a $100.00 payment. The Creditor asserts that the monthly payment to the Creditor should be $1,209.00.

Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

As to the Creditor's second objection, the Debtor's Schedule J, , lists a $137.00 monthly net income, while the Plan provides for a $200.00 monthly payment. Taken together, this suggests the plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

While the Debtor's recent bankruptcy case has implications for the

duration of the automatic stay, *see* 11 U.S.C. § 362(c)(3), it is not by itself reason to deny confirmation. However, given the other issues raised by the Creditor, the failure to accurately list all prior cases does raise concerns over whether the proposed financial information provided by the Debtor is accurate.

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

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

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

14. 12-34546-E-13 KEITH/ZANETTA ROBINSON MOTION TO MODIFY PLAN
PGM-8 Peter Macaluso 10-28-15 [180]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 28, 2015. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

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

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

Keith and Zanetta Robinson ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 28, 2015. Dckt. 180.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 20, 2015. Dckt. 191. The Trustee opposes the Motion based on an increase of $643.85 in the deductions to fund repayment of retirement loans since the date of the petition being filed which the Trustee asserts may not have had court approval. The proposed plan forgives $42,097.00 of delinquent plan payments. The Debtor explains the basis for this delinquency as necessary car repairs and catching up on unidentified bills. Additionally, the Debtor states that they have to deal with post-petition taxes which will complete in December.

The Trustee states that the ongoing mortgage was initially paid through the plan but was changed to be directly by the Debtor because of a loan modification. It is not clear to the Trustee that the Debtor's explanation is correct as to the reason for the delinquency. The Trustee asserts that the Debtor may either be unable to make plan payments or is spending the money on unnecessary expenses.

DEBTOR'S RESPONSE

The Debtor filed a response on November 30, 2015. Dckt. 194. The Debtor states that the Debtor had a 401k loan that was listed in the schedule. In 2013, unbeknownst to counsel, and not understanding the need for court approval, the Debtor took a second 401k loan which increased the loan payments by $300.00. Debtor used this loan to repair and service their vehicles, "make ends meet," and to utilize the sums to keep the bankruptcy and monthly obligations paid for the last two years.

DISCUSSION

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

The Trustee's objection is well-taken. Admittedly, the Debtor states that the Debtor took a second 401k loan out which increased the loan payments by $300.00. Also admittedly, the Debtor failed to obtain court approval for the loan. Instead, the Debtor unilaterally incurred further debt to pay for car expenses and other undisclosed expenses without complying with the Bankruptcy Code. While the court is sympathetic to debtors who are in financially difficult situations, such situations do not excuse the Debtor from properly complying with the Bankruptcy Code.

A review of the Debtor's case shows that no Motion to Incur Debt has been filed. The Debtor has not sought retroactive court authority for the additional 401k loan taken out during the plan. Instead, the Debtor is first mentioning a 401k loan, which is two years old already. The Debtor gives a superficial explanation in the Motion and Declaration as to why the additional loan was taken out. While the proposed plan does provide for an 8.00% dividend to unsecured creditors as compared to the 0.00% dividend proposed in the prior proposed plan, the plan is still suggesting a forgiveness of $42,097.00 in delinquent plan payments. The fact that the Debtor has not received court approval for the improper second 401k loan and this is the first time the Debtor discloses the second 401k loan, the court is not persuaded that this plan is the Debtor's best effort.

With respect to the missing $42,097.00 of defaulted Plan payments, Debtors appear to casually ignore this missing money. These Debtors have substantial monthly income – $15,426.20 a month in gross monthly income. Schedule I From, Exhibit 2; Dckt. 184. From this, Debtors are "able" to have only $690.00 of monthly net income to fund a plan. Schedule J Form, Exhibit 3; *Id.* On top of this, there is $42,097.00 missing, which the court does not find credible an explanation that it was needed for reasonable, necessary, and proper car repairs.

In responding to the Objection, the Debtors are MIA. No declaration is provided, only the arguments of counsel, making statements not supported by evidence.

Not only have Debtors failed to show that they are prosecuting this plan and case in good faith, but have demonstrated that they are not prosecuting the case and plan in good faith. Debtors have squandered their opportunity for the extraordinary relief under the Bankruptcy Code. All Debtors and their counsel offer is argument that $42,000 has disappeared, Debtors have borrowed even more money for whatever unaccounted for purpose, and seek to write their own bankruptcy code under which they are not required to follow the rules that govern every other debtor.

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

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

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

15. 11-44552-E-13 TONI MAYO
SDB-2 Scott de Bie

MOTION TO VALUE COLLATERAL OF JP MORGAN CHASE BANK, N.A. 11-3-15 [30]

Final Ruling: No appearance at the December 8, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on November 9, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Toni Mayo ("Debtor") to value the secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 23233 Lone Pine Drive, Auburn, California ("Property"). FN.1. Debtor seeks to value the Property at a fair market value of $125,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. The Debtor notes that a Motion to Value the Creditor's Collateral was heard on December 20, 2011 and subsequently granted on December 20, 2011. Dckt. 23. However, the Debtor states that service may not have been sufficient and re-files the Motion to ensure proper service. The court appreciates such attention to detail to insure that orders issued by the court will have full force and effect.

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

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

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

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

Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Proof of Claim No. 5-1 filed by JPMorgan Chase Bank, N.A. is the claim which may be the subject of the present Motion. On December 5, 2014, the Creditor withdrew the Proof of Claim.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $236,445.15. Creditor's second deed of trust secures a claim with a balance of approximately $44,718.52. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Toni Mayo ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause

appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of JPMorgan Chase Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 23233 Lone Pine Drive, Auburn, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $125,000.00 and is encumbered by senior liens securing claims in the amount of $236,445.15, which exceed the value of the Property which is subject to Creditor's lien.

16. 12-34858-E-13 MELINA LEWIS **MOTION TO MODIFY PLAN**
BLG-3 Chad Johsnon **10-20-15 [59]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 20, 2015. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

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

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

Melina Lewis ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 20, 2015. Dckt. 59.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 3, 2015, Dckt. 66. The Trustee opposes the Motion on the following grounds:

1. The plan is not the debtor's best effort. The Debtor is proposing to increase her plan payments from $150.00 per month to $263.00 beginning July 2015 due to an increase in disposable income. Debtor's supplemental Schedule I reflects monthly gross wages of $7,659.83, and deductions of $2,333.43 for tax, medicare, and social security. The Trustee calculates Debtor's withholding net 7.5% for Medicare and Social Security to be $1,759.00 per month, rounded. The Trustee calculated estimated taxes for 2015 using the Debtor's filing status deduction and exemptions from the 2014 tax returns for an estimated total tax of $16,800.00. Debtor's estimated tax withholding is $21,108.00. The Trustee estimates the Debtor has over withheld taxes by $4,308. The Trustee requests the Debtor be required to pay all tax returns to the Trustee for the benefit of the creditors, or increase the plan payment by an additional $359.00 per month, for a total of $826.00.

2. Debtor may not have had permission to borrow funds from her retirement plan. Debtor's Declaration indicates Debtor made necessary repairs to her roof and refers to the exhibits which included the roofing repair contract and a 403(b) loan confirmation of activity in the amount of $9,000.00. The Debtor's Supplemental Schedule J now budgets $204.22 per month for 403(b) loan payments. The Trustee states that he cannot find a court order authorizing the borrowing nor why the Debtor would take out $9,000.00 when the repair estimate was $6,885.00.

3. Debtor's modified plan proposes 0% to unsecured creditors where attorney's fees are paid in full and only unsecured claims remain to be paid. The Trustee has disbursed 3.00% to date and calculates that with the proposed increased plan payment of $467.00, the plan could potentially pay up to 17.87% to unsecured.

4. Debtor's Supplemental Schedules I and J do not agree with the Summary of Changes to Income and Expenses Debtor has included with the Declaration. Namely, it appears that the Debtor's Schedules I and J improperly calculate the fidelity adjustment by either not including the adjustment in the Debtor's deductions on Schedule I or double counting them on Schedule J. The Debtor does not provide an explanation for these calculations nor does the Debtor provide most recent pay stubs to corroborate the evidence.

DISCUSSION

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

The Trustee's objections are well-taken. It appears that both the objections tie into the fact that the proposed plan may not be the Debtor's best efforts, especially in light of the Debtor potentially withdrawing unauthorized funds from her retirement account without court permission. A review of the Supplemental Schedules I and J show that not only is there the appearance of over-withholding, the Debtor is making payments to 403(b) loan repayments on a loan that the Debtor never sought court permission to incur. Based on the Trustee's calculation, it appears that there may be substantial additional disposable income that should either be added into the plan payments through reducing the Debtor's withholdings or should be committed to the plan through the Debtor committing her tax returns to the plan payments when received. Instead, to the court, it appears that the Debtor may be partaking in some creative deductions in her pay in order to give the appearance of less disposable income in hopes of using the tax refund outside the plan.

This conclusion is only further emphasized by the Debtor without authorization taking out a loan from her retirement account, in an amount far in excess of any repairs necessary for repairs, to only then have her Schedule J reflect the repayment of such at the expense of the estate and creditors. This plan is not the Debtor's best efforts as required by 11 U.S.C. § 1325(b). FN.1.

FN.1. The court notes that there recently been a rash of debtors who have obtained post-petition financing without obtaining approval of the court. It appears that bankruptcy counsel in this District may have developed a "plan" to have clients obtain whatever financing they want, believing that the court would allow a "poor, misguided debtor" to flaunt the Bankruptcy Code. Alternatively, debtor counsel in the District may have determined that law practices could be more profitable by cutting the actual services to clients. Neither is acceptable. It is clear that the court must disabuse all attorneys of any notion that an "it's a good strategy to seek forgiveness for a 'poor, least sophisticated debtor' who violated the Bankruptcy Code to get extra money than seek permission."

Additionally, In reviewing the Supplemental Schedule J on August 6, 2015, the court noted previously in the civil minutes that one of the expenses is $475.00 for this one Debtor's telephone, cell phone, internet, satellite, and cable service. Exhibit C, p. 23; Dckt. 50. Coincidentally, the judge just happened to be paying his family' bill for (1) a land line, (2) high speed internet, (3) cable (not including any premium channels), and three cell phones (two of which have unlimited data packages). The total bill for all of the above was $437.29 (which is the full billed rate and not part of any reduced or new customer limited time package). While such outside of court experience is not evidence or determinative of the ruling, it is common knowledge that a cell phone, internet service, and basic cable and satellite services for one person do not cost $475.00 a month for the average consumer. When this general knowledge is coupled with an unauthorized loan of $9,000 for a roof repair for which the documentation shows a cost of $6,885.00, it raises the specter of bad faith and whether the Debtor is attempting to so improperly manipulate the bankruptcy system that prosecuting any bankruptcy case could be in good faith.

In reviewing Schedule J, though not listed as a dependant, Debtor also

disburses from her income $250 a month as "Support to Daughter." *Id.* at 25.

Further undercutting the credibility of the Debtor is that she states under penalty of perjury in her declaration the following legal conclusions:

A. "My plan complies with applicable laws." Declaration ¶ 3.

B. "The Modified Plan complies with the provisions of this chapter and with other applicable provisions of title 11 of the United States Code." Declaration ¶ 3.a.

C. "I have filed the petition in good faith." ¶ 3.h.

D. "[T]he plan provides to pay the creditors pursuant to section 1325(a)(5)(B)." Declaration ¶ 3.e.

Declaration, Dckt. 62. That a layperson would sign a declaration making such legal conclusions (though the Debtor may have view the good faith statement as a personal opinion) could well mean that the Debtor merely signed the document because, "it lets me with, without regard to what I'm testifying to therein."

Debtor obtained confirmation of the original plan in this case in 2012 based on the financial information provided in original Schedules I and J. Dckt. 1. No objection to confirmation was filed and no hearing was conducted before the court. On Schedule J, Debtor stated under penalty of perjury that her transportation expenses (gas (at 2012 prices), license, registration, and repairs) was only $100.00 a month. Debtor further stated under penalty of perjury that her cell phone expense was $187 and her phone/cable/internet expense was $199.14. Those expenses totaled $386, for one person.

On Schedule J Debtor states under penalty of perjury that she has a 24 year old son, who was listed as a "dependent." *Id.* at 32. However, in the additional expenses, Debtor states she is also disbursing $250 a month "Support to Daughter." *Id.* at 34.

Debtor's auto insurance was stated under penalty of perjury to be $150 a month in 2012. *Id.* at 33. This drops to $99 in the Supplemental Schedule J. Dckt. 50 at 23.

These changing numbers, without explanation raise serious issues not only with the credibility of any testimony provided by Debtor, but whether this case was filed and is being prosecuted in good faith.

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

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

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

appearing,

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

17. 15-21163-E-13 GIANNE/RUBY-ROSE APURADO MOTION TO CONFIRM PLAN
ELG-1 Julius Engel 10-15-15 [67]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 16, 2015. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

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

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

Gianne and Ruby-Rose Apurado ("Debtor") filed the instant Motion to Confirm the Amended Plan on October 15, 2015. Dckt. 67.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 5, 2015. Dckt. 76. The Trustee opposes confirmation on the following grounds:

1. The Debtor is $697.74 delinquent in plan payments.

2. The plan fails to provide for the priority claim of the Franchise Tax Board, Proof of Claim No. 10-1, in the amount of $870.00.

DISCUSSION

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

The Trustee's objections are well-taken.

The basis for the Trustee's first objection is that the Debtor is $697.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

Here, the Debtor's plan does not provide for the priority claim on the Franchise Tax Board. The Franchise Tax Board filed Proof of Claim No. 10-1 in the amount of $870.00. The proposed plan does not provide for the payment of this priority claim in violation of 11 U.S.C. § 1325(a)(2).

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

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

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

18. 15-21163-E-13 GIANNE/RUBY-ROSE APURADO — CONTINUED MOTION TO DISMISS CASE
DPC-2 Julius Engel — 10-7-15 [63]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 7, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's decision is to grant the Motion to Dismiss and the case is dismissed.

David Cusick, the Chapter 13 Trustee, asserts that Gianne and Ruby-Rose Apurado's ("Debtor's") case should be dismissed on two grounds. First, Debtor is delinquent on plan payments. Second, Debtor has not filed a new plan.

DEBTOR'S OPPOSITION

Debtor filed opposition on October 21, 2015. Dckt. 74. Debtor has filed, noticed, and served an Amended Plan on October 15, 2015. Dckt. 67, 73.

NOVEMBER 4, 2015 HEARING

At the hearing and due to the interconnectedness of the instant Motion and the Motion to Confirm, the Motion to Dismiss was continued to December 8, 2015, at 3:00 p.m. to be heard in conjunction with the Motion to Confirm.

DISCUSSION

On December 8, 2015, the court denied confirmation of the Debtor's proposed plan due to the Debtor being delinquent in the amount $697.74 and the

failure of the plan to provide for the priority claim of the Franchise Tax Board.

First, Trustee seeks dismissal of the case on the basis that the Debtor is $697.74 delinquent in plan payments. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Second, the Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on September 20, 2015. Dckt. 59. While the Debtor did file a proposed plan and Motion to Confirm on October 15, 2015, the court denied confirmation of that plan as discussed supra. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

Therefore, cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

19. 10-25364-E-13 DEF-5 ROBERT/MARGARETTE WARNICK David Foyil

MOTION FOR SUBSTITUTION OF DECEASED PARTY 10-23-15 [90]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 23, 2015. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute is granted.

Joint Debtor, Margarette Warnick, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Robert Warnick. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on March 5, 2010. On May 27, 2010, the Debtor's Chapter 13 Plan was confirmed. Dckt. 24. On December 9, 2014, Debtor Robert Warnick passed away. The Joint Debtor asserts that she is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties.

The Debtor failed to file a Notice of Death.

Local Bankruptcy Rule 1016-1 outlines the procedure necessary for a party to notice the court and other parties of interest of the death of a debtor. Specifically, the Local Rule states:

> In a bankruptcy case which has not been closed a Notice of Death of the debtor [Fed. R. Civ. P. 25(a), Fed. R. Bank. P. 7025] shall be filed within sixty (60) days of the death of a debtor by the counsel for the deceased debtor or the person who intends to be appointed as the representative for or successor to a deceased debtor. The notice of Death shall be served on the trustee, U.S. Trustee, and all other parties in interest. A copy of the death certificate (redacted as appropriate) shall be filed as an exhibit to the Notice of Death.

If the moving party wished to combing the Notice of Death with a claim for relief as outlined in Local Bankr. R. 1016-1(b), the moving party was required to title the motion "NOTICE OF DEATH AND MOTION FOR [stated relief requested]."

Unfortunately, the Debtor did not comply with the Local Rules. The Debtor filed two Motions: (1) Motion for Substitution of Deceased Party and (2) Motion for Waiver or Requirement to Complete and File the Debtor's 11 U.S.C. § 1328 Certificate and the Certificate of the Chapter 13 Debtor Regarding 11 U.S.C. § 522(q) Exemptions. Dckt. 90 and 95. Neither of these motions are titled Notice of Death. Only the second Motion has a death certificate attached.

However, it appears that the Debtor's counsel is operating under the prior version of the Local Rules. Given the relative newness of the Local Rule and the fact that the death certificate has, in fact, been filed, the court waives the instant non-compliance with the Local Rule. However, Debtor's counsel should review the updated Local Rules.

The Debtor filed a death certificate on October 23, 2015. Dckt. 98. Joint Debtor is the wife of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that she will continue to prosecute this case in a timely and reasonable manner.

David Cusick, the Chapter 13 Trustee, filed a non-opposition on November 20, 2015.

DISCUSSION

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

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

See also, *Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the

same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Here, the Surviving Debtor has requested the first step, the substitution as the real party in interest for the interests of the Deceased Debtor. The Motion is Granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Margaret Warnick is substituted as the successor-in-interest to Robert Warnick pursuant to Federal Rule of Civil Procedure 25 and Federal Rule of Bankruptcy Procedure 9014 and 7025.

20. 10-25364-E-13 ROBERT/MARGARETTE WARNICK
DEF-6 David Foyil

MOTION FOR WAIVER OF REQUIREMENT TO COMPLETE AND FILE THE DEBTORS' 1328 CERTIFICATE AND THE CERTIFICATE OF THE CHAPTER 13 DEBTOR REGARDING 522 EXEMPTIONS
10-23-15 [95]

Tentative Ruling: The Motion for Waiver of Debtor's 11 U.S.C. § 1328 Certificate and the Certificate of Chapter 13 Debtor Regarding 11 U.S.C. § 522(q) Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 23, 2015. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion for Waiver of Debtor's 11 U.S.C. § 1328 Certificate and the Certificate of Chapter 13 Debtor Regarding 11 U.S.C. § 522(q) Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Chapter 13 Case to Continued is granted, and the Request for Waiver of Debtor's 11 U.S.C. § 1328 Certificate and the Certificate of Chapter 13 Debtor Regarding 11 U.S.C. § 522(q) Exemptions is denied.

Joint Debtor, Margarete Warnick, seeks an order approving the motion to waive the requirement of the deceased Debtor, Robert Warnick, to complete

and filed the Debtor's 11 U.S.C. § 1328 Certificate and the Certificate of Chapter 13 Debtor Regarding 11 U.S.C. § 522(q) Exemptions.

The Motion also states, "Co-Debtor is asking this court to allow further administration of my case so that I may obtain a discharge. I believe that further administration is possible and in the best interest of the parties." Though not titled in the Motion or stated in the prayer, the court construes this to be a request, pursuant to Federal Rule of Bankruptcy Procedure 1016, for relief to allow this bankruptcy case to proceed as to the Deceased Debtor. Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under chapter 11, chapter 12, or chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id*.

The Debtor filed for relief under Chapter 13 on March 5, 2010. On May 27, 2010, the Debtor's Chapter 13 Plan was confirmed. Dckt. 24. On December 9, 2014, Debtor Robert Warnick passed away. The Joint Debtor asserts that she is the lawful successor and representative of the Debtor.

Local Bankruptcy Rule 5009-1(b) requires the filing with the court Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate and Debtor's Statement of Chapter 13 Debtor Regarding 11 U.S.C. § 522(q). Local Bankr. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

The court has been presented with sufficient evidence and the non-opposition of the Chapter 13 Trustee to conclude that further administration of this case with the personal representative appointed for the interests of the Deceased Debtor is possible. That portion of the motion is granted.

Here, the Debtor has not provided any evidence or argument as to why the surviving Debtor, as the personal representative of the deceased Debtor, could not sign the certificates on behalf of the deceased Debtor. The certificates do not require that the surviving Debtor perform any additional tasks that would be repetitive or unnecessary. Instead, the surviving Debtor, acting as the personal representative and agent for the deceased Debtor, could sign these certificates of the deceased Debtor.

Therefore, the Debtor failing to show cause, the Motion for waiver of the post-filing certifications 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 for Waiver of Debtor's 11 U.S.C. § 1328 Certificate and the Certificate of Chapter 13 Debtor Regarding

11 U.S.C. § 522(q) Exemptions filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion For Continued Administration of this case to proceed notwithstanding the Debtor Robert Warnick is granted.

IT IS FURTHER ORDERED that the request for waiver of the 11 U.S.C. § 1328 and 11 U.S.C. § 522(q) certifications is denied.

21. 15-28165-E-13 TOG-1 | **LEON VICENTE AND ANGELA XILOJ**
Thomas Gillis | **MOTION TO VALUE COLLATERAL OF DITECH FINANCIAL, LLC**
11-2-15 [14]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on November 2, 2015. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of DITECH FINANCIAL, LLC F/K/A GREEN TREE SERVICING, LLC ("Creditor") is denied without prejudice.

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

Cir. 2004).

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 20, 2015. Dckt. 23. The Trustee simply argues that because the Creditor has not filed a claim in the case, the Trustee is uncertain if the Debtor can value the property when there is no allowed claim on file. The Trustee cites only to 11 U.S.C. § 502(a).

DISCUSSION

As to Trustee's objection, the court is not persuaded that a proof of claim is necessary in order for the court to value the secured claim of a debtor. First, the Trustee's "opposition" does not provide any argument or legal authorities (other than referencing the Bankruptcy Code proof of claim sections) as to why the mere fact a secured claim does not have a proof of claim why a Motion to Value is inappropriate.

A creditor is not required to file a proof of claim for a secured claim. Rather, the Debtor has to address the secured claim, or continue to have the collateral saddled by the lien. As the Supreme Court has found, a lien continues through the bankruptcy case unaffected, subject to the ability of a debtor to modify the rights of the holder of the lien under the provisions of the Bankruptcy Code. *Dewsnup v. Timm*, 502 U.S. 410 (1992).

The mere failure to file a proof of claim not affecting the lien rights and the creditor having a "secured claim, is recognized in 11 U.S.C. § 506(d):

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
>
> > (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
> >
> > **(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.**

Therefore, § 506(d) allows for liens to pass through the bankruptcy case unaffected. The lien being unaffected by the bankruptcy case itself, therefore, means that the discharge injunction does not stip the lien. Even reviewing the plain language of § 506(d), the Code expressly states that a secured claim is not void "due only to the failure of any entity to file a proof of such claim under section 501 of this title."

Applying these foundations to the Trustee's argument, the assertion that a proof of claim is necessary for the court value the creditor's secured claim pursuant to § 506(a) is not supported by the Bankruptcy Code.

Looking outside of § 506, Fed. R. Bankr. P. 3002 outlines the rules for filing a proof of claim or interest. Pursuant to Fed. R. Bankr. P. 3002(a):

> (a) Necessity for Filing: Unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or

interest to be allowed. . . .

The canon of construction *expressio unius est exclusio alterius*, when one or more things of a certain classification are expressly mentioned, others of the same classification is excluded, applies directly to the instant objection. Here, the rules promulgated explicitly require that an unsecured creditor must file a proof of claim in order for their unsecured claim to be deemed allowed. Fed. R. Bankr. P. 3002 excludes secured claims from such requirements. As such, and under the canon, the failure of an entity to file a proof of claim for a secured claim does not deem it disallowed.

While the court is cognizant of the literal reading advanced by the Trustee, the substantial case law and legislative history surrounding § 506 valuations support the conclusion that a proof of claim is not necessary for a § 506(a) motion. This is further emphasized by Fed. R. Bankr. P. 3004 and 3006. While Fed. R. Bankr. P. 3003(c)(3) provides for an exclusive period within which a creditor may file a proof of claim, Fed. R. Bankr. P. 3004 allows for a trustee or debtor to file a proof of claim on behalf of a creditor if that creditor fails to timely file a proof of claim. In comparison, Fed. R. Bankr. P. 3006 deals with the withdrawal of claims. Specifically, the Rule permits a creditor, as a matter of right, to withdraw a claim prior to any objection being filed. The Rule, however, does not extend that same right to a trustee or debtor.

The Trustee's suggestion that a proof of claim is necessary for the debtor to value a secured claim would lead to a very troubling dysfunctional in the Bankruptcy Code. A creditor, as the only entity who has the authority to withdraw claims, could preclude a debtor confirming a plan and having the creditor's secured claim properly valued by withdrawing any proof of claim filed by the Debtor or trustee pursuant to Fed. R. Bankr. P. 3006.

Additionally, the Trustee's premise would also mean that the bankruptcy trustees in this District would have been improperly been disbursing funds to any creditor with a secured claim provided for in a plan which did not file a proof of claim, regardless of whether its claim was valued under § 506(a) or not. The two page "opposition" of the Trustee implicates a larger issue than just whether the Debtor could file a Motion to Value without a proof of claim. This is clearly not the contemplated nor actual outcome intended by Congress.

Therefore, the Trustee's opposition is overruled.

UNIDENTIFIABLE CREDITOR NAMED IN MOTION

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

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

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff,

> as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

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

Debtor seeks to value the collateral of "DITECH FINANCIAL, LLC F/K/A GREEN TREE SERVICING, LLC." However, the court cannot determine from the evidence presented what, if this entity is, in fact, the creditor and whose secured claim is to be valued pursuant to this Motion. The court will not issue orders on incorrect or partial parties that are ineffective. Debtor may always use Federal Rule of Bankruptcy 2004 to aid in finding creditors.

It appears that the name "DITECH FINANCIAL, LLC F/K/A GREEN TREE SERVICING, LLC" may be the loan servicer, an admission that Debtor has no idea who the creditor is and seeks an order valuing that unidentified creditor in absentia through the loan servicer. If the court were to grant such order, it would be ineffective, subjecting Debtor to years of paying under a plan, only to discover that Debtor still owes that unidentified creditor the full amount of the debt. Such discovery after years of performing under a Chapter 13 Plan would be an unhappy day not only for the Debtor, but her counsel as well – most likely leaving the Debtor unable to either "lien strip" the true creditor's security interest or no having the benefit of paying a reduced secured claim.

Therefore, because the Debtor has not provided evidence of who the actual creditor is, 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 for Valuation of Collateral filed by Leon Vicente and Angela Xiloj ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

22. 12-22167-E-13 MICHAEL/TANYA CHILSON
BLG-3 Paul Bains

MOTION FOR COMPENSATION BY THE LAW OFFICE OF BANKRUPTCY LAW GROUP, PC FOR PAULDEEP BAINS, DEBTORS' ATTORNEY(S)
11-10-15 [50]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on November 12, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is denied without prejudice.

Pauldeep Bains, the Attorney ("Applicant") for Michael and Tanya Chilson, the Chapter 13 Debtor ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period February 3, 2012 through December 8, 2015. Applicant requests fees in the amount of $1,890.00 and costs in the amount of $36.47.

Applicant notes that, pursuant to the executed copy of this court's Rights and Responsibilities of Chapter 13 Debtors and their Attorney, Applicant has been paid $2,000.00 by the David Cusick, the Chapter 13 Trustee. Under that document, Applicant was set to receive $3,500.00 for services rendered.

APPLICANT'S MOTION FOR COMPENSATION

Applicant's motion asserts the following grounds for compensation beyond the No-Look Fee received in this case:

A. Since confirmation of the May 7, 2012 Plan, Bankruptcy Law Group has been required to complete a significant amount of additional work as necessitated by unforeseeable circumstances;

B. Applicant's firm has completed 2.3 hours of "Case Admin," of which 0 were charged;

C. Applicant has communicated with debtors and trustee on income, expense VA lump sum payment and inheritance, prepared an "MTM and Modified Plan," which took 14.1 hours. Applicant is not charging for 7.8 hours;

D. The firm also completed the instant Motion for Additional Attorney Fees, which took 2.0 hours. Applicant is charging 0 hours for this work.

Dckt. 50.

To support this motion, Applicant filed the Declaration of Pauldeep Bains on November 10, 2015. Dckt. 52. The Declaration states:

A. It was unanticipated when the debtor's filed their Chapter 13 that their income and expenses would change and that they would need to lower their monthly plan payment. Furthermore, it was unanticipated that debtors would receive an inheritance and VA disability back pay allowing an additional lump sum payment towards their Chapter 13 proceeding;

B. It was necessary to prepare and file Motion to modify BLG-2 to reflect the changes in the monthly income and expenses and to account for an inheritance and a lump sum of VA disability back pay;

C. I believe the circumstances that have been described in the motion, are beyond what should be considered "typical" in a Chapter 13 case as described In re Pedersen 229 B.R. 445 (Bankr. E.D.Cal. 1999).

Id. at ¶ 3-5.

Also, Applicant filed an Exhibit A on November 10, 2015. Dckt. 53. FN.1. Because this document has not been authenticated and no hearsay exception was provided, this evidence cannot be considered by the court. Fed. R. Evid. 801, 803, 901, 902.

Finally, Applicant filed a Supplemental Bains Declaration on November 12, 2015. Dckt. 56. The Supplemental Bains Declaration corrects an error in the Motion, stating that Jan P. Johnson was the Chapter 13 Trustee, and requests that David Cusick's name be inserted into the relief requested instead. *Id.*

APPLICABLE LAW

NO-LOOK FEES

The payment that counsel receives under the "no-look" fee, after it is elected and confirmed in the confirmation order, is viewed by the court as generally sufficient to fairly compensate counsel for all pre-confirmation and most post-confirmation services such as reviewing notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to claims filed.

Local Rule 2016-1 governs no-look fees in Chapter 13 cases and states in relevant part:

> (c) **Fixed Fees Approved in Connection with Plan Confirmation**. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> 1. The maximum fee that may be charged in $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> 2. The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> 3. If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subprt, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most post-confirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

Bankr. E.D. Cal. R. 2016-1.

The United State Bankruptcy Court for the Eastern District of California issued the *Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases*, which states in relative part:

> 4. If counsel has filed an executed copy of the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys," but the initial fee is not sufficient to fully compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The court will not approve, however, additional compensation in cases in which no plan is

> confirmed, or for work necessary to confirm the initial plan. Further, counsel should not view the fee permitted by these Guidelines as a retainer that, once exhausted, automatically justifies a fee motion. This fee is sufficient to fairly compensate counsel for all preconfirmation services and most post-confirmation services such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. . .

Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases.

DISCUSSION

On the evidence admissible under the Federal Rules of Evidence, this court cannot assert that the facts of this case are "substantial and unanticipated." The Rights and Responsibilities of Debtor and Attorney, filed February 3, 2012 and referred to by Applicant, states that after the case is filed Applicant agreed to:

> 5. Prepare, file, and serve necessary modifications to the plan which may include suspending, lowering, or increasing plan payments.
>
> 6. Prepare, file, and serve necessary amended statements and schedules, in accordance with information by the debtor.
>
> ...
>
> 11. Provide such other legal services as are necessary for the administration of the present case before the Bankruptcy Court.

Dckt. 7. p. 2. Here, where Applicant asserts that the firm has provided services to modify the plan and other legal services necessary for the administration of the case, the court does not find that the Applicant has sufficiently authenticated or states under the penalty of perjury as to the accuracy of the time records of that the services provided as "substantial or unanticipated."

While it is possible that the court could have pieced together the "substantial and unanticipated" grounds from other pleadings in the case – i.e. the modified plan, the evidence filed in support of the modified plan, and the court's civil minutes confirming the modified plan - the court declines the invitation to provide associate work for the Applicant. The Applicant should provide all grounds for substantial and unanticipated fees in the Motion and declaration. The Debtor's declaration cuts a bit too short a corner and does not attest that the information in the billing records is true and correct. Instead, the Applicant appears to just suggest that in the record there are sufficient grounds for additional fees. This is imporper.

On these grounds, the motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Pauldeep Bains ("Applicant"), Attorney for the Chapter 13 Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the motion is denied without prejudice.

23. 15-27472-E-13 RIGOBERTO/FELIX RODRIGUEZ — MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
PGM-2 Peter Macaluso — 11-5-15 [42]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on November 5, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Wells Fargo Bank (Creditor") is granted and the secured claim is determined to have a value of $8,595.00.

DEBTOR'S MOTION TO VALUE COLLATERAL

The Motion filed by Rigoberto and Felix Rodriguez ("Debtor") to value the secured claim of Wells Fargo Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2010 Volkswagen Jetta ("Vehicle").

The Debtor seeks to value the Vehicle at a replacement value of $8,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also*

Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004). Debtor also attached a document titled "West Auction Vehicle Appraisal as Exhibit A. FN.1.

FN.1. Debtor provided no additional evidence to authenticate the document attached as Exhibit A, titled "West Auctions Vehicle Appraisal," and provided no hearsay to admit this out-of-court statement. Fed. R. Evid. 801, 803, 901, 902. Thus, this evidence is unauthenticated and inadmissible hearsay. Additionally, Debtor does not state why an "auction value appraisal" is relevant to determination of value in this Contested Matter.

In addition, Debtor declares that the state of the car is as follows:

A. Paint not in good condition

B. Tires not in good condition

C. Dents and scratches around the car

D. Needs a new drive belt

E. Needs new valve covers

F. Shocks/struts need to be replaced

G. Visor missing on passenger side

H. Our car was appraised by West Auctions, who determined the liquidation value of our vehicle to be $4,950.00.

Dckt. 44 ¶ 6 (A)-(G), 7.

CREDITOR'S OPPOSITION TO THE MOTION

Creditor filed an opposition the Debtor's Motion on November 17, 2015. Dckt. 57. Creditor opposes the motion on the following grounds that the Creditor should not be forced to accept the low valuation of the collateral. The Creditor states that no evidence or context has been given by the Debtor as to the conditions of the Vehicle to determine if the value of the Vehicle should be adjusted downward. Namely, Creditor asserts that the Debtor has not provided grounds as to his expertise in the field to determine if such repairs are in fact necessary.

The Creditor seeks to value the Vehicle at $9,750.00 based on the properly authenticated NADA Valuation Report.

CREDITOR'S OPPOSITION TO THE EXHIBIT

Creditor filed a separate opposition to Debtor's evidence submitted in support of Debtor's Motion. Dckt. 58. The Creditor objects to the Debtor's vehicle appraisal because it lacks foundation, was not authored by anyone under the penalty of perjury and has not been authenticated. Additionally, the Creditor objects to the Debtor's conclusions on car repairs because the Debtor

has failed to establish the Debtor's expertise.

DEBTOR'S REPLY

Debtor filed a reply on November 23, 2015. Dckt. 63. The Debtor asserts that the Debtor has provided evidence that the Vehicle value should be $8,000.00 based on the Debtor's opinion and the attached appraisal. Furthermore, the Debtor notes that the Creditor has not requested a continuance for an evidentiary hearing and that the court should not allow one because the Creditor did not request one. The Debtor also argues that the Creditor's valuation is not accurate because it makes no adjustment for damage.

The Debtor argues that the Creditor failed to file a separate statement of disputed facts as required by Local Bankr. R. 9014-1. The Debtor argues that the Creditor has not authenticated that NADA exhibit.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred in November 23, 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $11,125.31.

First, the court notes that the Debtor is incorrect in stating that the Creditor failed to authenticate the NADA Valuation (see Dckt. 60, ¶ 3) and that the Creditor failed to file a separate Statement of Disputed Facts (Dckt. 59). The Creditor provided the declaration of an employee who authenticated the valuation and presented foundation for the hearsay exception. Therefore, the Debtor's objections are overruled.

As to the Debtor's valuation, the Debtor does not provide the declaration of Donna Bradshaw of West Auctions to authenticate the valuation. Instead, the Debtor filed their own declaration in attempts to introduce the appraisal. This is improper. The Debtor has not provided the court with a basis for determining that this out of court statement is admissible hearsay. Fed. R. Evid. 802, 803. The court will not presume to make evidentiary legal assertions for Movant, which may or may not be so intended. Some common Hearsay Rule exceptions include records of regularly conducted activity, public records and reports setting forth the activities of the public agency or observed pursuant to a duty imposed by law, and market reports, commercial publications." Fed. R. Evid. 803(6), (8), and 803(17).

The two values the parties are proposing for the Vehicle are $8,000.00 and $9,750.00. There is a difference of $1,750.00 between the two. Assuming that combined the two attorneys bill a combined hourly rate of $650 an hour, two and one-half hours of time expended arguing on this Motion exhausts the value being argued over.

The court begins the NADA Valuation of $9,750.00, which the court accepts from Wells Fargo Bank, N.A. as being the "replacement value" determined "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time the value is determined." 11 U.S.C. § 506(a)(2).

Debtor testifies under penalty of perjury to the following:

A. The vehicle is in fair condition.

B. This 2010 model year old vehicle has 105,189 miles on it (which is approximately 17,531 miles per year over six years).

C. Paint is not in good condition.

D. Tires are not in good condition.

E. Dents and scratches around the car.

F. Needs a new drive belt.

G. Needs new valve covers.

H. Shocks/struts need to be replaced.

I. Visor missing on passenger side.

Declaration, ¶¶ 4-6. The NADA report makes no adjustment for mileage, stating that the mileage for a clean retail vehicle valued at $9,750.00 would be 77,500 miles. The actual mileage on this vehicle is 50% higher. Based on common experience and knowledge in the community the court determines that (1) 17,531 miles per year is higher than the general average and (2) that actual mileage of 105,189 is greater mileage than the 77,500 used in the NADA Report and would cause the value to be reduced. Fed. R. Evid. 201.

Second, the court finds credible Debtor's testimony of the damage and required repairs for the vehicle to not be unreasonable and likely to exits for a six model year old vehicle with 105,189 miles on it. This damage and required repairs would further decrease the retail value of the vehicle. Further, it is not unexpected that a person who has been driven to bankruptcy by financial pressures would have deferred maintenance and possible cosmetic damage to a vehicle.

All totaled, the court finds that the additional mileage, damage, condition, and deferred maintenance further reduces the value of the vehicle from the "Clean Retail, 77,000 mile" value presented by Wells Fargo Bank, N.A. an addition $1,155.00.

Therefore, the court determines the value of the Vehicle to be $8,595.00.

The lien on the Vehicle's title secures a purchase-money loan incurred in November 23, 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $11,125.31. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $8,595.00. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value the secured claim of Wells Fargo Bank, N.A. filed by Rigoberto and Felix Rodriguez("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. ("Creditor") secured by an asset described as 2010 Volkswagen Jetta ("Vehicle") is determined to be a secured claim in the amount of $8,595.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $8,959.00 and is encumbered by liens securing claims which exceed the value of the asset.

24. 15-27472-E-13 APN-1 RIGOBERTO/FELIX RODRIGUEZ Peter Macaluso OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 10-23-15 [36]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 23, 2015. By the court's calculation, 46 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection to Confirmation.

Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Creditor"), opposes confirmation of the Plan, proposed by Rigoberto and Felix Rodriguez ("Debtor") on October 6, 2015, on the basis that:

1. The value allocated to Creditor's collateral under Debtor's proposed Plan is substantially below the value given in the *NADA Official Used Car Guide*. On the absence of further evidence explaining the valuation discrepancy, Creditor

> contends that Debtor has not satisfied the burden under 11 U.S.C. Sec 506(a)(2). Thus, Debtor's proposed Plan does not comply with 11 U.S.C. § 1325(a) because it does not pay Creditor the present value of its secured claim and, therefore, cannot be confirmed.

Dckt. 36; Dckt. 38 ¶ 4, 5. In sum, Creditor objects on the grounds that Debtor's October 6, 205 proposed Plan relies on the motion to value collateral secured by a lien held by Creditor.

DISCUSSION

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Creditor. Dckt. 17 p.3. However, Debtor filed a Motion to Value Collateral of Creditor on November 5, 2015. Dckt. 42.

The court has granted the Motion, valuing the secured claim at $8,595.00. The proposed Chapter 13 Plan provides to pay this claim, amortized over 60 months at 4.50% interest. Using the Microsoft Excel Loan Calculator Program, the court computes this monthly payment to be $160.24. The proposed plan lists a monthly payment of $185.00 a month, which appears to overstate the amount that is required to be paid the Bank on this secured claim. (It appears that counsel for Debtor ran a loan amortization using a secured claim value of $9,700.00.)

The allowed secured claim, as valued pursuant to 11 U.S.C. § 506(a) is properly provided for in the Chapter 13 Plan. The objection of Wells Fargo Bank, N.A. is overruled.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Confirmation of the Plan is overruled.

25. 15-27472-E-13 DPC-1 RIGOBERTO/FELIX RODRIGUEZ Peter Macaluso OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 11-12-15 [53]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on November 12, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection to Confirmation.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan, filed on October 6, 2015 by Rigoberto and Felix Rodriguez ("Debtor") on the basis that:

1. In violation of 11 U.S.C. § 1325(a)(6), Debtor cannot afford to make plan payments because Debtor's Plan relies on the Motions to Value Collateral of Wells Fargo Bank and Citibank/Best Buy, set for hearing on December 8, 2015;

2. While Trustee does not oppose this treatment, Section 6 of Debtor's Plan proposes to treat the non-dischargeable debt of

> Robert Russo as a Class 6 special unsecured debt. Trustee admits that "[t]he additional provisions of the current plan limiting the payment [of Class 6 debtors] to months 49-60 were overlooked in error at the time the Trustee filed the Opposition to the Motion to Extend Automatic Stay (docket #27).

Dckt. 53.

Debtor has not filed an opposition.

DISCUSSION

A review of the Debtor's plan shows that it relies on the court valuing the secured claims of both Best Buy and Wells Fargo Bank. Dckt. 17 p. 3. However, since Trustee's objection was filed, Debtor filed Motions to Value Collateral of Wells Fargo Bank, N.A., and Citibank N.A./Best Buy Credit Services. Dckt. 42, 48.

The court has granted the Motion to Value the secured claim of Wells Fargo Bank, N.A. That secured claim being valued at $8,595.00, the monthly payment is $160.00, while the Chapter 13 Plan had already allocated monthly payments of $180.00 to be paid for this secured claim. (It appears that Debtor mis-computed, and overstated, the monthly payment of the Class 2 claim for Wells Fargo Bank, N.A. in the proposed plan).

The court has denied Debtor's Motion to Value the secured claim of some entity stated to be "Citibank, N.A./Best Buy Credit Services." DCN: PGM-3. The court has been presented with no evidence that an entity by that name is a creditor in this case. The court has not been presented with any evidence that any such entity exists.

The Chapter 13 Plan does not provide for any secured claim of "Citibank, N.A./Best Buy Credit Services." There is a claim listed for a creditor named "Best Buy Credit Services." When the court checked the California Secretary of State's on-line data base of entities registered to do business in California, there is no corporation, limited liability company, or limited partnership with the name "Best Buy Credit Services."

The court notes that on November 11, 2015, twenty-eight days before the hearing on the motion to value, a creditor named Portfolio Recovery Associates, LLC filed a proof of claim for a general unsecured claim in the amount of $1,795.00. Proof of Claim No. 9. In Box 3.a. of the Proof of Claim it is stated that Debtor may have scheduled the claim as "Best Buy." The basis for the claim is stated to be "CREDIT CARD."

Attached to Proof of Claim No. 9 is a Bill of Sale and Assignment, by which Citibank, N.A. assigned the $1,795.14 "Best Buy" claim to Portfolio Recovery Associates, LLC. Unfortunately, there is no Exhibit 1 listing the accounts sold by Citibank, N.A. attached to Proof of Claim No. 9.

While it may be that Portfolio Recovery Associates, LLC may be the creditor with the secured claim, no relief has been sought against it. As written, the Plan provides for a Best Buy Credit Services secured claim in the total claim amount of $1,758.36. However, it provides to pay the secured claim portion in the amount of only $250.00, with a monthly plan payment of $15.00.

At $1,795.14, with 3.00% interest, the monthly payment is slightly more than double, with a $33.47 a month payment required.

Though this secured claim has not been valued, it appears that Debtor so grossly over projected the payment to Wells Fargo Bank, N.A. on its secured claim (by $20 a month), that there exists an extra $15 a month for the Trustee to hold back the full payment of $33.47 to be paid to the creditor once properly identified, or such portion thereof which may ultimately determined to be the value of the secured claim.

The Objection is overruled, with the Trustee to withhold $33.47 of each monthly plan payment for disbursement of the creditor holding the secured claim identified as the "Best buy Credit Services" claim.

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 Objection to Confirmation the Plan is overruled, and that the plan filed on October 6, 2015 is confirmed, with the court ordering that the Trustee withhold $33.47 from each month plan payment for application to the Class 2 secured claim for the creditor identified in the Plan as "Best Buy Credit Services." The Trustee shall not disburse the money except upon further order of the court after the creditor has been identified and the value of the secured claim, if less than $1,795.14, has been determined by the court pursuant to 11 U.S.C. § 506(a). This order language shall be included in the Order confirming the Chapter 13 Plan which is to be prepared by Counsel for Debtor, approved by the Chapter 13 Trustee, and lodged with the court.

26. 15-27472-E-13 RIGOBERTO/FELIX RODRIGUEZ — MOTION TO VALUE COLLATERAL OF CITBANK, N.A./BEST BUY CREDIT SERVICES
PGM-3 Peter Macaluso — 11-5-15 [48]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 5, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of "Citibank N.A./Best Buy Credit Service" ("Creditor") is denied without prejudice.

The Motion filed by Rigoberto and Felix Rodriguez ("Debtor") to value the secured claim of "Citibank, N.A./Best Buy Credit Service" ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a: (1) Apple laptop; (2) an LG television; and (3) and iPhone 5 ("Property"). The Debtor seeks to value the Property at a replacement value of $250.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor seeks to value the collateral of "Citibank N.A./Best Buy Credit Service." However, the court cannot determine from the evidence presented

what, if any, legally recognized entity the Debtor asserts is a creditor and whose secured claim is to be valued pursuant to this Motion. The court will not issue orders on incorrect or partial parties that are ineffective. Debtor may always use Federal Rule of Bankruptcy 2004 to aid in finding creditors. FN.1.

FN.1. It appears that the name "Citibank N.A./Best Buy Credit Service" may be a made-up name, an admission that Debtor has no idea who the creditor is and seeks an order valuing that unidentified creditor in absentia. If the court were to grant such order, it would be ineffective, subjecting Debtor to years of paying under a plan, only to discover that Debtor still owes that unidentified creditor the full amount of the debt. Such discovery after years of performing under a Chapter 13 Plan would be an unhappy day not only for the Debtor, but her counsel as well – most likely leaving the Debtor unable to either "lien strip" the true creditor's security interest or no having the benefit of paying a reduced secured claim.

The Debtor's Schedule D indicates that the creditor is "Best Buy Credit Card Services." Dckt. 11. The Debtor fails to attach any evidence to show who the real creditor in interest is. Instead, the Debtor utilizes a "/" which is the equivalent of "and/or" in order to "cover all bases." Unfortunately, this is not sufficient and the court will not issue maybe-effective orders.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Rigoberto and Felix Rodriguez ("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.

27. 12-25574-E-13 JASON/MARGARET KHAN
PGM-1 Peter Macaluso

MOTION FOR OMNIBUS RELIEF UPON DEATH OF DEBTOR
10-29-15 [52]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 29, 2015. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute is continued to 3:00 p.m. on January 12, 2016.

Joint Debtor, Jason Khan, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Margaret Khan. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on March 22, 2012. On August 31, 2012, the Debtor's Chapter 13 Plan was confirmed. Dckt. 36. On September 1, 2015, Debtor Margaret Khan passed away. The Joint Debtor asserts that he is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. The Suggestion of Death was filed on October 29, 2015. Dckt. 52. Joint Debtor is the husband of the deceased

party and is the successor's heir and lawful representative.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 18, 2015. Dckt. 58. The Trustee objects on the following grounds:

1. The Debtor does not city the legal authority of continued administration of the case.

2. It is not clear if the deceased Debtor had any life insurance as no policies were listed in the most recent Schedules B and C. a life insurance expense in the amount of $28.46 was listed on Schedule J. Dckt. 22.

3. The Motion does not address any survivor benefits. A pension through Operating Engineers retirement fund with a value of $9,207.95 and a 401(k) through Teichert with a value of $8,626.45 were listed on Schedule B. Both Assets were listed on Schedule C and exempted in those amounts. It is not clear which Debtor these assets belonged to.

4. The Surviving Debtor has offered no explanation as to how he will be able to pay th expenses and fund the plan after losing the deceased Debtor's income. The Surviving Debtor also failed to file supplemental Schedules I and J.

DEBTOR'S REPLY

The Surviving Debtor filed a reply on November 23, 2015. Dckt. 61. The surviving Debtor responds as follows:

1. Further administration of the case is possible because the Surviving Debtor is the deceased Debtor's husband and successor in interest. The Surviving Debtor states that he intends to complete the plan. Dckt. 55. Additionally, the Surviving Debtor asserts that it is in the best interest of the parties to continue the case because there is a confirmed plan.

2. The Surviving Debtor did not receive anything more than a social security death benefit of $255.00 which was used for the funeral of the deceased Debtor.

3. The pension belongs to the Surviving Debtor and Operating Engineers.

4. The Debtor's income was based on the surviving Debtor's employment and a contribution from his deceased wife of approximately $1,600.00 per month, less $200.00 for taxes for 1099 work. The Debtor states that while the income from the deceased Debtor has been eliminated, the Surviving Debtor does have fewer expenses as his daughters are now 19 and 26 years of age and no longer require food and other expenses originally

contemplated in the 2012 budget. The Debtor acknowledges the need to amend Schedules I and J to ensure the ongoing feasibility of the plan.

DISCUSSION

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

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

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

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

> Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

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

Local Bankruptcy Rule 5009-1(b) requires the filing with the court Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. Local Bankr. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

Here, the court shares the concerns of the Trustee over the continued feasibility and administration of the case. The Debtor admits in the reply that there is a need for supplemental Schedules I and J. This need is only further emphasized by the facts that the Debtor's last Schedule I and J filed is three years old, that the Debtor Margaret Khan passed away, and that the Debtor's children are no longer requiring food and other expenses.

It is impossible for the court to make a determination that continued administration of the case is in the best interest of the estate and parties. The Debtor admits that the court does not have sufficient evidence to ensure the ongoing feasibility of the plan. See Dckt. 61.

Rather that denying the Motion, the court continues the instant Motion to 3:00 p.m. on January 12, 2015. The Debtor shall file and serve on or before December 22, 2015 supplemental Schedules I and J. Any opposition or reply shall be filed and served on or before January 5, 2016. This will allow the Surviving Debtor to address all of the issues in one omnibus motion, rather than granting only partial relief and requiring one or more additional motions.

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

IT IS ORDERED that the Motion is continued to 3:00 p.m. on January 12, 2015. The Debtor shall file and serve on or before December 22, 2015 supplemental Schedules I and J. Any opposition or reply shall be filed and served on or before January 5, 2016.

28. 15-26082-E-13 NICHOLAS RIGHTER **CONTINUED OBJECTION TO DEBTOR'S**
DPC-2 Brian Turner **CLAIM OF EXEMPTIONS**
10-2-15 [25]

Tentative Ruling: The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and parties requesting special notice on October 2, 2015. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Claimed Exemptions is overruled.

The Trustee objects to the Debtor's use of the California Code of Civil Procedure §703.140(b)(5) for a "Bank Levy Return Location Levying Officer Sheriff's Department Los Angeles County 110 N Grand Ave, Rm 525 Los Angeles CA 90012" asset in the amount of $19,242.16. The Trustee basis his objection on the ground that 11 U.S.C. § 551 provides for the automatic preservation of an avoided transfer under various code sections, including 11 U.S.C. § 547, for the benefit of the estate but only with respect to estate property. The Trustee is not certain that the funds are not held by the Sheriff's Department based on the date of the levy, June 15, 2015, where the case was filed on July 31, 2015.

DEBTOR'S REPLY

The Debtor filed a reply on November 3, 2015. Dckt. 41. The Debtor asserts that the Debtor held a legal or equitable interest when his petition was filed in the funds levied by Golden West. The Debtor argues that returning the funds to the Debtor so that he may purchase a new vehicle will benefit the estate because his vehicle is barely operational and that he would lose his job if he is unable to find suitable transportation.

The court first notes that Debtor offers no testimony or other evidence to support the arguments made by counsel in the opposition. The court is left to go with mere argument as the only "defense."

TRUSTEE'S RESPONSE

The Trustee filed a response on November 6, 2015. Dckt. 43. The Trustee states that the Debtor fails to explain how he has a legal and equitable interest in the funds. Furthermore, while the Debtor claims to need a new vehicle, the Trustee argues that the Debtor has not proven the need for a new vehicle. The Trustee points out that on Schedule B, the Debtor lists a 2000 Jaguar S type in fair condition and needs a new windshield, A/C and replacement of the bumped and inside lining of the roof.

The Debtor has failed to bring a motion to seek authorization to purchase a new vehicle or provide any details about the purchase of a new vehicle.

NOVEMBER 17, 2015 HEARING

At the hearing, the court ordered the following:

IT IS ORDERED that the hearing on the Objection is continued to 3:00 p.m. on December 8, 2015.

IT IS FURTHER ORDERED that:

A. On or before November 24, 2015, Debtor will file and serve on the Chapter 13 Trustee and U.S. Trustee a supplemental opposition stating the legal and evidentiary basis for asserting an exemption in property recovered by the estate and the preservation of the transfer provided in 11 U.S.C. § 551.

B. Replies by the Trustee, if any, shall be filed and served on or before December 3, 2015.

C. If the Trustee determines that no Reply will be filed or that in light of the supplemental opposition that he no longer intends to proceed with the objection to claim of exemption, the Trustee may file an ex parte motion to dismiss the objection to claim of exemption (Fed. R. Civ. P. 41(a)(2); Fed. R. Bankr. P. 7041, 9014) or a notice of waiver of oral argument, and notify the courtroom deputy for Department E that such ex parte motion or waiver has been filed. If so filed, the court will consider the ex parte

motion or waiver and consider whether the matter may be resolved without oral argument in favor of the Debtor. If the court cannot so determine, then the hearing will be conducted and the Debtor afforded the opportunity to address any issues with the court.

D. Separate motions seeking further orders relating to the use of monies in which the Debtor is asserting the exemption may be filed and set for hearing at 3:00 on December 8, 2015, the court shortening the notice period. Such motions, separate points and authorities, separate declarations, and exhibits shall be filed and served on or before November 25, 2015, and oppositions, if any, may be presented orally at the hearing.

Dckt. 54.

DEBTOR'S SUPPLEMENTAL OPPOSITION

The Debtor filed a supplemental opposition on November 24, 2015. Dckt. 50. The Debtor asserts that because the Debtor has avoided the transfer, the Debtor may exempt the property pursuant to 11 U.S.C. § 522(g)(1) and (h). The Debtor asserts that because: (1) the transfer was involuntary; (2) the transfer has been avoided; (3) the Debtor did not conceal the property; and (4) the Debtor could have exempted the property under California Code of Civil Procedure § 703.150(b)(5) had the funds not been transferred that the Debtor is entitled to recover the assets.

Additionally, the Debtor asserts that the avoidance and turnover of the funds to the Debtor will benefit the estate. Specifically, the Debtor asserts that his employment requires that he holds a "high standard of aesthetically acceptable appearance" and that the Debtor's current vehicle is in need of sufficient repairs. The Debtor wishes to purchase a 2012 Jeep Grand Cherokee and was planning to use the garnished funds for the purchase of such.

TRUSTEE'S REPLY

The Trustee filed a reply to the Debtor's supplemental opposition on December 1, 2015. Dckt. 60. The Trustee states the following:

1. The Debtor has presented insufficient evidence for why their claim is effective for an exemption on Schedule C. The Debtor no longer maintains that the funds involved were at the location claimed and has not presented any reasonable means to identify the property such as on Schedule C giving the levy number, the bank levied, and identifying the account levied with the last 4 digits of the account number.

2. The Debtor's response is to claim that the Debtor may claim the property as exempt pursuant to both 11 U.S.C. § 522(g)(1) and (h). The Trustee asserts first that 11 U.S.C. § 522(g)(1) does not include recoveries under 11 U.S.C. § 547. Secondly, as to

11 U.S.C. § 522(h), the Trustee asserts that its application is limited to when the Trustee does not attempt to avoid such transfer and does not state an express exception to 11 U.S.C. § 551.

DISCUSSION

On Schedule B in this case Debtor listed as a "debt owed to debtor" the following asset:

> Bank Levy Return
> Location Levying Officer
> Sheriff's Department Los Angeles County
> 110 N. Grand Ave, Rm 525
> Los Angeles, CA 90012

Dckt. 1 at 11. The amount of this debt owed to Debtor is listed at $19,242.16. No explanation is provided as to how the Los Angeles County Sheriff's Department owes a debt to Debtor.

On Schedule C Debtor claims an exemption in the debt owed by the Los Angeles County Sheriff's Department pursuant to California Code of Civil Procedure § 703.140(b) for the full $19,242.16 amount of the debt. *Id.* at 14.

Though Schedule B lists the Los Angeles County Sheriff's Department owing a debt to Debtor, it appears that the real "asset" is intended to be the $19,242.16 which was levied upon by the pre-petition state court judgment creditor, Golden 1 Credit Union. The state court suit, judgment, and bank levy by Golden 1 Credit Union are listed on the Statement of Financial Affairs, Question NO. 4. *Id.* at 29.

Stipulation to Avoid Transfer to Golden 1 Credit Union

Debtor filed a "motion" to avoid a transfer from the Debtor to Golden 1 Credit Union in the amount of $19,242.16. Dckt. 19. Debtor states (subject to the certifications of Fed. R. Bankr. P. 9011) that Golden 1 Credit Union levied on Debtor's bank account as part of enforcing a pre-bankruptcy state court judgment. (That motion does not identify the state court action, court, or case number.) The Motion affirmatively states that the monies were transferred to Golden 1 Credit Union.

On November 3, 2015, Debtor and Golden 1 Credit Union filed a Stipulation which resolved the "motion" to avoid transfer. The court inferred from the Motion that both Debtor and Golden 1 Credit Union waived the requirements of Federal Rule of Bankruptcy Procedure 7001(1) that an action to avoid a transfer pursuant to 11 U.S.C. § 547 must be commenced as an adversary proceeding, and that the parties contested to the Contested Matter proceeding. Dckt. 39.

In the Stipulation, both the Debtor and Golden 1 Credit Union affirmatively state that the Debtor's bank account was levied upon pursuant to the writ of execution in the state court action (a copy of the state court judgment is attached as Exhibit 1 to the Stipulation) and that the monies levied upon have been paid to Golden 1 Credit Union. Stipulation, ¶ 2; *Id.* In the Stipulation, Golden 1 Credit Union agrees to turn over the $19,242.16 to either the Debtor or Trustee, as ordered by the court. While the Stipulation uses imprecise terms, the court construed the language to the

parties stipulating to the relief requested in the motion to avoid transfer, and has avoided the transfer of the $19,242.16 to Golden 1 Credit Union. See court's findings of fact and conclusions of law stated in the Civil Minutes for the November 17, 2015 hearing on the Motion to Avoid Transfer (DCN: FF-2).

Objection to Claim of Exemption

A hyper-technical reading of Schedule C could be that the Los Angeles County Sheriff's Department owes a debt of $19,242.16 to Debtor, and Debtor claims an exemption in it. Debtor has listed the asset as a debt owed to Debtor, not as an asset of the Debtor in the possession of a levying officer and subject to the execution lien of a judgment creditor. However, while such a hyper-technical reading would further address the imprecise pleading practices and failure to follow basic pleading rules by counsel for Debtor, that point has been sufficiently made by the court.

It is not unreasonable to read the asset being claimed as exempt is the $19,242.16 which was levied upon and paid to Golden 1 Credit Union. However, it appears that as of the commencement of the bankruptcy case they were not property of the Debtor, but had been paid to Golden 1 Credit Union in partial or full satisfaction of the pre-petition state court judgment. If the levy was made on June 16, 2015 and the Debtor commenced this Chapter 13 case on July 31, 2015, it would not be unexpected that during the intervening forty-five days the levied upon monies would be paid to Golden 1 Credit Union as payment on the judgment. Thus, it appears that the bulk of Debtor's opposition, about the Debtor retaining an interest in levied upon property while it is still in the custody of the levying officer is not applicable to this avoided transfer which was made to Golden 1 Credit Union.

Having been paid to Golden 1 Credit Union, then there was a pre-petition transfer (as if the Debtor himself had personally delivered the monies to Golden 1 Credit Union) which occurred within ninety-days of the commencement of the bankruptcy case. Therefore, Debtor then requested and has obtained an order avoiding the transfer pursuant to 11 U.S.C. § 547. As raised by the Chapter 13 Trustee, which such a transfer is avoided, the property or dollar value is recovered from the transferee and the property or dollar value is returned to the bankruptcy estate. While "avoided," the transfer is preserved for the benefit of the bankruptcy estate. 11 U.S.C. § 551. The avoidance of a transfer is not a novation of the transfer, but gives the bankruptcy estate all of the rights and interests of the transferee.

> "The preservation for the benefit of the estate under section 551 is automatic, even though the preserved lien could have been avoided by creditors in pre-petition state court actions. However, the estate succeeds only to the priority that the avoided and preserved lien had with respect to competing interests. Defects in the lien under state law, such as failure properly to perfect (or to continue perfection of) a personal property security interest or properly to record a real property lien, are not cured. Avoidance and preservation of the lien do not remove the defect or enhance the avoided lien's priority under state law in comparison to competing liens on the same property. The trustee, however, inherits the position of the entity whose lien was avoided and may assert any defenses that party may have had against junior

lienholders."

COLLIER ON BANKRUPTCY ¶ 551.02.

As of avoiding the transfer, the $19,242.16 is part of the bankruptcy estate, with the estate with all of the rights, title and interest in the judgment creditor.

Claim of Exemption in Monies Recovered by Avoiding Transfers

Debtor's opposition cuts the corner and assumes facts contrary to evidence – that the Debtor personally retained an interest in the monies which were levied upon and then paid to Golden 1 Credit Union in satisfaction (partial or full) of the pre-petition state court judgment. No legal authority has been provided to show that the Debtor retains an interest in property which is paid to the judgment creditor by the levying officer.

What Debtor has failed, or intentionally avoided, to address is when and how a Debtor may claim an exemption in property which has been recovered by the estate and is subject to the transfer being preserved for the estate (not the Debtor) pursuant to 11 U.S.C. § 551.

In the Debtor's supplemental opposition, the Debtor cites to 11 U.S.C. § 522(g) and (h) for the grounds that the Debtor is able to claim an exemption in the $19,242.16 levied. This code sections state the following:

> (g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--
>
> (1) (A) such transfer was not a voluntary transfer of such property by the debtor; and
>
> (B) the debtor did not conceal such property; or
>
> (2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.
>
> (h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--
>
> (1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and
>
> (2) the trustee does not attempt to avoid such transfer.

The Trustee argues that these sections do not apply to the instant case because § 522(g) does not explicitly city § 546 and § 522(h) does not express an exception to § 522(h).

However, this reading of the sections misstates the plan language of these Bankruptcy Code sections. Namely, these sections were enacted to grant the debtor the ability to exempt property in property that was avoided if the transfer was involuntary, the debtor did not conceal the property, and the trustee did not pursue the avoidance him or herself. See House Report No. 95-595, 95th Congr., 1st Sess. 360 (1977). The debtor, through 11 U.S.C. § 1303, has the "rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l)." As such the debtor can exercise the avoidance powers of the trustee, as the debtor is the fiduciary to the estate. Section 522(h) contemplates the circumstance where there may be an avoidable transfer but given the fact that the debtor would be likely to claim an exemption in most if not all of the property, it is of no benefit to the estate for the trustee to exhaust estate funds to recover property that the debtor would just exempt. It is the balance of the debtor's fresh start with preferential transfers and the benefit of the estate.

Under the Trustee's reading, the Debtor would never be able be able to claim an exemption in avoided transfer. The Trustee asserts that because § 547 is not explicitly stated in § 522(g), the ability for the Debtor to claim an exemption in avoided property pursuance to § 547 is nonexistent. However, looking at the sections cited in § 522(g), none of these sections are avoidance but rather are turnover and treatment of such transfers. It is § 522(h) that provides for the Debtor to avoid a transfer under § 547 that the Trustee chose not to pursue which then explicitly cites back to § 522(g)(1) requirements that the "transfer was not voluntary transfer of such property by the dater" and "the debtor did not conceal such property."

It is necessary to read these code sections in unison in factual situations as is presented before the court. The compartmentalized reading asserted by the Trustee undermines the reason for the code sections, creating a "limbo" of assets that the Debtor would normally been able to exempt under § 522(b) through § 522(g) by powers exercised by § 522(h).

Here, the Debtor has presented evidence that the transfer of the funds (i.e. the levy) was not voluntary and that the Debtor concealed these funds at the time of filing. Additionally, the Debtor has shown that the transfer is avoidable under § 547 (as evidenced by the stipulation between Debtor and Creditor) and the Trustee did not attempt to avoid such transfer.

The fundamental objection from the Trustee appears to be the sufficiency of the information over where the funds are being held and the classification of such. As discussed supra, the Trustee is correct that it is not the responsibility of the court nor other parties to piecemeal the Debtor's schedules and the location of the funds. The asset listed in the Debtor's schedules is ambiguous and vague. It is additionally clear for the pleadings that the Sheriff's Department of Los Angeles County is no longer in possession of the funds. They have been turned over the Golden 1 Credit Union. From the schedules and Statement of Financial Affairs, the court is able to discern the identity of the levied funds. Particularly, the Debtor's Motion to Compel Turnover of Exempted Funds states that the Trustee is holding the funds. Dckt. 55. Specifically, the court knows the location of the levied funds given that

the court ordered that the transfer was avoided pursuant to § 547 and ordered that Golden 1 shall deliver to the Trustee the funds on or before November 30, 2015. Dckt. 53.

Therefore, in light of the foregoing, the Trustee's objection is overruled.

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 Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled

29. 15-26082-E-13 NICHOLAS RIGHTER **MOTION TO COMPEL**
FF-3 Brian Turner **11-25-15 [55]**

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

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

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

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 25, 2015. By the court's calculation, 13 days' notice was provided. 14 days' notice is required.

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

The Motion to Abandon Property is granted.

The Motion filed by Nicholas Righter ("Debtor") requests the court to order the Trustee to abandon property commonly known as "Bank Levy Return" in the amount of $19,242.16 (the "Property").

Unfortunately, the Debtor only provided 13 days notice. Pursuant to Local Bankr. R. 9014-1(f)(2), a minimum of 14 days notice is necessary.

Therefore, because the Debtor failed to give sufficient notice to necessary parties, 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 Abandon Property filed by Nicholas Righter ("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 MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES

ALTERNATIVE RULING

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Nicholas Righter ("Debtor") requests the court to order the Trustee to abandon property commonly known as "Bank Levy Return" in the amount of $19,242.16 (the "Property"). FN.1.

FN.1. The court notes that the Debtor improperly titles this a "Motion to Compel to Turn-Over of Exempted Funds." The term "turnover" has a specific meaning in the Bankruptcy Code. Instead, the Debtor is seeking the abandonment of the Property. The court sua sponte corrects the language.

The Debtor lists the following as the location of the Property:

Location Levying Officer
Sheriff's Department Los Angeles County
110 N. Grand Ave, Rm 525
Los Angeles, California

However, on November 17, 2015, the court granted the Debtor's Motion to Avoid Wage Garnishment and ordered that Golden 1 deliver the Property to David Cusick, the Chapter 13 Trustee, on or before November 30, 2015. Dckt. 53.

This Property is exempted in the amount of $19,242.16 pursuant to California Code of Civil Procedure § 703.150(b)(5) as listed on Debtor's Schedule C. On December 8, 2015, the court overruled the Trustee's Objection to Exemptions as to the Property.

The court finds that the Debtor has fully exempted the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property. FN.2.

FN.2. The Debtor's motion discusses the Debtor's desire to use the Property to purchase a new vehicle. To date, no Motion to Incur Debt has been filed nor any other Motion authorizing the purchase of a vehicle.

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 Abandon Property filed by Nicholas Righter ("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 Compel Abandonment is granted and that the Property identified as:
>
> 1. "Bank Levy Return" in the amount of $19,242.16
>
> and listed on Schedule B by Debtor is abandoned to Nicholas Righter by this order, with no further act of the Trustee required.

30. 15-27785-E-13 LATANYA MOORE
APN-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY CAPITAL ONE AUTO FINANCE
11-6-15 [16]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on November 6, 2015. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Capital One Auto Finance, a division of Capital One, N.A. ("Creditor") opposes confirmation of the Plan on the basis that the plan fails to provide for the full secured claim of the Creditor. In part, the Creditor objects to the plan's valuation of the Debtor's claim, the monthly payment amount, and the proposed interest rate.

The Creditor's objections are well-taken.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that the Debtor adequately fund the plan with future earnings or other future income that is

paid over to the Trustee, 11 U.S.C. § 1322(a)(1), provide for payment in full of priority claims, 11 U.S.C. § 1322(a)(2) & (4), and provide the same treatment for each claim in a particular class, 11 U.S.C. § 1322(a)(3). But, nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim.

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

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

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

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

Here, the plan proposes to pay Creditor $23,928.00 as a Class 2 claim. However, the Creditor filed Proof of Claim 2-1 in the amount of $27,884.88. This is higher than what is proposed by the Debtor’s plan. Pursuant to 11 U.S.C. § 1325(a)(5), the Debtor has to provide for the payment in full of the secured claim. The Debtor’s plan fails to provide such.

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 Capital One Auto Finance, a division of Capital One, N.A., having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

31. 15-27785-E-13 LATANYA MOORE
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-12-15 [21]

Final Ruling: No appearance at the December 8, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on November 12, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Debtor has failed to provide the Trustee with a tax transcript or a copy of the Federal Income Tax Return with attachments for the most recent pre-petition tax year.

On December 3, 2015, the Trustee filed a withdrawal of the Objection pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 , stating that the Debtor has provided the required copy of the tax returns.

Therefore, after the withdrawal of the Trustee's objection, the objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled.

32. 15-27786-E-13 RAJESH KAPOOR
DPC-1 Fred Ihejirika

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-12-15 [24]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 12, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan proposed on October 2, 2015 by Rajesh Kapoor ("Debtor") on the basis that:

1. Debtor's total unsecured debt is listed as $462,319.00, which exceeds the statutory limit of $383,175.00 provided in 11 U.S.C. § 109(e);

2. Trustee has not received Debtor's tax transcript or a copy of the Federal income Tax Return for the most recent pre-petition

tax year, or a written statement that no such documentation exists;

3. The Debtor's 60 days of employer payment advices were not provided to Trustee;

4. Debtor did not pay $79.00, due on November 2, 2015, as an installment of this court's filing fee;

5. Debtor did not file for Chapter 13 relief in good faith, because the property in India has been listed as 3 separate values: $1.00 in Debtor's petition; $402,300.00 as of September 9, 2011 (Case No. 08-27971, Dckt. 63, page 4, lines 17-18); and $15,000.00 per the settlement between Debtor and Chapter 7 Trustee at the conclusion of that Chapter 7 case (Case No. 08-27971, Dckt. 85, p. 3, Ref. 21);

6. The proposed Plan fails the liquidation analysis under 11 U.S.C. § 1325(a)(4).

Dckt. 24. Debtor did not file an opposition.

DISCUSSION

The Trustee's objections are well-taken.

First, under 11 U.S.C. § 109(e), an individual whose unsecured debt exceeds $383,175.00 may not file for Chapter 13 relief. Here, Debtor's unsecured debt is listed as $484,384.00. Dckt. 7 § 2.15. Thus, Debtor is statutorily barred from filing for Chapter 13 relief and fails to comply with 11 U.S.C. § 1325(a)(3).

Trustee's second objection is that the Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Third, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). Debtor has failed to provide necessary pay stubs and has failed to provide the tax transcript. These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Fourth, Debtor failed to pay the November 2, 2015 installment for this court's filing fee. The court ordered Debtor to pay installments of the filing fee, with the first payment of $79.00 due on or before November 2, 2015. This is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

Trustee's fifth and sixth objections relate to Debtor's three separate values asserted for the "property in India:" $402,300.00 as of September 9, 2011 (Case No. 08-27971, Dckt. 63, page 4, lines 17-18); $15,000.00 per the settlement between Debtor and Chapter 7 Trustee at the conclusion of Debtor's previous Chapter 7 case (Case No. 08-27971, Dckt. 85, p. 3, Ref. 21); and $1.00 in Debtor's petition for Chapter 13 relief (Dckt. 1, Schedule A). While these discrepancies are not independent grounds to deny confirmation, they are further evidence that this petition was filed in bad faith. 11 U.S.C. § 1325

(a)(4), (7).

On these grounds, the Plan does not comply with 11 U.S.C. §§ 109(e), 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 Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

33. 15-27388-E-13 JOHNNY/MELISSA ROBBINS MOTION TO CONFIRM PLAN
PLC-1 Peter Cianchetta 10-27-15 [16]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 27, 2015. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

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

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

Johnny and Melissa Robbins ("Debtor") filed the instant Motion to Confirm the Amended Plan on October 27, 2015. Dckt. 16.

WELLS FARGO BANK OPPOSITION

Wells Fargo Bank, N.A. dba Wells Fargo Dealer Services ("Creditor") filed an opposition to the instant Motion on November 3, 2015. Dckt. 20. The Creditor objects on the ground that the plan attempts to value the Creditor's secured claim without a Motion to Value. The Creditor notes that the Debtor proposes an interest rate that does not adequately protect the Creditor's interest and that the plan does not provide for the Creditor's full secured claim.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 24, 2015. Dckt. 25. The Trustee opposes the Motion on the following grounds:

1. Debtor has failed to provide the Trustee with a tax transcript or a copy of the Federal Income Tax Return for the most recent pre-petition tax year.

2. The Debtor is delinquent in plan payments in the amount of $310.00. The Debtor has paid $0.00 into the plan to date.

3. The Debtor has failed to file a Motion to Value Collateral of Wells Fargo Bank.

DISCUSSION

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

The Trustee and the Creditor's objections are well-taken.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Creditor. However, the Debtor has failed to file a Motion to Value the Collateral of Creditor. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

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

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

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

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

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

the secured claim.

Here, the Creditor is provided for, but the claim is undervalued based on the Debtor appearing to attempting to value the Creditor's collateral. Without the Motion, the plan does not fully provide for the Creditor's claim and therefore the plan cannot be confirmed.

The Trustee additionally argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the tax transcript. These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The basis for the Trustee's objection is that the Debtor is $310.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

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

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

34. 14-28890-E-13 JOANN ARTIAGA **MOTION TO MODIFY PLAN**
PGM-1 Peter Macaluso **10-29-15 [76]**

Final Ruling: No appearance at the December 8, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 29, 2015. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. 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 Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 29, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed

order to the court.

35. 15-28790-E-13 BRIAN THRONBURG — **MOTION TO AVOID LIEN OF PATELCO CREDIT UNION**
TLA-1 Thomas Amberg — **11-24-15 [14]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on November 24, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Patelco Credit Union ("Creditor") against property of Brian Thronburg ("Debtor") commonly known as 8956 Salmon Falls Drive, Sacramento, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $7,432.85. An abstract of judgment was recorded with Sacramento County on October 6, 2015, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $203,320.00 as of the date of the petition. The unavoidable consensual liens total $32,000.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $175,000.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Patelco Credit Union, California Superior Court for Sacramento County Case No. 34-2015-00174880, recorded on October 6, 2015, Book 2015006 and Page 0828 with the Sacramento County Recorder, against the real property commonly known as 8956 Salmon Falls Drive, Sacramento, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

36. 11-47891-E-13 CLAY/MARIA QUINT — CONTINUED MOTION TO MODIFY PLAN
WW-2 Mark Wolff — 9-22-15 [31]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 22, 2015. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

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

Clay and Maria Quint ("Debtor") filed for Chapter 13 relief on November 30, 2011. Dckt. 1. Debtor's November 30, 2011 Plan was confirmed on February 21, 2012. Dckt. 25.

Debtor filed a First Modified Plan on September 22, 2015 and accompanying Motion to Confirm. Dckt. 31, 33.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed opposition to confirmation on October 13, 2015. Dckt. 37. Trustee asserts the plan may not be proposed in good faith, does not pay all projected disposable income received into the plan, and that the plan does not authorize interest paid to Class 2 creditor, Palace Resorts.

As evidence of these objections, Trustee points to numerous discrepancies in Debtor's filed documents. First, Debtor's September 22, 2015 Modified Plan proposes to reduce the commitment period from 60 months down to 47 months. Contrarily, Debtor's Current Monthly Income and Calculation of Commitment Period and Disposable Income indicates Debtor is over median income and the commitment period is 5 years Dckt. 1.

Second, Debtor's proposed plan provides for a lump sum payment of $25,000.00 in month 47; however, the monthly plan payments under the confirmed November 30, 2011 plan is $1,550.00. Dckt. 33.

Third, Debtor declares Debtor Clay Quint is retiring in 2 years; however, Debtor also claims his income will be reduced by 50%, until he receives his retirement income after 2 years. This pay reduction is due to Debtor Clay Quint going back to school. Thus, the reduction in pay is a voluntary reduction in hours, and Debtor projects income to reduce from $6,745.00 per month to $3,567.42.

Fourth, Debtor's projected income conflicts with Debtor's Schedule I, filed November 30, 2011, which projected retirement income of $5,300.00 per month (or 80% of base income). Dckt. 1, 34. Debtor's supplemental Schedule J, filed concurrently with the September 22, 2015 Modified Plan, projects negative monthly income of $604.53. Trustee has requested the last six months of pay stubs and bank statements for each Debtor. Dckt. 38.

Finally, Debtor's September 22, 2015 Modified Plan does not authorize interest paid to Class 2 creditor Palace Resorts. The confirmed November 30, 2015 Plan provides for 5% interest to the creditor; Trustee has accrued $773.89 in interest to the creditor. Dckt. 38.

OCTOBER 27, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on December 8, 2015 to allow the Debtor the opportunity to cure the Trustee's objections.

DISCUSSION

To date, nothing has been filed by the Debtor in connection with the instant Motion evidencing that the Debtor has cured the Trustee's delinquency.

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

The Trustee's objections are well-taken. First, the court agrees with the Trustee that the Debtor is an above-median income debtor and therefore, the applicable commitment period should be 60 months. Instead, the Debtor is proposing a 47 month plan. Additionally, the financial information provided for by the Debtor offers conflicting information as to the actual income. The Debtor's supplemental Schedule J filed on September 22, 2015, states that the Debtor has a monthly net income of negative $604.53, yet the plan proposes a lump sum of $25,000.00 Dckt. 35. The Debtor's Motion nor Declaration offer any explanation of where the $25,000.00 is coming from but also how the Debtor can afford any plan when the Debtor has a negative monthly disposable income.

The Trustee's second objection is also well-taken. The plan does not provide for the 5.00% interest on the Placer Resorts' claim, which translates to the Debtor failing to provide for the full claim of the secured creditor.

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

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

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

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

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

Here, the Debtor provides for the claim, just not the entire claim, in this case, the 5.00% interest. Therefore, the objection is sustained.

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

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

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

37. 15-22094-E-13 RL/AMY WARD **MOTION TO CONFIRM PLAN**
MWB-3 Mark Briden **10-19-15 [68]**

Final Ruling: No appearance at the December 8, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 19, 2015. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 19, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so

approved, the Chapter 13 Trustee will submit the proposed order to the court.

38. 15-25094-E-13 DPC-1 ALEX/MICHELE MARTINEZ Mark Briden

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-20-15 [33]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 20, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to ~~continue~~ the Objection ~~to 3:00 p.m. on January 26, 2016.~~

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Debtor's previous motion to Value Collateral of Green Tree Servicing LLC was denied on August 18, 2015. The Trustee alleges that without the court valuing the secured claim, the Debtor cannot make plan payments.

SEPTEMBER 15, 2015 HEARING

At the hearing, the court continued the Objection to 3:00 p.m. on October 27, 2015 to be heard in conjunction with the Motion to Value. Dckt. 46.

OCTOBER 27, 2015 HEARING

In light of the Trustee's Objection being based upon the Motion to Value, the court continued the Objection to 3:00 p.m. on December 8, 2015 to be heard in conjunction with the Motion to Value. Dckt. 54.

DISCUSSION

The Debtor filed a Motion to Value Green Tree Servicing LLC on September 11, 2015. Dckt. 40. A review of the Motion shows that the Debtor once again listed Green Tree Servicing LLC as the creditor without providing any evidence that Green Tree Servicing LLC is the actual creditor rather than merely the loan servicer. Dckt. 53

The court, rather than denying the Motion to Value, continued the Motion to allow Green Tree Servicing LLC to file properly authenticated evidence to show that it is, in fact, the actual creditor.

However, Green Tree Servicing LLC failed to file a response as ordered by the court. The Debtor also failed to provide any supplemental papers.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Green Tree Servicing LLC. However, the Debtor has failed to file a Motion to Value the Collateral naming the actual creditor. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6).

~~However, in light of the interconnectedness of the instant Objection and the Motion to Value and the court having continued the Motion to Value, the court continues the instant Objection to 3:00 p.m. on January 26, 2016.~~

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> ~~**IT IS ORDERED** that Objection to confirmation the Plan is continued to 3:00 p.m. on January 26, 2016.~~

39. 15-25094-E-13 ALEX/MICHELE MARTINEZ
MWB-2 Mark Briden

CONTINUED MOTION TO VALUE COLLATERAL OF GREEN TREE SERVICING, LLC
9-11-15 [40]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 11, 2015. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Green Tree Servicing LLC ("Creditor") is ~~continued to 3:00 p.m. on January 26, 2016.~~

The Motion to Value filed by Alex Martinez and Michele Martinez ("Debtors") to value the secured claim of Assignee, Green Tree Servicing LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 2725 Sandstone Drive, Anderson, California ("Property"). Debtor seeks to value the Property at a fair market value of $180,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Proof of Claim No. 3 filed by Green Tree Servicing, LLC is the claim which may be the subject of the present Motion.

OPPOSITION

Creditor has not filed an opposition.

OCTOBER 27, 2015 HEARING

At the hearing, the court issued the following order:

> **IT IS ORDERED** that the Motion is continued to 3:00 p.m. on December 8, 2015, telephonic appearances permitted.
>
> **IT IS FURTHER ORDERED** that Ditech Financial, LLC, successor to Green Tree Servicing LLC, and Green Tree Servicing, LLC to the extent it exists as a separate entity, shall file and serve all properly authenticated documents that evidence that Green Tree Servicing LLC is, in fact, the creditor either holding the Note endorsed in blank or otherwise or that Green Tree Servicing LLC is the beneficiary of the Deed of Trust on or before November 10, 2015.
>
> **IT IS FURTHER ORDERED** that any replies or oppositions shall be filed and served on or before November 24, 2015.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve the instant order on Ditech Financial, LLC and Green Tree Servicing, LLC at the following addresses:

Katelyn R. Knapp
Attorney for Green Tree Servicing LLC
Malcolm Cisneros, A Law Corporation
2112 Business Center Drive
Irvine, CA 92612

Green Tree Servicing, LLC
Attn: Officer or Agent
345 St. Peter Street, Ste. 600
Saint Paul, MN 55102

Ditech Financial LLC
Attn: Officer or Agent
1400 Landmark Towers
345 St. Peter Street
Saint Paul, MN 55102

Telephonic appearances are permitted for any persons or counsel who choose to appear. The court does not order Ditech Financial, LLC; Green Tree Servicing, LLC; or the attorneys for either to appear at the continued hearing.

In issuing the order, the court notes that the California Secretary of State does not list "Green Tree Servicing, LLC" as an entity authorized to do business in the State of California. http://kepler.sos.ca.gov/. The California Secretary of State now lists only Ditech Financial, LLC. A review of the LEXIS NEXIS corporate filing data base lists Green Tree Servicing, LLC as a historical name for Ditech Financial, LLC. This is consistent with a recent Wall Street Journal article relating to Green Tree Servicing, LLC being merged into and being a part of Ditech Financial, Inc., as part of a restructuring by the common parent holding company. Ditech Funding, LLC may also address how, with the merger the parties and courts are going to properly address relief being granted or relating to the interests of the entity formerly known as Greet Tree Servicing, LLC.

Dckt. 54.

DISCUSSION

To date, Ditech Financial, LLC, successor to Green Tree Servicing LLC, and Green Tree Servicing, LLC to the extent it exists as a separate entity, has failed to file any evidence or declaration as how the party is a creditor.

The Debtor has provided the alleged Assignment of Deed of Trust, dated on August 17, 2015. Dckt. 42, Exhibit A. The Assignment states the following:

> For value received, the undersigned holder of a Deed of Trust (herein "assignor") whose address is c/o 7360 South Kyrene Road, Tempe, AZ 85283, does hereby grant, sell, assign, transfer and convey, unto Green Tree Servicing, LLC (herein "Assignee"), whose address is 7360 South Kyrene Road, T-314, Tempe, AZ 85283, all beneficial interest under a certain Deed of Trust described below and obligations therein described, the money due and to become due thereon with interest, and all rights accrued or to accrue under such Deed of Trust.

Dckt. 42

> The signature block of the "Assignor" states it is signed by:
>
> HSBC Finance Corporation as successor servicer to Beneficial Financial Inc. a California corporation, on behalf of itself and as successor by merger to Beneficial California Inc. by its Attorney-in-Fact Green Tree Servicing LLC

Dckt. 42.

First, the court notes that there is no such position of "holder of a Deed of Trust." A party can be a holder of a Note endorsed in blank and a party can be the beneficiary of a Deed of Trust - however, a party cannot be the holder of a Deed of Trust.

Second, based on the language of the signature block, Green Tree Servicing, LLC appears to be the Attorney-in-Fact for HSBC Finance Corporation, who is stated to be the "successor servicer." Essentially, the signature block states that HSBC Finance Corporation is not, in fact, the beneficiary of the Deed of Trust or the holder of the Note, but instead is the successor servicer, which makes Green Tree Servicing LLC, the servicer of a servicer. This representation does not indicate that there was actually any assignment of the underlying Note or the Deed of Trust which would entitle Green Tree Servicing LLC to be the creditor in fact.

Third, this Assignment does not appear to have been recorded. The alleged Assignment does not have a evidence that it was recorded with the Shasta County Recorder's Office nor does a search of the Shasta County's website provide any evidence that such Assignment was recorded. FN.1.

FN.1. http://apps.co.shasta.ca.us/riimspublic/Asp/ORPublicDocNameList.asp

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A review of the Proof of Claim No. 3 does not provide any further insight. The Proof of Claim was filed by Katelyn R. Knapp, as attorney for Green Tree Servicing LLC. The Proof of Claim names Green Tree Servicing LLC as the creditor. Ms. Knapp is an attorney with a Southern California law firm and does not appear to be an employee of or have personal knowledge of the business operations of Green Tree Servicing, LLC. As discussed above, the documents attached to the Proof of Claim, which Ms. Knapp has signed under penalty of perjury do not document how Green Tree Servicing, LLC has ended up being the creditor.

Attached to the Proof of Claim is the Loan Agreement. The Loan Agreement states that the lender is "Beneficial California Inc." The Amount Financed is stated to be $25,099.31. Later on in the Loan Agreement, in the About Your Loan Repayment section beginning on page 4, states that the Amount Financed is $25,099.31 and the Principal as $26,378.74.

The Debtor does not provide any evidence that shows that the Note, endorsed in blank, is held by Green Tree Servicing LLC or that the unrecorded Assignment does anything more than transfer the servicing rights. The missing link is over whether HSBC Finance Corporation has, in fact, at any point been the holder of the Note (whether endorsed in blank or otherwise) or that it has been assigned as the beneficiary under the Deed of Trust.

This is Debtor's second attempt at the Motion to Value.

It appears that Green Tree Servicing LLC is not providing actual evidence to the Debtor or the court that it is the creditor in fact. Instead, it appears that Green Tree Servicing LLC is providing unrecorded, nonsensical Assignments in the attempt of giving the appearance of being the holder of the Note or being the beneficiary of the Deed of Trust.

Ditech Financial, LLC, successor to Green Tree Servicing LLC, and Green Tree Servicing, LLC to the extent it exists as a separate entity, has failed to comply with a court order to provide evidence of how it is a creditor.

Without evidence as to who the real creditor is, the court cannot grant the Motion and value the claim of "Assignee, Green Tree Servicing LLC" without having evidence that they are the actual creditor.

~~To afford Ditech Financial, LLC, successor to Green Tree Servicing LLC, and Green Tree Servicing, LLC one more chance to provide authenticate evidence as to who the actual creditor is, the court continues the Motion on last time to 3:00 p.m. on January 26, 2016. Ditech Financial, LLC, successor to Green Tree Servicing LLC, and Green Tree Servicing, LLC shall file and serve all properly authenticated documents that evidence that Green Tree Servicing LLC is, in fact, the creditor either holding the Note endorsed in blank or otherwise or that Green Tree Servicing LLC is the beneficiary of the Deed of Trust on or before January 12, 2016. Any replies or opposition shall be filed and served on or before January 19, 2016.~~

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Alex Martinez and Michele Martinez ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> ~~**IT IS ORDERED** that the Motion is continued to 3:00 p.m. on January 26, 2016, telephonic appearances permitted.~~

~~**IT IS FURTHER ORDERED** that Ditech Financial, LLC, successor to Green Tree Servicing LLC, and Green Tree Servicing, LLC to the extent it exists as a separate entity, shall file and serve all properly authenticated documents that evidence that Green Tree Servicing LLC is, in fact, the creditor either holding the Note endorsed in blank or otherwise or that Green Tree Servicing LLC is the beneficiary of the Deed of Trust on or before January 12, 2016.~~

~~**IT IS FURTHER ORDERED** that any replies or oppositions shall be filed and served on or before January 19, 2016.~~

40. 13-34597-E-13 VAN PHAM **MOTION TO MODIFY PLAN**
CA-3 Michael Croddy **10-17-15 [47]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 17, 2015. By the court's calculation, 52 days' notice was provided. 35 days' notice is required.

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

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

Van Pham ("Debtor") filed the instant Motion to Confirm the Modified Plan on October 17, 2015. Dckt. 47.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 20, 2015. Dckt. 56. The Trustee opposes the Motion on the ground that the Debtor's plan is not the Debtor's best effort. The Trustee states that the Debtor's supplemental Schedule J filed October 17, 2015 reflects property taxes of $252.00 per month. The Debtor reports a home ownership expense of $1,702.56. Bank of America, N.A. filed a Notice of Mortgage Payment Change on July 7, 2015 which stated that the monthly payment is $1,702.56 including escrow. The Notice of Mortgage Payment Change indicates $4,028.10 of property tax payments is included in the monthly payment amount. The Trustee asserts that the Debtor has understated monthly net income by $252.00 per month.

DISCUSSION

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

The Trustee's objection is well taken. It appears that the Debtor has improperly "double counted" the property taxes. The Notice of Mortgage Payment Change filed by Bank of America, N.A. indicates that the property taxes are included in the monthly payment amount. The Debtor does not appear to own additional property that would require additional property tax.

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

> [i]f 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–-(A) 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 (B) 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 Debtor appear to have an additional $252.00 in disposable income that should be applied to the plan. Thus, the court may not approve the plan.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of

the pleadings, evidence, arguments of counsel, and good cause appearing,

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

41. 15-27797-E-13 DPC-1 DOLORES/SIDNEY FOGAL Peter Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 11-12-15 [14]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 12, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

Dolores and Sidney Fogal ("Debtor") filed for Chapter 13 relief on October 2, 2015, with an accompanying proposed Plan. Dckt. 1, 5.

TRUSTEE'S OBJECTION TO CONFIRMATION OF THE OCTOBER 2, 2015 PLAN

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

1. Debtor's plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtor's non-exempt assets total $7,217.00, and Debtor proposes to pay 10.57% to unsecured creditors, which amounts to approximately $5,278.00. Trustee notes that Debtor's Schedules B and C show non-exempt equity in personal property totaling $6,572.00.

2. California Code of Civil Procedure § 703.140(b)(5) allows Debtor to exempt a total of $26,425.00. Here, Debtor claimed $27,000.00 of property as exempt. The personal property valued at $6,572.00, plus the $645.00 of over-exempted property, provides a total non-exempt amount of $7,217.00.

3. Trustee plans to file an Objection to Exemptions, set for hearing on December 15, 2015.

Dckt. 14, 16.

DEBTOR'S RESPONSE

Debtor filed a response on November 23 2015. Dckt. 23. Debtor does not oppose the objection, and proposes to cure the error with the following:

1. Limit Debtor's claimed exemption under CCP § 703.140(b)(5) to $26,425.00, because the higher exemption claim was due to computer error;

2. Increase the amount of non-exempt assets to $7,217.00, to reflect the total value of non-exempt property after correcting this error.

Dckt. 23.

DISCUSSION

A review of the court's docket shows that Trustee filed an Objection to Debtor's Claimed Exemptions. Dckt. 18. The Objection to Exemption is set for hearing on December 15, 2015, at 3:00 p.m. Dckt. 19. Debtor filed a response on November 23, 2015, and do not oppose Trustee's Objection to Exemption. Dckt. 25. Trustee has not withdrawn either objection.

The Debtor has stipulated to the Objection to Claim of Exemption, which the court sustains and removed from the calendar. The court shall issue an order thereon.

With the amendment proposed and the Objection to Claim of Exemption having been sustained, the proposed plan complies with 11 U.S.C. §§ 1322 and 1325, 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 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 Objection to Confirmation of the Plan is overruled, Debtor having agreed to amend the Chapter 13 Plan to provide that the amount to be distributed to creditors holding general unsecured claims shall not be less than $7,217.00. This amendment shall be stated in the order confirming the Chapter 13 Plan.

ORDER SUSTAINING OBJECTION TO CLAIM OF EXEMPTION
DCN: DPC-2.

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 Claim of Exemption filed by the Chapter 13 Trustee having been presented to the court, Debtor having stipulated to the objection being sustained, the stipulation having been stated in connection with the hearing on the Trustee's Objection to Confirmation (see Debtor's Response, Dckt. 25); and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Claim of Exemption is sustained and the exemptions claimed pursuant to California Code of Civil Procedure § 703.140(b)(5) [the "wildcard"] is reduced to an aggregate total of $26,425.00. The court disallows $645.00 of the exemption claimed by Debtor. The court has not disallowed the exemption for any specific asset, and all assets in which the exemption was claimed are subject to any trustee or appropriate party in interest recovering the non-exempt $645.00 if Debtor fails to complete the Chapter 13 Plan and the assets are to be liquidated.

42. 06-20808-E-13 PAUL WHELAN
EJS-1 Stephen A. Koonce

CONTINUED MOTION TO APPROVE EXEMPTION OF PERSONAL INJURY CLAIM
11-3-15 [89]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Creditors, and the Office of the U.S. Trustee on November 3, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Approve Exemption of Personal Injury Claim is granted.

Paul Whelan ("Debtor") filed a petition for Chapter 13 relief on March 24, 2006. Dckt. 1. Debtor was granted a discharge on April 12, 2012. Dckt. 67. The case was closed on April 26, 2012. Dckt. 73. The court approve Debtor's Motion to reopen the Chapter 13 case on November 26, 2014. Dckt. 75.

DEBTOR'S MOTION TO APPROVE EXEMPTION OF PERSONAL INJURY CLAIM

Debtor filed the instant Motion to Approve Exemption of Personal Injury Claim on November 3, 2015. Dckt. 89. To Debtor asserts the following grounds for his motion:

A. During the prior Chapter 13 case, Debtor had four hip replacement surgeries. All four surgeries were performed by surgeon Paul M. Sasaura, M.D. of Mercy San Juan Medical Center in Carmichael, California;

B. Debtor's right hip joint was replaced in July 2009, and the left hip joint was replaced on December 2009;

C. Both initial replacements were defective and subject to recall in 2010, so Debtor's right joint was replaced again in January 2011 and the left hip joint in April 2011;

D. The defective implant devices were DePuy ASR Hip Implants manufactured by DePuy Orthopedics, Inc;

E. Debtor filed a civil action entitled Paul Whelan et at. vs. DePuy Orthopedics, Inc., et al., in the Superior Court of California, County of San Francisco, Docket Number CGC-10-505062;

F. Debtor used $35,000.00 of an advance for the settlement to pay medical bills, legal bills related to a custody matter, expenses for elder care, home repairs, and other living expenses for adult children who were out of work. These expenses were paid in October 2012, after the Chapter 13 discharge;

G. Debtor became involved in the U.S. ASR Hip Settlement Program, which resulted in a one-time payment of $319,000.00 and interest, less the advanced amount; Debtor has not received the lump-sum settlement amount to date;

H. Debtor's civil counsel and claims processor became aware of the bankruptcy, and was advised to reopen the Chapter 13 case to disclose the claim as an asset of the estate and to file for an exemption.

Dckt. 92. Debtor filed Amended Schedules B and C, which lists the post petition personal injuries claim under California Code of Civil Procedure § 704.140(b) for the full $319,000.00. Dckt. 88.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on November 6, 2015. Dckt. 97. Trustee objects on the grounds that Debtor has not provided sufficient information and evidence to support the exemption. To support the exemption, Debtor must provide an estimate of the costs of the treatments or a current statement of his current monthly income and expenses to demonstrate his need for the additional income for his support. Dckt. 97.

NOVEMBER 17, 2015 HEARING

To afford the Debtor the opportunity to provide sufficient evidence of how the monies have been used for the "support of the judgment debtor and the spouse and dependents of the judgment debtor" as required by California Code of Civil Procedure § 704.140(b), the continued the hearing to 3:00 p.m. on December 15, 2015. The Debtor was ordered to file and serve supplemental

evidence on or before December 1, 2015. Any replies or oppositions were to be filed and served on or before December 8, 2015.

DEBTOR'S SUPPLEMENTAL DECLARATION

The Debtor filed a supplemental declaration on November 13, 2015. Dckt. 101. The Debtor states that he is current 63 years old, disabled, and being treated for a heart condition. The Debtor asserts that he will need the settlement funds for future hip replacement surgeries, neck surgery to repair damaged vertebrae, which will include recovery and rehabilitation expenses.

The Debtor states that he has had four hip replacement surgeries during the life of the Chapter 13 plan and that he will need to get further replacements because of defective replacements and wear and tear.

The Debtor states that the undetermined copays for the recent medical services and rehabilitation needs require the use of the settlements funds to pay for the costs. The Debtor includes with his declaration two health reports as to the Debtor's heart and spinal issues as well as updated Schedules I and J.

TRUSTEE'S NON-OPPOSITION

On December 1, 2015, the Trustee filed a non-opposition to the instant Motion.

DISCUSSION

The Trustee's objection is well-taken. The Debtor did not provide specifics as to how the money was spent, how much of the funds are left, nor any supplemental Schedules I and J to determine if the exemption is proper.

When a Debtor seeks to supplement schedules post-discharge and closing, the Debtor must present evidence to the court about the updated financial situation of the Debtor as well as evidence as to how those assets have been used.

Here the Debtor states that funds, in the form of an "advance" on the award "to pay medical bills, legal bills relative to a custody matter, expenses for elder care, home repairs and for other living expenses including adult children who were out of work." Dckt. 89.

The exemption claimed under California Code of Civil Procedure § 704.140(b) provides that "an award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." As discussed by the court in *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal. 2015), the burden of proof under California law for claiming an exemption is on the debtor. See Cal. C.C.P. § 703.580(a)-(b).

The Debtor's supplemental declaration provides more detailed and specific explanations as to the necessary health expenses as well as evidence of the other medical expenses incurred. The sufficiency of the Debtor's supplemental explanation is partially evidenced by the Trustee's non-opposition.

The court has considered Debtor's age, only 63, and stated medical condition is determining whether over $300,000 paid in a lump sum is actually reasonably necessary for the support of the judgment debtor and dependants of the judgment debtor. Cal. C.C.P. § 704.140. Using the information from the Social Security Administration, Debtor argues that given his life expectancy of 19.15 years, this award equals $1,388.00 a month.

Debtor states under penalty of perjury that his income from Social Security and VA benefits will net him $4,186.00 a month. Exhibit C, Dckt. 100. Debtor projects that his monthly expenses are $3,542.00 a month, giving him monthly net income of $644.00 – without any portion of the $319,000 settlement.

In reality, it appears that the settlement may not be for Debtor's support, but either for luxuries or to pass onto others. If the $319,000 was conservatively invested to get an annual return of only 4% per annum, the court projects that over 19 years the monthly payment to Debtor would actually be almost an additional $2,000 a month for 19 years. The court used the Microsoft Excel Annuity Calculator program to make this calculation.

It appears that the Debtor's projected expenses do not fully take into account the future medical expenses relating to the injuries upon which the settlement recovery is based, as well as other medical conditions. The court also considers that Debtor completed a sixty month plan and that this settlement relates to an injury that occurred post-petition and when the plan was almost two-thirds completed.

The court also considers that no creditors have come forward and the Trustee, having conducted his own independent review, has come to the conclusion that the exemption is warranted based on the information provided by Debtor, with the assistance of Debtor's counsel.

As required by California Code of Civil Procedure § 704.140(b), the Debtor has shown that the Debtor's application of the exception is necessary for the support of the Debtor, namely his medical expenses.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Exemption for Personal Injury filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the Debtor is authorized to claim an exemption for the full amount of the settlement in the amount of $319,000.00 pursuant to California Code of Civil Procedure § 703.140(b).