UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

February 3, 2015 at 3:00 p.m.

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1. 12-33903-E-13 JOHN MOORE — CONTINUED MOTION TO MODIFY PLAN
SJS-4 Scott J. Sagaria — 12-2-14 [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 December 2, 2014. 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 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.

John Moore ("Debtor") filed the instant Motion to Modify Plan on December 2, 2014. Dckt. 59. Debtor states that the proposed Modified Plan lowers the administrative expenses in Section 2.07 to $79.00. Debtor has also adjusted the amount of arrears owed to Class 1 creditor, Wells Fargo Bank, N.A., and provided an Additional Provision to address the dividends. Debtor has also adjusted the monthly contract amount pursuant to the recently filed Notice of Mortgage Payment Change. Debtor has adjusted the priority claim amount of

the State Board of Equalization in Class 5 based upon their Proof of Claim.

The modifications require a slight increase in the Debtor's monthly plan payment. Debtor has elected to extend the duration of his Chapter 13 plan from 36 months to 38 months.

TRUSTEE'S OBJECTIONS

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 18, 2014. Dckt. 68. The Trustee objects on the following grounds:

1. The Trustee is uncertain Debtor will be able to afford the proposed increased plan payment in the 42nd month.

The Additional Provisions propose a plan payment of $42,313.00 total paid in through November 2014, $1,610.00 per month commencing December 25, 2014, then $3,236.73 commencing January 25, 2016 for the remainder of the plan. Debtors plan payment under the confirmed plan is $1,566.00 for 60 months.

Debtor's Declaration states that Debtors modified plan proposes a slight increase in the plan payment, which will be accommodated by reducing the telephone, cell phone, internet, satellite, and cable budget from $150.00 to $100.00. Dckt. 65.

Debtor's Amended Schedule J reflects the $50.00 reduction and indicates Debtor has a monthly net income of $1,616.00. Dckt. 58.

Debtor does not indicate how he will afford the $1,626.73 plan payment increase in the 41st month of the plan, even if they receive a reasonable loan modification in January/February 2015.

2. Debtor's modified Plan indicates Debtor has paid a total of $42,313.00 to the Trustee through November 2014, when the Trustee's records reflect that the Debtor has actually paid in $43,883.00, with the last payment of $1,570.00 having posted November 26, 2014.

3. Debtor's Amended Schedule J indicates Debtor's monthly expenses are $1,019.00, his monthly income from Schedule I is $2,635.00, leaving a monthly net income of $1,616.00. Attachment A appears to be business expenses in the amount of $906.00, which are not included on Schedule J. Debtor's prior Schedule J (Dckt. 1, pg. 23) includes business expenses of $906.00. FN.1.

FN.1. Though denominated as an "Amended" Schedule J, this appears to be a "Supplemental" Schedule J showing the court post-petition changes in the Debtor's expenses. If accepted as an "Amended" Schedule, the Debtor would be stating under penalty of perjury that his expenses were only $1,019.00 as of the commencement of this case and through the present. This is substantially less than the $1,975.00 listed on Original Schedule I under penalty of perjury (Dckt. 1 at 23) and indicates that the Debtor had an additional $956.00 a month in projected disposable income which he (1) failed to properly report and (2) failed to provide for creditors through his Chapter 13 Plan to date. Accepted as a Supplemental Schedule J as of the December 2, 2014 filing (Dckt. 58) would indicate that the Debtor has been able to reduce his expenses to the current $1,019.00 due to post-petition changes in expenses.

Debtor has not filed Supplemental Schedule I, but Debtor's prior Schedule I filed July 30, 2012 (Dckt. 1, pg. 22) indicates Debtor is self employed with an average monthly income of $3,541.00, not $2,635.00 as stated on Debtor's "Amended" Schedule J. If Debtor's business expenses of $906.00 were included on amended Schedule J, Debtor would not be able to afford the proposed plan payment of $1,610.00, but only $710.00.

JANUARY 13, 2015 HEARING

The court continued the hearing to 3:00 p.m. on February 3, 2015. Dckt. 71.

DISCUSSION

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

The Trustee's objections are well-taken. While the second objection appears to be a mere scrivener's error in the Motion and proposed Plan, the remaining two objections highlight feasibility issues with the proposed Plan.

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

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

Since the court continued the matter, no supplemental pleadings have been filed.

Therefore, because of the discrepancy in income, the absence of the business expenses, and the Debtor's apparent inability to make the plan payments beginning on the 41st month, 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. 14-29407-E-13 VINCENT GONZALES
DPC-2 Gerald B. Glazer

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-29-14 [14]

Final Ruling: No appearance at the February 3, 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 and Debtor's Attorney on October 29, 2014. By the court's calculation, 27 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 March 3, 2015 to be heard in conjunction with the Motion to Determine that Case May Proceed Pursuant to Fed. R. Bankr. P. 1016.

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

1.Vincent Gonzales ("Debtor") is deceased. The petition was filed by Debra Gonzales, Power of Attorney, for Debtor. Ms. Gonzales appeared at the Meeting of Creditors on October 23, 2014 and advised the Trustee that Debtor passed away six (6) days after filing of this case. The Meeting of Creditors was continued to November 20, 2014.

2.The Trustee has not been provided proof of power of attorney to date.

3.Debtor has failed to file his tax transcript or a copy of his Federal Income Tax Return for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists.

4.It appears that the Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtor's nonexempt equity totals $173,849.00 and Debtor proposes a 1% dividend to unsecured creditors. This totals $704.35. The non-exempt equity is from real property located at 991 Farnham Avenue, Woodland, California listed on Schedule A. Debtor used an incorrect exemption (California Code of Civil Procedure § 704.950) on Schedule C to try to exempt

the equity in the property. Debtor exempted $175,000.00 under California Code of Civil Procedure § 704.950 for a declared homestead. Debtor has failed to provide a declared homestead to the Trustee to date. Trustee's Objection to Exemption is set for hearing on December 9, 2014.

The Trustee alleges that the Debtor has deceased shortly after the case was filed. Although not in itself a reason to deny confirmation, it does reflect that Debtor will not be able to make plan payments, as Debtor does not have the capacity to make any sort of payments. 11 U.S.C. § 1325(a)(6). Additionally, because the Trustee has no received power of attorney documents, this also indicates that there may be no legal entity that can act on Debtor's behalf in this case.

Further, the Trustee asserts that Debtor has failed to file tax return documents which are required to be filed with the Trustee in 11 U.S.C. § 521. The failure to comply with other requirements in the Bankruptcy Code is grounds to deny confirmation of the Plan. 11 U.S.C. § 1325(a)(1).

Finally, the Trustee alleges that the Plan will pay unsecured creditors a total of $704.35, when under a hypothetical Chapter 7 liquidation, unsecured creditors would receive approximately $173,849.00 total, should the Trustee's objection to exemption be sustained. This indicates that the Plan does not meet the required liquidation analysis for plan confirmation. 11 U.S.C. § 1325(a)(4).

NOVEMBER 25, 2014 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on February 3, 2015. Dckt. 26. The court ordered that supplemental pleadings shall be filed by Debtor on or before December 29, 2014. The court further ordered that replies, if any, shall be filed and served on or before January 20, 2015.

The court addressed some concerns as to the proposed plan as presented before continuing the matter. The court noted the following:

> The proposed Chapter 13 Plan "requires" the deceased Chapter 13 Debtor to make $125.00 a month payment for thirty-six months. No Class 1 Claims are to be paid. No Class 2 Claims are to be paid. No Class 3 Claims are to be paid. One Class 4 Claim is to be paid directly by the "Debtor," in the amount of $1,087.75 a month to Bank of America (presumably Bank of America, N.A. and not one of the other 17 entities with the words "Bank of America" in their names). No Class 5 Claims are to be paid. No Class 6 Claims are to be paid. For Class 7, a projected $70,000.00 in general unsecured claims are to be paid a 1% dividend – $700.00.
>
> Debtor's income consists of $1,798.00 in Social Security and $1,379.60 in retirement/pension a month. Schedule I, Dckt. 1 at 22. Presumably, this monthly income has terminated at Debtor's death. No explanation is given how the deceased Debtor will fund the Plan for thirty-six months.
>
> The $125.00 a month will fund paying the deceased Debtor's counsel $2,000.00 of his $3,000.00 in legal fees and

the Chapter 13 Trustee's fees. Assuming 8% of the plan payments for Chapter 13 Trustee fees and expenses, that leaves $115.00 a month to fund the plan. Eighteen months of the plan consumers the payments to pay counsel the $2,000.00. Assuming no other administrative expenses, there would be $2,185.00 to disburse on the $70,000.00 of general unsecured claims. This would increase the dividend to 3% from the 1% guaranteed under the Plan.

No explanation has been provided as to why a 3% dividend is in good faith, reasonable, and consistent with the Bankruptcy Code in light of the Debtor having passed away six days into this case. Debtor has no spouse. Statement of Financial Affairs Question 16, Dckt. 1 at 30. It appears that this bankruptcy case has been filed to preclude the proper administration of the deceased Debtor's probate estate rather than a good faith rehabilitation of an individual debtor's finances. This appears to be a case where the deceased Debtor is merely the proxy for third-parties who seek to have their personal financial interests advance under the guise of the Debtor.

DEBTOR'S SUPPLEMENTAL BRIEF IN SUPPORT OF CONFIRMATION

On December 29, 2014, the Debtor filed a Brief in Support of Confirmation. Dckt. 37. The Debtor responded as follows:

1.On December 21, 2014, the court appointed Desiree Gonzales as Debtor's personal representative to proceed with this matter.

2.Pursuant to the court's December 21, 2014 order, a separate motion for determination whether the Chapter 13 can be further administered in the best interests of the parties will be filed on or before January 20, 2015.

Some of Debtor's children are residing at Debtor's residnece at 991 Farnham Avenue, Woodland, California, and were so residing prior to Debtor's death. Tahnee Gonzales has been residing at the residence and is making the mortgage payment and helping with the upkeep of the residence. Debtor's daughter and personal representative Desiree Gonzales is contributing $125.00 per month to make the plan payments. Schedules I and J are being amended to reflect the current financial status of the estate of hte Debtor.

3.Further administration of this Chapter 13 case is possible and in the best interest of the parties. Fed. R. Bankr. P. 1016 provides that the death of a Chapter 13 debtor does not automatically end the case, but that 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. Also, pursuant to California Code of Civil Procedure § 704.995, notwithstanding the bankruptcy and the continuation of the exemptions in bankruptcy, the declared homestead passes to Debtor's daughter Yahnee. Finally, under both California Code of Civil Procedure § § 704.110 and 704.115, death benefits from retirement plans are exempt notwithstanding the bankruptcy. Thus, the current plan is an efficient way to administer Debtor's estate and the

creditors are treated appropriately and fairly.

TRUSTEE'S RESPONSE

The Trustee filed a response on January 6, 2015. Dckt. 42. The Trustee responds as follows:

1.The Debtor is current under the terms of the Plan filed on September 19, 2014 (Dckt. 5).

2.The Debtor's Ex Parte Application to Substitute Deceased Party Pursuant to Federal Rules of Bankruptcy Procedure 7025 was granted by the court and the order filed on December 21, 2014. Dckt. 35.

3.The court ordered that the Debtor's personal representation, Desiree Gonzales, file and serve a regularly noticed motion (Local Bankr. R. 9014(f)(1)) requesting a determination pursuant to Fed. R. Bankr. P. 1016 that this Chapter 13 case should properly proceed notwithstanding the death of the Debtor by January 20, 2015.

ISSUE OF GOOD FAITH PROSECUTION OF CASE

The Parties, including the Chapter 13 Trustee and U.S. Trustee, should be prepared to address at the continued hearing whether this bankruptcy case can be prosecuted in good faith. The Debtor died shortly after this bankruptcy case was filed in September 2014. It appears that he failed to make even one payment in this case.

Debtor's children, of unstated ages, are residing in the Debtor's property. Debtor's daughter now asserts a homestead exemption in the Debtor's property, with is property of the bankruptcy estate. An issue appears to arise as to whether the Debtor's daughter can claim a homestead exemption in property she does not own – the property being in the bankruptcy estate. 11 U.S.C. § 541. With the Debtor having passed, the court has not yet been shown whether there is any homestead exemption which can be claimed by the deceased.

While the personal representative cites to various California Code of Civil Procedure Sections, there is little discussion of the property of the estate and how it has to be administered through a Chapter 13 Plan for a deceased debtor. It could appear that the Debtor's heirs are attempting to use the deceased Debtor as their proxy and avoid filing bankruptcy and fulfilling the commitments of a debtor and submitting all of their assets to the bankruptcy case.

DISCUSSION

A review of the docket shows that the Debtor's personal representative filed a Motion to Determine that Case May Proceed Pursuant to Fed. R. Bankr. P. 1016 on January 20, 2015. Dckt. 45. The hearing on the motion is set for 3:00 p.m. on March 3, 2015.

Due to the interconnectedness of the instant Objection and the Motion to Determine that Case May Proceed Pursuant to Fed. R. Bankr. P. 1016, the court continues the matter to 3:00 p.m. on March 3, 2015.

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 is continued to 3:00 p.m. on March 3, 2015.

3. 09-42013-E-13 JUAN/REYNA SALAZAR
JLK-2 James L. Keenan

MOTION TO APPROVE LOAN MODIFICATION
1-6-15 [49]

Tentative Ruling: The Motion to Approve Loan Modification 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, Creditor, parties requesting special notice, and Office of the United States Trustee on January 6, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Approve Loan Modification 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 Approve Loan Modification is denied without prejudice.

The Motion to Retroactively Approve Loan Modification filed by Jose and Reyna Salazar ("Debtors") seeks court approval for Debtors to incur post-petition credit.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on January 16, 2015. Dckt. 57. The Trustee states the following:

1.The Debtors are seeking approval of a loan modification agreement entered into April 21, 2011. The Debtors are seeking to approve a modification that happened three years ago which resulted in a $38,8000.00 difference in mortgage payments. Dckt. 52. The Debtors petition as filed October 9, 2009. The

Debtors' plan includes the creditor in class 4 with a monthly contract installment of $3,142.00.

> The Trustee notes the monthly loan payment effective May 1, 2011 including escrow was $2,217.83. The result was a difference in the monthly payment of $2,217.83 versus $3,142.00 included as Class 4 of the confirmed plan for the period of May 2001 to October 2014. The confirmed plan paid 27.48% to unsecured creditors, $22,462.77 total. Dckt. 46. The Trustee's Final Report and Account was issued December 10, 2014.
>
> The loan modification appears to have reasonable terms, and the Trustee does not oppose it on the basis of its terms.

2.The Trustee is uncertain the Declaration was signed by the Debtors. Dckt. 51. The signatures appear very similar and do not match the signatures on the loan document. Dckt. 52, pg. 5. Where the signatures are printed rather than cursive, the Debtors may want to submit a supplemental declaration to verify that both documents have been signed by the Debtors.

3.This loan modification appears required for the Debtors to obtain a discharge. A debtor normally can only obtain a discharge in chapter 13 "after completion of all payments under the plan." 11 U.S.C. § 1328(a). The plan required the Debtors or a third party to pay the ongoing mortgage payments as a class 4 claim. Dckt. 5, pg 3 § 3.15. Where the Final Report has issued and no objections have been filed, the Trustee asks that the consider granting the present motion so the Debtors can obtain their discharge.

DISCUSSION

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. The proposed new debt is a single loan incurred only to modify debtors' existing mortgage encumbering their residence commonly known as 2520 Barona St., West Sacramento, California.

B. Debtors enters into a loan modification with the lender on their First Deed of Trust. The mortgage modification would be for a new principal balance in the amount of $510,545.92 with a flexible interest rate as follows: 2% for the first 60 months of the loan beginning May 1, 2011, with a monthly mortgage payment that includes taxes and insurance of $1,682.97; 3% for the next 12 months with a monthly payment of $1,921.47; and 4% for the remaining 351 payments at $2,170.41 per month.

C. Debtors' current mortgage is 6.5%.

D. The proposed modification is attached herewith as Exhibit "A."

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that the terms of the modification but does not actually cite the lender nor

the reasons why the motion is being presented three years after the Debtors entered the modification. This is not sufficient.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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

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

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

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise,

> debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

The brevity and lack of specifics in the Motion concerns the court. The Debtors do not name the lender in the Motion. The Debtors do not explain why or under what authority the court may retroactively authorize a three-year old modification.

The court is also concerned as to whether BAC Home Loan Servicing, LP has authority to enter into modifications on behalf of Bank of America, who appear to the actual holder of the mortgage.

Lastly, as the Trustee highlights, the Debtors' declaration has signatures that do not match the signatures that are on the Loan Modification Agreement. Compare Dckt. 51 and 52. The style and print are widely different and the two signatures on the Declaration seem similar. This concerns the court

on many levels, namely whether the Debtors actually signed the declaration.

GOOD FAITH OF DEBTORS

The Debtors' good faith in this case appears to be at issue. For forty-two months the Debtors expenses (monthly Class 4 mortgage payment) have been $924.17 less then stated to the court under penalty of perjury. In effect, there has been undisclosed additional disposable income of $38,815.14 (42 months x $924.17). Given that the Debtors were able to only afford a month plan payment which generated a 1% dividend for general unsecured claims, this additional, undisclosed disposal income appears to have caused creditors holding general unsecured claims a significant prejudice.

Therefore, because of the failure to plead with particularity, 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 Approve the Loan Modification filed by Jose and Reyna Salazar 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.

4. 09-41725-E-13 BRIAN/LISA PRESTWOOD SS-3

MOTION TO VALUE COLLATERAL OF J.P. MORGAN CHASE BANK, N.A. 12-31-14 [69]

Final Ruling: No appearance at the February 3, 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, creditors, parties requesting special notice, and Office of the United States Trustee on December 31, 2014. By the court's calculation, 34 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 J.P. Morgan 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 Brian K. Prestwood and Lisa A. Prestwood ("Debtor") to value the secured claim of J.P. Morgan Chase Bank N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 8465 Zachis Way, Antelope, California ("Property"). Debtor seeks to value the Property at a fair market value of $239,000.00 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.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $256,656.89. Creditor's second deed of trust secures a claim with a balance of approximately $56,747.00. 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 Brian K. Prestwood and Lisa A. Prestwood ("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 J.P. Morgan Chase Bank N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 8465 Zachis Way, Antelope, 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 $239,000.00 and is encumbered by senior liens securing claims in the amount of $256,747.00, which exceeds the value of the Property which is subject to Creditor's lien.

5. 10-37127-E-13 BARRY/COLLEEN PAGE — MOTION TO INCUR DEBT
SS-10 Scott D. Shumaker — 1-20-15 [153]

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 Debtors, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 20, 2015. By the court's calculation, 14 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 denied without prejudice.

The motion seeks retroactive permission to purchase a 2014 Ford Edge, VIN No. XXXX9968, which the total purchase price is $52,078.48 based on the Sale Agreement (Dckt. 156, Exhibit 1), with monthly payments of $532.34.

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).

PURCHASE OF VEHICLE

Debtor completed the purchase of the vehicle on January 25, 2015, without court approval and in direct violation of the confirmed plan. The Debtor was not authorized to make such a purchase, and electing to do so calls into question whether confirmation of the Plan in this case was properly confirmed, the statement made under penalty of perjury in the Schedules and to confirm the plan were truthful, and if the Debtor filed and is prosecuting this case and Plan in good faith.

The Debtor does not address the reasonableness of incurring debt to purchase a brand new vehicle while seeking the extraordinary relief under Chapter 13 to discharge debts. The Debtor merely states that the interest rate of a used vehicle was high so Debtor's father offered $8,000.00 as a down payment for a new vehicle. The Debtors do not explain why that $8,000.00 could not be used as payment for a used vehicle in order to minimize any monthly payment on a brand new vehicle.

Additionally, the transaction is not best interest of the Debtor. The loan calls for a substantial interest charge – 12.45%. Moreover, it is unclear to the court how in good faith the Debtor could propose to purchase a car. A debtor driven to seek the extraordinary relief available under the Bankruptcy Code is hard pressed to provide a good faith explanation as to how a "reward" for filing bankruptcy is to purchase a car and attempt to borrow money at a 12.45% interest rate.

MOTION PRECEDES "RETROACTIVE" PURCHASE DATE

What is even more unusual is that the Motion was filed five days prior to the alleged execution of the purchase of the vehicle. The Motion is written in the past tense which questions whether the Motion is actually based on personal knowledge of facts. For instance, "On January 25, 2015 Debtors visited Folsom Lake Ford to look for a car." Dckt. 153.

The Debtors' declaration faces the same issue. The Declaration was signed by both Debtors, under penalty of perjury, on January 20, 2015. Dckt. 155. However, like the Motion, the Debtors state that on January 25, 2015, the Debtors were unaware that they needed to obtain court approval to purchase the vehicle.

This clearly is not a situation where the Debtor in January 2014 innocently purchased a vehicle and the motion and declaration contain a typographical error by listing the year as 2015. The purchase contract states that the monthly payments for the brand new vehicle purchased by the Debtors begin February 25, 2015 and the final payment is due January 25, 2012 (six years later). Exhibit 1, Dckt. 156.

The basis of the Debtors and Debtors' counsel argument for retroactive approval is that the Debtors were "unaware that they were required to obtain Court approval in order to buy a car" and that the Debtors "did not inform their Attorney ahead of time that they were purchasing a vehicle." However, based on the time line and dates provided for in the Motion and the Sales Agreement, it appears that the Debtors had as much as five days notice as to

the requirements for court approval.

DEBTORS' INCOME AND EXPENSES

Reviewing the attached supplemental Schedules I and J raise even more concerns. The Debtors report business income but do not show any withholdings. On Schedule J, there is no self-employment tax or income tax deduction. It appears that the Debtors are double reporting "Vehicle Expense" of $250.00 on both Schedule J and the Business Income and Expenses. There is a $1,600.00 expense on the Business Income and Expense sheet for "Travel and Entertainment" without any explanation of why or how the expense is so large in comparison for an insurance agent.

ADDITIONAL FUNDING FROM DEBTOR'S FATHER

Debtors state that due to their income and expenses, they were being quote interest rates of 20%. However, the Debtor's father "gave" them $8,000.00 as a down payment, which resulted in them being able to qualify for the "lower" rate of 12.45%. This "lower" rate is still significantly higher than interest rate for qualified buyers for whom the bank, credit union, auto finance company have a good faith belief the loan will be repaid. Either the lender "knows" the Debtors cannot make the payments and the car will have to be repossessed, or the lender has taken advantage of financially gullible consumers. Additionally, if Debtor's father had $8,000.00 to apply toward the purchase, it may well be that the father has credit which would support an interest rate of 2% to 5% for an auto purchase. If the father believes that the Debtors can pay for the vehicle, then he could obtain the loan, purchase the vehicle with the Debtors, and then have the Debtors pay the loan.

FIVE YEAR OLD BANKRUPTCY CASE

This bankruptcy case was filed on June 30, 2010. The final payment under the sixty month plan will be due in May 2010 – a mere four months after the January 2015 unauthorized obtaining of credit to purchase a vehicle. This was done with knowledge of the requirement and consultation of counsel. In July 2014 Debtor filed a Fourth Modified Plan by which they sought to reduce the monthly plan payments to $100.00. Motion, Dckt. 127. This reduction was necessary due to Debtor's business expenses and some medical bills. *Id.* The Debtor so testified under penalty of perjury in his Declaration. Dckt. 129. In the Fourth Modified Plan, due to the financial strains on the Debtors, the dividend to creditors holding general unsecured claims was reduced to 2% (from the 4% in the Second Modified Plan). Plan, Dckt. 130.

In their Second Modified Plan which was confirmed by the court, Debtors had reduced their monthly plan payments to $474.00 a month (from the confirmed plan payment of $811.00) and provided for a 4% dividend on general unsecured claims (100% for a $4,271.42 student loan, POC NO. 6, and a 6% dividend to all other general unsecured claims). Second Modified Plan, Dckt. 75; Original Plan, Dckt. 5. In his declaration, the Debtor explains all of the increased expenses and financial strains on the Debtors which warrant the modification to reduce their payments. Declaration, Dckt. 73. In addition, the Debtors did not have to continue to make payments on the claim secured by their Saab, as it was totaled in an accident and the debt paid by insurance.

When confirming their Original Plan, Debtors stated under penalty of

perjury on Schedule I monthly gross income of $10,834.00 and on Schedule J monthly expenses of ($6,921.00). Dckt. 1 at 27 and 28. To warrant the reduced plan payments for the Second Modified Plan, Debtors stated under penalty of perjury that their expenses had increased to ($7,166.00). Dckt. 74 at 2.

By the time of the Fourth Modified Plan, Debtors' "net" monthly income has increased to $11,000.00 (as compared to the gross wages of $10,834.00 in 2010, which were stated to be $7,732.00 net after taxes, Social Security, and insurance, Dckt. 1 at 27). Now, to support the current request, Debtors state that their net income from business is only $7,825.00. This is after taking expenses from $11,100.00 gross income.

PURCHASE OF A NEW CAR BY DEBTORS

While the Debtors are nearing the finish line, they are not there yet. These Debtors have been "forced" on two prior occasions to reduce their plan payments and the dividend to creditors holding general unsecured claims. However, when they want to purchase a car, they apparently "must" have a brand new car with only 22 miles on it. They could not, as is common for consumers living on a budget outside of the extraordinary protections of bankruptcy, could not purchase a two or three year old car for which substantial depreciation has already occurred.

This purchase demonstrates two things. First, the Debtors do not intend to comply with the law, but do what they want and send their attorney in to convince the court to rewrite the law according to the Debtors. Second, the financial information provided by the Debtors in this case to support confirmation of the Original Plan, Second Modified Plan, and the Fourth Modified Plan may not have been truthful and honest. Rather, it may have been information created solely to justify reducing plan payments and maintaining the lifestyle which the Debtors want to live – without regard to being unable to pay for that lifestyle.

DENIAL OF MOTION

The circumstances surrounding this Motion in conjunction with the concerns over the supplemental income and expenses of the Debtor raise serious red flags over the candor of the Debtors. With full knowledge of the requirements of the Bankruptcy Code, the Debtors (and their counsel) have constructed the purchase and motion so as to try and tie the hands of the court. To Debtors, granting of their motion is made a fait accompli, with the court nothing more than a rubber stamp for the Debtors.

Based on the evidence presented, the Motion is denied.

With respect to the conduct and representations of the Debtors in this case, the court leaves that to the Chapter 13 Trustee and U.S. Trustee to review and consider what actions, if any, are appropriate.

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 denied.

6. 10-48245-E-13 JEREMY/CONNIE HAYS
RK-1

AMENDED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH PROGRESSIVE INSURANCE
1-20-15 [119]

Tentative Ruling: The Motion to Approve Compromise 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, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 24, 2014. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Motion For Approval of Compromise 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 in interest are entered.

The Motion For Approval of Compromise is granted.

Jeremy and Connie Hays, the Chapter 13 Debtors, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Progressive Choice Insurance Company ("Settlor"). The claims and disputes to be resolved by the proposed settlement are a bad faith claim against the Settlor arising from the theft of Movant's vehicles and the subsequent denial of insurance coverage by Settlor. The amount of the settlement is $35,000.00

Attached to the Motion is the Declaration of Andrew Kalnoki, special counsel in the state law case ("Special Counsel"). Dckt. 85. Special Counsel states, in his opinion, the outcome of the trial was uncertain. If the Debtors prevailed at trial, Special Counsel states that he believes the best result would have been the reimbursement of the present fair market value of the vehicle, in the amount of $45,000.00 to $55,000.00. Because of credibility issues and the bad faith claim being weak, Special Counsel believes that the settlement is fair and equitable.

The Declaration states that the global settlement was for $35,000.00. Out of that sum, Progressive is to pay $25,000.00 and the junk yards $10,000.00.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 12, 2014. Dckt. 96. The Trustee states that the Motion is silent as to what party is to pay the filing fee to reopen the case, which is currently deferred. Dckt. 71. The case had been closed with a discharge on February 3, 2014 (dckt. 63) and was reopened pursuant to the motion of the Trustee who had served in the case. Dckt. 67. The Trustee believes the fee to reopen a Chapter 13 case is normally $235.00.

DEBTOR'S REPLY

The Debtors filed a reply to the Trustee's objection on December 23, 2014. Dckt. 102. The Debtors state that if the fee to reopen in the amount of $235.00 must be paid, then special counsel consents toward the fee being repaid from his award pursuant to the Motion for Fees. Dckt. 89.

JANUARY 13, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on February 3, 2015 to allow the Debtors to file supplemental pleadings. Dckt. 110. The court ordered that the Debtors shall file and serve supplemental pleadings and the settlement agreement on or before January 20, 2015. If the settlement agreement is confidential, the Debtors were instructed to contact Janet Larson, the courtroom deputy, to file the settlement agreement under seal on or before January 27, 2015. The court further ordered that any reply or response shall be filed or served on or before January 27, 2015.

DEBTORS' SUPPLEMENTAL PLEADING

The Debtors filed a supplemental pleading on January 20, 2015. Dckt. 119. The Supplement to the Motion states the following:

1.If the fee to reopen in the amount of $235.00 must be paid, then Special Counsel hereby consents toward the fee being repaid from his award pursuant to the motion for fees.

2.Exhibit A is the offer of settlement proposed by counsel for debtors' vehicle insurers Progressive Ins. Co., contingent upon this court's approval.

3.This case had a slim to non chance of success at its inception, thus the settlement offer in the state court action should not only be construed as

fair, but also as a great success.

4.The settlement is in the best interest of the estate and all parties because it brings a difficult case to a final conclusion.

Debtors' Special Counsel, Andrew Kalnoki, provides his Supplemental Declaration in support of the Motion. Dckt. 120. He testifies under penalty of perjury that,

a. He consents to the payment of the $235.00 fee to reopen the case to be paid form his fees as approved by this court.

b. Exhibit a is a "memorialized agreement with opposing counsel for Progressive Ins. Co, in Sacramento Superior Court case number 34-2009-0004221 to settle for $35,000.00."

Filed as Exhibit A is a copy of a letter dated July 31, 2012, from Craig Farmer of Farmer Smith & Lane. The letter states the following:

> This letter is to confirm our mutual agreement ot resolve all claims of Mr. Kalnoki's clients against the defendants in Sacramento Superior Court Case No. 34-2009-00045221 under a Whit v Western Title Waiver for the total combined sum of $35,000.00 dollars. Of the total settlement amount, Ms. Bell's clients will provide $10,000.00 and Mr. Farmer's client will provide $25,000.
>
> The above settlement funding is conditioned upon Mr. Kalnoki's obtaining the appropriate consent to the settlement by the Hays Bankruptcy Trustee and the Bankruptcy court including any direction as to how the settlement to proceeds shall be dispersed.
>
> It is my further understanding that Mr. Kalnoki's clients want the vehicles returned as they have the keys and ownership papers. Accordingly, I ask that Ms. Bell consult her client and obtain approval to allow the vehicles to be released to Mr. Kalnoki's clients as part of the global resolution of this matter.
>
> Finally, at the conclusion of these steps, Mr. Kalnoki's office will file a Request for Dismissal with prejudice of Sacramento Superior Court Case No. 34-2009-00045221. The monies funding the settlement will not be disbursed until each of the above-described steps have been completed.

Dckt. 121, Exhibit A.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement

is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

When the court continued the hearing to allow Debtors the opportunity to correct the deficiencies with the original pleadings, the Debtors were order to file and serve "the settlement agreement" on or before January 20, 2015. Order, Dckt. 115. The order expressly provided that if the record needed to be sealed, such would be done for the parties.

Unfortunately, the Debtors again have withheld from the court the actual settlement agreement. Rather, only a copy of a letter stating the proposed terms for the settlement has been provided. Exhibit A. The court would find it highly unusual for defendants for whom insurance company defense is being provided to be settling without there being an actual written settlement agreement.

This is the second attempt of the Debtors, Debtors' counsel, and Special Counsel at getting approval for the settlement. As stated at the original hearing, the court will not piece together a settlement agreement from various documents and assumptions. The parties must provide the actual settlement agreement with all of the terms outlined.

In seeking approval of the Settlement, Special Counsel for Debtors argues that the settlement amount is appropriate and that the claims have been impaired due to Debtors' failure to accurately and truthfully complete the claims forms when they reported the vehicle and boat stolen to the insurance company.

The court also notes that the Debtors have not attempted to get approval of the settlement until two and a half years after the settlement letter was sent, which raises questions over why it has taken the Debtors so long to file the instant Motion. From the conduct of Debtors and their attorneys, it appears that something is amiss with the settlement and there are additional, undisclosed terms (which may include additional monies being paid to these or other persons based on the claims which are property of the estate).

> "However, there would not have been any award of punitive damages, since there was a policy defense by Progressive, i.e. failure to disclose material facts on the claims forms. Debtors offered to sell their boat prior to the theft claim

> and did not disclose the attempted sale to the carrier. Progressive found out that there had been an offer for sale by researching on Craigslist.com. Progressive summarily construed the Hays' denial of their attempt to sell their boat as fraud and denied the Hays' claim."

Points and Authorities pg, 7:17-24, Dckt. 84. See also Declaration of Special Counsel, pg. 1:23-24, 3:8-14. The Debtors lack of candor in making the insurance claim, the failure to disclose the asset (claim) previously in the case, and the absence of a settlement agreement are concerning to the court.

The court reads the Supplemental Pleadings to state that after more than two years the Insurance counsel and Debtors' Special Counsel have not yet prepared a written settlement agreement. While that seems incomprehensible (from both a legal and risk management perspective for the attorneys), the court will give the attorneys the benefit of the doubt and not conclude that there are additional terms which are not being disclosed to the court.

The court approves a settlement by which the total claims being paid is $35,000.00. If any other monies are paid relating to or in any way connected to the settlement, such amounts and parties must be disclosed to the court. The easiest way to accomplish this is for Craig E. Farmer, counsel for Progressive Ins. Co. to file with the court a copy of the fully executed settlement agreement. All settlement monies shall be paid to the Chapter 13 Trustee, with such monies to be disbursed upon further order of this court.

Therefore, the Motion is granted and settlement for $35,000.00 is approved.

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 to Approve Compromise filed by Jeremy and Connie Hays, the Chapter 13 Debtors, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Jeremy Louis Hays and Connie Maria Hays (Debtors), Progressive Ins. Co., and all of the Defendants in California Superior Court for the County of Sacramento, Case No. 34-2009-00045221, *Hays v. Progressive Ins. Co., et al.*, are authorized to settle all claims asserted in that case on the following terms and conditions:
>
> A. The Settlement Amount for the claims asserted by the Debtors is $35,000.00.
>
> B. The $35,000.00 Settlement Amount and all other amounts, if any, paid to anyone relating to the settlement of claims shall be immediately paid to David Cusick, the Chapter 13 Trustee, who shall hold all such monies subject to further order of this

court.

C. On or before February 28, 2015, Craig E. Farmer, Esq., of Farmer Smith & Lane, LLP, counsel for Progressive Ins. Co., shall file with the court and serve on Andrew G. Kalnoki, Esq. (Special Counsel for Debtors), Richard Kwun (Bankruptcy Counsel for Debtors), Tina Ann Bell (Counsel for Other Defendant(s)), the Debtors, the Chapter 13 Trustee, and the U.S. Trustee a copy of the fully executed Settlement Agreement as authorized by this court pursuant to this Order. The Settlement Agreement shall disclose the identity of and amount to be paid each of the parties or other person (not including the attorneys' and representatives of the Defendants) to be paid any monies as part of or relating to the settlement.

D. After the filing of the Settlement Agreement, any person claiming an interest in or right to the settlement proceeds may file a motion for order authorizing the disbursement of the settlement monies held by the Chapter 13 Trustee. Said motion shall be filed pursuant to Local Bankruptcy Rule 9014-1(f)(1) [at least 28-days notice].

E. No attorneys' fees are approved for Debtors' Special Counsel or Bankruptcy Counsel pursuant to the Stipulation or this order. Such fees shall be approved pursuant to a separate order for motions for compensation.

The Clerk of the Court shall serve, in addition to any parties normally served, a copy of this Order on

Craig E. Farmer, Esq.
Farmer Smith & Lane, LLP
3620 American River Dr., Suite 218
Sacramento, CA 95864

Tina Ann Bell, Esq.
Rushford & Bonotto, LLP
2277 Fair Oaksl, Blvd. Suite 495
Sacramento, California 95825

Andrew G. Kalnoki, Esq.
791 University Avenue
Sacramento, CA 95825.

7. 10-48245-E-13 JEREMY/CONNIE HAYS **CONTINUED MOTION FOR**
RK-2 **REIMBURSEMENT OF FEES AND COSTS**
12-3-14 [89]

Tentative Ruling: 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).

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, parties requesting special notice, and Office of the United States Trustee on December 3, 2014. By the court's calculation, 41 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 granted in the amount of $14,000.00 and costs of $435.00.

Andrew Kalnoki, Special Counsel("Applicant") for Jeremy and Connie Hays, the Chapter 13 Debtors ("Client"), though Client, makes a Motion for Reimbursement of Fees and Costs in this case.

The Applicant is seeking compensation under the Contingency Fee between Applicant and Debtor in connection with a state law fraud, breach of contract, declaratory relief, conversion, intentional infliction of emotional distress and breach of the implied covenant of good faith claim. The order of the court approving employment of Applicant was entered on November 3, 2014, Dckt. 80. Applicant requests fees in the amount of $11,676.00 (33.33% of the $35,000.00 settlement in the state law case). AN.1.

AN.1. The amount listed is based on the corrected amount Applicant states in Applicant's reply. Dckt. 105.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on December 12, 2014. Dckt. 99. The Trustee states that the retainer agreement filed as an exhibit (Dckt. 94, pg. 3, Section 5), provided for a $10,000.00 nonrefundable retainer received toward the attorney fees and 33.33% of any settlement without litigation was dated April 23, 2009. This bankruptcy proceeding was filed October 25, 2010. The trustee is not certain when Applicant was first aware of the bankruptcy proceeding, although it may have been July 2012 (Dckt. 77, pg. 1, lines 25-26).

While no executory contracts were assumed by the plan, and the Debtor obtained a discharge, if the retainer agreement is enforceable and the Debtor did already pay Applicant $10,000.00 toward the attorney fees, the order should not allow Applicant more than the $11,655.50, reduced by any credit for remaining retainer fees.

APPLICANT'S RESPONSE

Client, on behalf of Applicant, filed a response on December 23, 2014. Dckt. 105. The Applicant argues that the under the Agreement, the Applicant is entitled to compensation. Namely, the Applicant first argues that the Applicant waived the 40% contingency rate he was entitled to under the Agreement and instead requests only 33.33%. Dckt. 94, pg. 3, section 5. Because of this reduction, the Applicant argues that it would be inequitable if the unused portion of the $10,000.00 is now deducted from the 33.33%. The amount used from the $10,000.00 retainer was $425.00 filing fee charged by the Superior Court. Applicant states that after three and a half years litigating this mater and is entitled to the 33.33% of the $35,000.00 settlement amount as well as the remaining balance from the $10,000.00 retainer.

JANUARY 13, 2015 HEARING

At the January 13, 2015 hearing, the court continued the hearing to February 10, 2015 at 3:00 p.m. The Applicant, through the Debtors and Debtors' counsel, was ordered to file and serve supplemental pleadings on or before January 27, 2015. The Trustee was ordered to file and serve a reply, if any, on or before February 3, 2015.

UNITED STATES TRUSTEE'S RESPONSE

The United States Trustee for the Eastern District of California, filed a response to Debtors' supplemental pleading on January 26, 2015. Dckt. 131. The response states as follows:

1. The Debtors assert in their supplemental pleading that they agreed to pay a "$10,000.00 non-refundable retainer fee" to Applicant. This retainer would be "in addition to" Applicant's contingency fee. Furthermore, the Debtors assert that this compensation arrangement is not a "recent fabrication". See Supplement, at ¶ 4.

2. While the arrangement may not be a "recent fabrication" it is contrary to the plain language in the Legal Services Agreement. Specifically, the handwritten addendum to Section 5 of the Legal Services Agreement explicitly states that the $10,000.00 retainer would be applied toward the attorney fees. See Dckt. 78, at pg. 3.

3. The Debtor and Applicant must disclose the true nature of Applicant's compensation arrangement in his employment application and in his fee application. See Fed. R. Bankr. P. 2014(a), 2016(a).

4. This disclosure is especially important, because there is a conflict between the plain language of the legal Services Agreement and the parties' purported understanding of the compensation arrangement.

5. Neither the Employment Application to employ Applicant (Dckt. 74), nor the motion to compensate Applicant (Dckt. 89), disclosed the parties' understanding that the $10,000.00 retainer was "in addition" to Applicant's contingency fee.

6. This disclosure is also absent from Applicant's supporting declaration. See Dckt. 76, at ¶ 6-7; Dckt. 91, at ¶ 16.

7. Both the Employment Application and the Compensation Motion gave the impression that the $10,000.00 retainer would be applied "toward" and not "in addition" to the contingency fee. See Employment Application, at ¶ 8-9, Dckt. 78, Compensation motion, at pg. 2 (lines 11-14), and Dckt.94.

8. The Debtors' Supplement does not address why the Employment Application and the Compensation Motion each failed to fully disclose Applicant's compensation arrangement. Which, may not have been discovered if the Chapter 13 Trustee did not raise it. See Dckt. 99.

9. Applicant's failure to fully disclose his compensation arrangement in connection with the Employment Application and the Compensation Motion is grounds for denial of some or all of Applicant's fee request.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick, filed a response to Debtors' supplemental pleading on January 27, 2015. Dckt. 133. The Trustee's concerns remain, because the Trustee's response to Debtor's Motion for Reimbursement of Fees and Costs (Dckt. 99) has not been addressed by the Debtor's Supplemental Motion.

SPECIAL COUNSEL'S JANUARY 27, 2015 SUPPLEMENTAL REPLY

The Applicant, filed a response regarding his attorney's fees request on January 27, 2015. Dckt. 135. The Reply states as follows:

1. The Trustee's objection to the Motion for Attorney's Fees is unsupported by the facts and/or the applicable law. In the Trustee's objection he addresses the issue of attorney's fees based upon the Attorney's fee agreement between Applicant and Debtor executed on April 23, 2009. The Trustee's interpretation of the language of the attorney's fee agreement does

not appear to be consistent with the intent of the contracting parties at the time they entered into said contract, and/or with the plain language of the attorney's fee agreement entered into long prior to the bankruptcy filing by the Debtors. Therefore, Applicant requests that the Trustee withdraw his objection after he has had an opportunity to review Applicant's response, and/or have the Court allow the attorney's fees as requested, the 33.33% of the total settlement ($35,000.000), with no deductions.

2. The Debtors and Applicant entered into a fee agreement on April 23, 2009, or nearly six years prior to the last hearing in this matter. At the time of signing of the agreement there was no hint that the Debtors would declare bankruptcy. In 2009, the parties were free to enter into a binding contract (The Attorney Services Agreement(on any terms that were fair at that time.

The agreement called for a negotiated fee for attorney's services as follows: Applicant would receive 33.33% of the settlement and/or judgment, in addition to the unused portion of the $10,000.00 non-refundable retainer deposited by the debtors.

To make the fee agreement fair, Applicant waived his normal fee of 40%, as indicated by the line inserted with a blue pen by Debtor on the fee agreement.

There is nothing illegal and/or unethical about charging a certain percentage of the gross recovery in a lawsuit, together with a non-refundable retainer toward costs and attorney's fees. Applicant could have charged 40% and/or even 50% together with a non-refundable retainer. Instead, Applicant agreed to reduce his customary fee of 40% to accommodate the Debtors.

The Trustee misunderstood the attorney's fee agreement, and somehow believes that the non-refundable retainer, which was in addition to the 33.33%, is a recent fabrication just to get excessive fees from the estate at the expense of the creditors. However, this is not the case as Applicant made such a condition as part of the fee agreement six years ago. The fee requested is only a small part of, or approximately one third of the fee Applicant could have received on an hourly fee basis and/or on a quantum merit basis If the attorney's fee contract is for some reason declared void.

It would be inequitable for the Trustee to argue that the $35,000.00 does not justify the attorney's fees initially agreed upon by the parties. The non-refundable fee would have been earned even if the results of the state court litigation yielded zero monetary recovery. The non-refundable fee was earned the moment it was paid to Applicant, per the intent of the parties.

Applicant does not know how the state court case litigation was omitted from the assets list for the Debtors at the initial filing of their bankruptcy claim. Had the state court case been timely disclosed to the Trustee, the state court case could and would have been exempted and/or waived, since at that time the chance of any monetary recovery was small and/or nil. Applicant would not have continued to prosecute the case on a contingency fee basis, and it would not have been feasible for the Trustee to pay an hourly rate of $350.00. Since the omission was inadvertent, Debtors could be allowed to amend the asset list, listing the state court action, and the Trustee could retroactively exempt the case all together, and waive any right thereto. This

would leave Applicant and the Debtors in the identical position they would have been, had the Debtors not declared bankruptcy, and the fee dispute would not have arisen at all.

The fee agreement signed by the parties was a form contract. Applicant's fee for routine work would have been 40%, which is established by the fee contract. However, Applicant allowed his fee to remain 33.33% as a consideration for depositing the $10,000.00 non-refundable retainer. Applicant asked the Debtor to draw a line with his own blue ink pen in the space where the 40% fee would have been. At the same time Applicant, prior to signing the fee agreement, inserted the language that the $10,000.00 retainer fee received was non-refundable.

Thus asserting that the fair reading of the fee agreement is to represent the Debtors for 33.33% is unrealistic.

The understanding of the parties to the contract was that the non-refundable retainer fee would be used to pay the expenses of litigation and the remainder, if any, would be added/applied to the 33.33% as attorney's fees. This was the intent of the parties when they entered into the attorney's fee contract. It was never mentioned, intended, and/or agreed upon that the remained of the non-refundable retainer would be refunded to the Debtors. Under such circumstances the non-refundable retainer fee would have been characterized as refundable retainer fee.

At the time of contract, the parties were free to accept the terms of the contract. The fee agreement was a negotiated contract. It should be noted that there are two persons handwriting on the fee agreement, Applicant's in black ink and Debtor's in blue ink.

3. California law consistently states that the primary objective in interpreting a contract is to ascertain and carry out the intention of the parties.

The attorney's fee agreement is a contract. The parties to the contract are the Debtors and Applicant. The parties' intent was to pay Applicant for his services with 33.33% of any settlement, in addition to the unused portion of the non-refundable retainer fee.

As a general rule, a contract is binding unless a party thereto objects to it. If such objection is raised against an attorney's fee contract arbitration ensures among the contracting parties. No objection by the parties to the contract was ever raised.

In the instant case, the Trustee objected to the attorney's fees requested by Applicant on the basis that under a reasonable interpretation of the fee agreement the remainder of the $10,000.00 non-refundable retainer fee should be deducted from the 33.33%, rather than added to it as was intended by the parties and is requested by Applicant.

When a court interprets a contract the ordinary use of words is used as the standard for interpretation. The ordinary meaning of a word is usually the definition found in a commonly accepted dictionary.

The common and ordinary meaning of the word non-refundable means that no money would be returned from the retainer to the Debtors under any

circumstances. If the unused portion fo the non-refundable retainer fee were to be returned to the Debtors and/or the Creditors, such would make the retainer herein refundable. The plain meaning of the language asserted on the contract and the intent of the parties negates such interpretation. Thus, if the Debtors could not get a refund from the non-refundable retainer fee, neither could the Creditors.

The parties throughout this controversy acted consistently with the representations in the contract. Applicant paid for the filing fees of the Complaint and paid for the filing fee to reopen this case. Applicant should also be reimbursed for those expenses.

The Court is respectfully requested no to disregard the intent of the parties to the contract, and the meaning of the words; nor interpret the request for the enforcement of the attorney fee contract as written and intended by the parties, as a violation of the parties' fiduciary duty toward the Creditors in this bankruptcy proceedings.

Applicant believed that it was only a formality to obtain his attorney's fee in this bankruptcy proceeding and did not scrutinize the documents that were filed by his counsel Mr. Kwun. While some of the documents were signed by Applicant, many of the documents filed in this proceeding were never seen by Applicant.

The Trustee's reading of the Attorney's Fee Agreement is narrow, and the agreement states in plain language that "10k nonrefundable retained received toward attorney fee." The language quoted does not say that the non-refundable retainer fee would be deducted from the additional 33.33% fee. It clearly says that it is non-refundable. If in fact it were refunded, by taking it out of the 33.33% it would not be consistent with the intent of the contracting parties. The intent of the parties controls. Parol Evidence can be introduced to show the intent of the contract parties.

4. Applicant fully performed under the fee agreement and is entitled to his fees as intended by the parties.

In the Tentative Ruling of the Court the statutory bases for attorney's fees was set forth.

Following those principles it is Applicant's position that the services he provided to the Debtors in obtaining a settlement of $35,000.00 in the Debtors' bad faith case greatly benefitted the Debtors. Without Applicant there would not have been any recovery and the estate and/or the Creditors would not be reimbursed at all.

It is Applicant's estimate that during the three-and-one-half years of representation of the Debtors, he spent approximately 200 hours on this matter.

Applicant's attorney's fee was $300.00 per hour when he took this case 6 years ago. However, since has increased to $350.00. Thus, on a quantum meruit basis, Applicant would be entitled to 200 x $300 = $60,000.00 at the lower rate, and 200 x $350 = $70,000.00, at the higher one. Therefore, requesting a small fraction of the quantum meruit fee, pursuant to a negotiated contract, is justified.

If the attorney's fee contract is declared void by the Court or the contract is deemed void and the attorney's fee agreement is rescinded, the fee would be determined on a quantum meruit basis. Under such scenario the Creditors and/or Debtors may no receive anything.

The compensation sought herein is reasonable under the complexity of this matter and the time expended in th estate court litigation. Furthermore, Applicant did not perform any unnecessary and/or duplicative services.

5. Applicant should be compensated for his services to the estate by contributing this brief and making two court appearances. It appears fair that Applicant be compensated for all of his time expended to protect the integrity of the process herein and the fair administration of the bankruptcy estate by the Trustee.

By participating in this matter as an appointed Applicant he spent approximately 17.5, by reviewing the Court's Tentative Ruling, reviewing the pertinent documents in the bankruptcy file, appearing twice in court for hearings, and researching and drafting of this brief.

Applicant's services were necessary toward the fair administration fo the estate. Thus, Applicant should be entitled to an additional $6,125.00 in fees for his services in the bankruptcy estate. However, Applicant waives his fees for his services as Applicant, if his fees for the underlying state court litigation are approved.

Applicant's writing of this brief to justify Applicant's fee in the underlying representation in the bad faith action was and should not be construed as part of his role for concluding the $35,000.00 settlement expeditiously.

6. Applicant respectfully requests that the Trustee withdraw his opposition to the attorney's fee request, since his interpretation appears to be inconsistent with the intent of the parties, the plain language of the contract, and fairness and equity.

Further, Applicant requests he receive his earned fee in the approximate sum of $11,666.66 minus the filing fee for the reopening of this case, that Applicant promised to pay.

In the alternative, it is respectfully requested that the court find that the fee request by Applicant is appropriate and instruct the Trustee to issue a payment to Applicant out of the forthcoming settlement of $35,000.00, the sum of $11,666.66 minus the filing fee for the reopening of this bankruptcy case in the sum of $250.00, which Applicant offered to pay on behalf of the Debtors.

FIDUCIARY DUTIES OF DEBTORS AND SPECIAL COUNSEL

Upon the filing of a bankruptcy case the bankruptcy estate is created. In a Chapter 7 case a trustee is immediately appointed. In a Chapter 11 case the debtor serves as the debtor in possession, in the place of a trustee, unless the court subsequently appoints a trustee. In Chapter 12 and 13 cases, while a trustee is appointed and has party in interest standing, the Chapter 12 and Chapter 13 Debtor take control of the property of the estate and fulfill

the duties of a trustee. When a plan is confirmed, the debtor or other person then ascends to the status of plan administrator to proper administer all of the property through the plan and properly pay creditors. These trustees, debtors in possess, Chapter 12 debtors, and Chapter 13 debtors are fiduciaries to the bankruptcy estate (the same as a trustee) and under the confirmed bankruptcy plans.

Trustees, debtors in possession, Chapter 12 and Chapter 13 debtors, and plan administrators may hire professionals to assist them in fulfilling their fiduciary duties. These professionals, including attorneys, have a fiduciary duty to the bankruptcy estate and to the plan estate created under a confirmed bankruptcy plan. *See In Re Brook Valley VII, Joint Venture*, 496 F.3d 892, 900 (8th Cir. 2007); *Woodson v. Fireman's Fund Insurance Company* (*In re Woodson*), 839 F.2d 610 (9th Cir. 1988); *In re Lee Way Holding Co.*, 102 BR. 616, 624 (S.D. Oh 1988).

In this Motion, Special Counsel and Debtors assert that the plain language of the written Attorney Fee Agreement is not what they "understood" the fees to be and that Special Counsel should be paid additional monies from the Estate's (and not the Debtors') portion of the settlement proceeds. As discussed below, the court does not find the testimony of a different understanding to be "credible" and Special Counsel's attempt to extract additional fees from the Estate to not be consistent with his fiduciary duties to the Estate.

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.

DISCUSSION

Applicant is arguing that by reducing the contingency fee from 40% as stated in the Legal Services Agreement to 33.33%, the Applicant is entitled to the 33.33% of the settlement and in addition be paid the $10,000.00 retainer on top of the 33.33% contingent fee.

Employment of Applicant was authorized on ex parte motion. No notice was provided for creditors and no opportunity for a hearing was provided. The Motion recounts a dispute between Applicant and Debtor’s bankruptcy counsel over the failure of the Debtor in having previously obtained authorization to

employ Applicant and approve the settlement. Motion, Dckt. 74. The Motion states the following:

A. A tentative settlement has been reached in the amount of $35,000.00.

B. Applicant was unaware that Debtor was in bankruptcy.

C. Applicant is to be paid a 33% (explained subsequently to be a typographical error, with the correct percentage 33.33%) of the $35,000.00 settlement.

D. A copy of the employment agreement is included as Exhibit A (Dckt. 78).

Motion, Dckt. 74. No reference is made in the Motion for Applicant to be paid 33.33% of the settlement and an additional $10,000.00 from a retainer.

In support of the Motion for Authorization to Employ Applicant, the declaration of Andrew Kalnoki (Applicant) was filed. Dckt. 76. In it, Applicant makes various statements under penalty of perjury, including,

a. Applicant has agreed to serve as state court counsel for Debtor on the terms stated in Exhibit A.

b. Applicant has a fee agreement to be paid 33% of the settlement proceeds and "**I seek only 33% of the settlement proceeds.**" *Id.*, pg. 7:2 [emphasis added].

Applicant makes no reference to the $10,000.00 retainer in his declaration or any right to be paid the $10,000.00 in addition to the "only 33%" which he represented to the court to be his fees for the legal services provided.

The court granted the motion and approve the employment on the 33% contingent fee basis. Order, Dckt. 80. This court is sensitive to non-bankruptcy attorneys providing services to debtors, trustees, debtors in possession, and other fiduciaries of bankruptcy estates. Often times it may appear that there is a "maze of bankruptcy laws and rules" which could exist for purposes of maximizing bankruptcy attorney fees and diminishing non-bankruptcy attorneys' fees. While such is inaccurate, the necessary safeguards imposed by Congress under the Bankruptcy Code and the U.S. Supreme Court in the Bankruptcy Rules exist because of the additional fiduciary duties which do not exist in non-bankruptcy courts and to prevent the abuse of bankruptcy estates. The court quickly authorized the employment and 33% fee arrangement to allay concerns, if any, of Applicant that his valuable services would not be appropriately compensated.

The actual Legal Services Agreement provided to the court (Exhibit A, Dckt. 78), differs slightly from that stated in the Motion and by Applicant under penalty of perjury in his Declaration. That portion relevant to the present Motion for Approval of Fees states:

5. ATTORNEY'S FEES

Client _____JH_____ will pay attorney 33.33% of

> any gross settlement if this matter is resolved without litigation. Client [blank line] will pay attorney 40% of any gross settlement and/or judgment if this matter is resolved after a Complaint is filed and/or a demand for arbitration is made, and/or the matter is litigated.

Dckt. 94. Hand written under this section, there is a clause that reads:

> 10% nonrefundable retainer received toward attorney fees.

Dckt. 94. This Legal Services Agreement is dated April 23, 2009 - more than a year prior to the filing of the bankruptcy case. As with may contingent fee contract there is a two tier fee arrangement built around whether "litigation" is commenced. If "litigation" is not required, then the contingent fee is 33.33% of the gross settlement. If a complaint is filed, demand for arbitration made, or the matter is litigated (it appears to judgment), then the fee is 40% of any gross settlement or judgment. These percentages do not shock the court or appear to unreasonable for "normal" contingent fee cases taken for consumers.

The Legal Services Agreement also provides that the client shall pay the "costs" in connection with the representation under the Agreement. Examples of costs identified in the Legal Services Agreement are the type which one normally expects to see in such an agreement.

In addition to the above provisions, as part of the Attorneys Fees Agreement provisions (Section 5), there is the hand written provision that there is a $10,000.00 retainer which will be "toward attorney fees." The plain reading of this sentence is that the $10,000.00 will be applied to either the 33.33% or the 40% contingent attorneys' fee.

Attorneys' Fees Authorized By Court

The present Motion requests that the court allow Applicant attorneys' fees computed at the 33.33% contingent fee rate. The Motion makes no reference to the $10,000.00 retainer. It merely states that counsel requests the court to approve attorneys' fees of $11,665.50 (33.33% of the $35,000.00 settlement).

Applicant provides his declaration in support of the present Motion. Dckt. 91. In it he testifies that a problem with Debtor's case was a policy defense asserted by the insurance company – Debtor's failure to disclose material information on the claim form. The material information was that Debtor was attempting to sell the insured property on Craig's list prior to it being reported as stolen. The insurance company had denied the insurance claim based on fraud.

Applicant's efforts resulted in Debtor obtaining a recovery on the insurance claim, but a bad faith denial claim could not be prosecuted. Instead, the claim advanced was that the insurance company negligently stored it after it was recovered.

Applicant testifies that he has put more than 200 hours into representing the Debtor on this claim. In this declaration he states that he is seeking 1/3rd of the settlement. No testimony is provided that in addition

to the 33.33% computation of the attorneys' fees Applicant should also be paid an additional $10,000.00.

Only after the Trustee brought to light that the calculation of the portion of the Settlement Proceeds to be paid Applicant was determined after application of the $10,000.00 retainer did Applicant make any reference to the retainer. In his "Reply" declaration, Applicant states that it would be unfair for him to account for the Retainer given all of the time he has spent working on the Debtor's state court action. Dckt. 106. Applicant states that only $435.00 of the Retainer has been used to pay the filing fee.

Though Applicant states that he is actually entitled to a 40% contingent fee, he agreed to "reduce" it to 33.33%. He now testifies under penalty of perjury that he agreed to waive the 40% fee if they provided a $10,000.00 retainer. Declaration para 7, *Id.* This statement under penalty of perjury is in conflict with (1) the plain language of the Legal Services Agreement, (2) the Motion to Employ Applicant, and (3) Applicant's prior declarations under penalty of perjury.

The court created a rudimentary chart to illustrate the total attorney's fees the Applicant would receive under his proposed compensation in the Motion compared to the fees that would be awarded under the plain language of the Legal Services Agreement.

	40% Contingent Fee **As Computed Under Plain Language of Legal Services Agreement**	**33.33% Contingent Fee + $10,000 Retainer** **As Proposed By Applicant**
Settlement Amount	$35,000.00	$35,000.00
Contingent Fee Computation	$35,000 x 40% **$14,000.00**	35,000.00 x 33.33% **$11,665.50**
Retention of Attorney's Fee Under Applicant's Proposal ($10,000.00 - $435.00 filing fee)		**$9,565.00**
	_____	_____
TOTAL ATTORNEYS' FEES TO BE PAID TO APPLICANT	**$14,000.00**	**$21,230.50**

As the chart shows, by "reducing" his attorneys' fee percentage to 33.33%, rather than the 40% provided under the Legal Services Agreement, Applicant would divert $7,230.50 of the settlement proceeds from the bankruptcy estate and the plan estate into his own pocket. This results in Applicant obtaining at the expense of the bankruptcy and plan estates a 51.65% overpayment of attorneys' fees as provided under the Legal Services Agreement and an 82% over payment of the 33.33% fees authorized by the court

in the order authorizing Applicant's employment.

The Applicant, as a fiduciary of both the fiduciary Debtors in this case and under the and the estate itself appears to be misrepresenting his "good will" in reducing his contingency rate at the detriment of the estate, the Debtors, and the creditors. Under the guise of being willing to reduce the contingency, the Applicant is attempting to not only receive a percentage of the settlement but also to hold on to the retainer paid by the Debtors, exponentially increasing his fees. This type of activity concerns the court.

The court is also concerned that Debtors and Debtors' counsel, also as fiduciaries of the estate, would support this request for fees when it would be to the detriment to the estate and creditors.

It may be that Applicant may fee that the case was misrepresented to him by Debtor. Applicant may well have taken on one of those cases which is a "loser" when the effective hourly rate is computed. But for contingent fee attorneys that "loser" is offset by the winners in which the time spent is much lower than would be expected and the effectively hourly rate is well in excess of any reasonable loadstar computed amount. That is the economic life of the contingent fee attorney. However, such perceived "misrepresentation" is not a basis for not disclosing information to the court and stretching the truth (or omitting the truth) when the Motion to employ was filed and the present Motion for fees which did not disclose that the Applicant's fees were to include the $10,000.00 retainer.

Supplemental Declaration of Special Counsel

Special Counsel filed his Supplemental Declaration on January 27, 2015. Dckt. 136. This declaration states that counsel intended to entere into a written fee agreement which was to "reduce the 40% fee customarily charged for services when a complaint needed to be filed and the matter litigated to 33.33%, plus any unused portion of the 10K non-refundable retainer fee." Declaration pg. 2:13-18. He believes that the written Attorney Fee Agreement "unequivocally states" that the retainer fee advanced is non-refundable and to be applied toward the attorney's fee. Declaration pg. 2:19-21.

So, by virtue of the "understanding," Special Counsel asserts that the fees were reduced so that he could make more than the 40% continent fee stated in the plain language of the Attorney Fee Agreement.

What is clear is that Special Counsel spent much more time and effort on this case then he intended to for his 40% contingent fee. The settlement came in much lower than the settlement that he envisioned based on a possible bad faith claim against the insurance company. As discussed in the court's ruling on the motion to approve the compromise, the Estate's bad faith claim was impaired due to the Debtors' misrepresentation on the insurance claim submitted for the stolen vehicles.

> "However, there would not have been any award of punitive damages, since there was a policy defense by Progressive, i.e. failure to disclose material facts on the claims forms. Debtors offered to sell their boat prior to the theft claim

> and did not disclose the attempted sale to the carrier. Progressive found out that there had been an offer for sale by researching on Craigslist.com. Progressive summarily construed the Hays' denial of their attempt to sell their boat as fraud and denied the Hays' claim."

Points and Authorities pg, 7:17-24, Dckt. 84. See also Declaration of Special Counsel, pg. 1:23-24, 3:8-14.

The court finds a declaration from Debtor Jeremy Hays stating that he agreed to pay a 1/3 contingent fee to Special Counsel. It does not state that Debtors that they intended and agreed to pay Special Counsel more than the 40% contingent fee by paying a 1/3 contingent fee. Declaration, Dckt. 92.

The plain language of the Attorney Fee Agreement prepared by Special Counsel for his clients (which now include the Bankruptcy Estate) states,

A. Special Counsel will file and prosecute a claim for the "injuries in the accident of September 21, 08."

B. Client will pay attorney,

1. 33.33% of any gross settlement if the matter is resolved without litigation;

2. 40% of any gross settlement and/or judgment if this matter is resolved after a Complaint is filed;

C. "10K nonrefundable retainer received toward payment of attorney fees."

D. Client will pay all "costs" incurred with attorney's representation.

E. "There is to be no change or waiver of any of the provisions of this agreement unless the change is in writing and signed by attorney and client."

Attorney Fee Agreement; Exhibit A, Dckt. 137, Exhibit A, Dckt. 94.

This Agreement grants Special Counsel a 40% contingent fee once the Complaint has been filed, as it was in connection with this Motion. The Agreement also expressly states that the $10,000.00 retainer shall be applied to the contingent fee. In the Motion, only $11,665.50 in fees are requested to be approved, which is 33.3% of $35,000.00. Special Counsel did not request that he be allowed the 40% due under the Attorney Fee Agreement. In his Declaration, Special Counsel states that all of the fees he is seeking is $11,665.00, only 33.3% of the $35,000.00 recovery. Declaration, 91. Special Counsel states under penalty of perjury,

> "I believe that I should be awarded my attorney's fees in the sum agreed to by the Hays, prior to filing this lawsuit, which is 1/3rd of the settlement or 33.3%."

Declaration, pg. 2:17-18. Special Counsel does not state that he is entitled under the Attorney Fee Agreement to any additional amounts. Jeremy Hays, the Debtor, states in his declaration that he consents only to 33.3% of the $35,000.00 ($11,665.50) being paid to Special Counsel for his attorneys' fees under the Attorney Fee Agreement. Dckt. 92.

When the existence of the $10,000.00 retainer was raised by the Trustee, Special Counsel filed a response saying that he "waived" the 40% fee. Dckt. 105. On its face, the Attorney Fee Agreement prepared by Special Counsel does not state that the 40% contingent fee is waived. Rather, it states that a 40% contingent fee is owing. Further, the $10,000.00 retainer shall be applied to the attorneys' fees owed under the Attorney Fee Agreement.

In his Declaration, Special Counsel states that the retainer to pay attorneys' fees under the Attorney Fee Agreement was to pay other attorneys' fees relating to the services, though no hourly or other attorneys' fee charges are provided for in the Fee Agreement.

Based on the evidence presented, the court concludes that Special Counsel has spent much more time on the contingent fee case then he anticipated. Whether such should have been known when he agreed to enter into the Attorney Fee Agreement or information was withheld from him by the Debtors, the court does not know. If Special Counsel, as an attorney, intended to write a Fee Agreement which stated, "Client shall pay attorney a $10,000.00 flat fee for legal services, plus an additional 40% contingent fee if a complaint is filed or a 33.3% contingent fee of any gross recoveries on the claims which are the subject of this fee agreement," then possibly there would be something to consider (though the reasonableness of such agreement would be in question) as to the merits of Special Counsel being entitled to a lower contingent fee but netting more money.

No such agreement was written by Special Counsel. He agreed to be paid 40% of the gross recovery. Further, Client agreed to pay the costs and expenses. The court includes in the costs and expenses the filing fee in state court and the fee for reopening this case. The court does not expect Special Counsel to pay for reopening a bankruptcy case which the Debtors "neglected" to tell him existed.

Special Counsel is allowed the following fees, which the Chapter 13 Trustee is authorized to disburse from the $35,000.00 Settlement Proceeds, after allowing for $10,000.00 credit for the retainer held by Special Counsel:

Attorneys' Fees (40% of $35,000.00).....$14,000.00
State Court Filing Fee.....$ 435.00

Total Approved Special Counsel Fees and Costs.....$14,435.00

Application of Retainer by Special Counsel.....($10,000.00)

Disbursement by Chapter 13 Trustee..... $ 4,435.00

All other requested fees are denied.

The U.S. Trustee, while noting that conduct of counsel could result in being disallowed all or a portion of the fees otherwise due, the U.S. Trustee believes that proper application of the $10,000.00 to the contingent fee and $435.00 filing fee will result in the proper allowance and payment of attorneys' fees. FN.1. The court so applies the retainer, using the 40% contingent fee provided in the plain language of the Attorney Fee Agreement.

FN.1. In the January 26, 2015 Reply, the U.S. Trustee does not expressly state the amount of attorneys' fees which should be allowed. The Reply could be read to be that the fees should be limited to the 33.3% which was stated in the application to employ, Declaration of Special Counsel, and the order approving employment. Dckts. 74, 76, and 80. While there is some merit to that position, the court construes the reference to 33.3% to an error in communication between Special Counsel and Bankruptcy Counsel for Debtors.

The court expects Special Counsel, the Debtors, and the Estate to live by the Attorney Fee Agreement as written. If the U.S. Trustee, Chapter 13 Trustee, or other party in interest believed that Special Counsel's fees should be reduced to his conduct in requesting the "lower" 1/3 contingent fee but higher total fees by not disclosing that he was not apply the $10,000.00 retainer to the attorneys' fee due under the Fee Agreement, such could have been argued.

It appears that the 40% contingent fee provides the reasonable contingent fee agreed to by Special Counsel. Unfortunately, this may well be a case in which the attorney worked more than the 40% contingent fee if he had chosen to bill, and the client agreed to pay, fees on an hourly basis. However, this "bad contingent fee bet" will be offset by the contingent fee cases which Special Counsel spends significantly less time then the contingent fees recovered if they were computed on an hourly basis.

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 Andrew Kalnoki, Special Counsel("Applicant") for Jeremy and Connie Hays, the Chapter 13 Debtors ("Client"), though Client, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Andrew Kalnoki is allowed the following fees and expenses as a professional of the Estate:
>
> Andrew Kal, Professional Employed by Debtors
>
> Fees in the amount of $14,000.00, and
> Costs in the amount of $435.00,
>
> for total allowed professional fees and costs pursuant to 11

U.S.C. § 330 of $14,435.00. Applicant shall first apply the $10,000.00 retainer to these fees and costs, and the Chapter 13 Trustee shall disburse $4,435.00 from the $35,000.00 Settlement Proceeds (Order Approving Settlement, DCN:RK-1) as payment in full of the professional fees allowed Applicant in this bankruptcy case.

8. 10-48347-E-13 ROMEO/EMMA CARAS **MOTION TO VALUE COLLATERAL OF**
MET-4 **DEUTSCHE BANK NATIONAL TRUST COMPANY**
1-12-15 [71]

Tentative Ruling: The Motion to Value 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, parties requesting special notice, and Office of the United States Trustee on January 12, 2015. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Value 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 Value secured claim of Deutsche Bank National Trust Company, Trustee and Supplemental Interest Trust Trustee, Home Equity Mortgage Loan Asset-Backed Trust Series INDS 2007-1 ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Romeo C. Caras, Emma M. Caras ("Debtors") to value the secured claim of Deutsche Bank National Trust Company, Trustee and Supplemental Interest Trust Trustee, Home Equity Mortgage Loan Asset-Backed Trust Series INDS 2007-1 ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject

real property commonly known as 5327 Chenin Blanc Place, Vallejo, California ("Property"). Debtor seeks to value the Property at a fair market value of $300,000.00 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.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $583,307.00. Creditor's second deed of trust secures a claim with a balance of approximately $64,130.00. 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 Romeo C. Caras, Emma M. Caras ("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 Deutsche Bank National Trust Company, Trustee and Supplemental Interest Trust Trustee, Home Equity Mortgage Loan Asset-Backed Trust Series INDS 2007-1 secured by a second in priority deed of trust recorded against the real property commonly known as 5327 Chenin Blanc Place, Vallejo, 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 $300,000.00 and is encumbered by senior liens securing claims in the amount of $583,307.00, which exceed the value of the Property which is subject to Creditor's lien.

9. 14-28452-E-13 SATINDERJIT BAINS **MOTION TO MODIFY PLAN**
MAC-1 **12-15-14 [18]**

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, all creditors, parties requesting special notice, and Office of the United States Trustee on December, 15 2014. 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). 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.

Satinderjit Bains ("Debtors") filed the instant Motion to Modify Plan on December 15, 2014. Dckt. 23. Debtor is seeking to modify their confirmed Plan in the following manner: payments of $771.00 shall be paid stemming from the original plan (October-December), followed by 57 payments of $320.84 commencing on December 25, 2014, for the duration of the Debtor's Chapter 13 plan. Said plan is estimated to pay 94.1% to general unsecured.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on January 20, 2015. Dckt. 25. The Trustee objects on the following grounds:

1. The Trustee is uncertain of the treatment for creditor Carfinance Capital. The Debtor's proposed modified plan does not list the creditor Carfinance Capital. The instant motions states that "On September 23, 2014, Debtor's car was stolen...and Debtor's insurance determined the car was a

total loss".

However, under the confirmed plan (Dckt. 17) said creditor was listed as a secured creditor with a claim in the amount of $16,995.42. The Trustee has since disbursed $1,100.89, which is not accounted for or authorized under the modified plan.

2. The Debtor failed to file Supplemental Schedules I & J. The Debtor's instant motion proposes to reduce plan payments and the supporting declaration (Dckt. 18) states that Debtor's brother contributes to her monthly income. However, there have been no filings of amended Schedules of I or J.

3. The Debtor's plan filed December 15, 2014 is no properly signed. Pursuant to Local Bankr. R. 9004-1(c) "the name of the person signing the document shall be typed underneath the signature". However, Debtor's Plan (Dckt. 23) fails to comply with this rule.

BANK OF AMERICA, N.A.'S OBJECTION

Bank of America, N.A. ("Creditor") filed an objection to the instant Motion on January 20, 2015. Dckt. 28. The Creditor objects on the following grounds:

1. Lack of Adequate Funding. The pre-petition arreareages total the amount of $2,179.95, but the Debtor's plan states that number as $0.00. Furthermore, the Debtor's plan states that no pre-petition defaults exist, and only the post petition payments will be paid. Therefore, the Debtor's plan fails to comply with 11 U.S.C. §361 by not providing adequate protection to Creditor's interests, and does not meet the "feasibility" requirement of 11 U.S.C. §1325(a)(6).

2. Improper Attempt to modify loan in violation of 1322(a)(2). The Debtor's Plan attempts to modify Creditor's claim to a principal residence. The attempt by the Debtor to claim there are no pre-petition arrears requires the court to take clarify whether the Creditor is authorized by the court to apply post-petition payments to pre-petition arrears, or whether the pre-petition arrears are intended to be paid by the Chapter 13 Trustee through the modified Plan.

DISCUSSION

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

Here, the Trustee's objections are well taken. The proposed plan does not address the treatment of Carfinance Capital after the secured vehicle was allegedly stolen, especially since it still lsites the creditor with a claim in the plan. The court cannot determine the feasibility of the plan without Supplemental Schedules I and J. Lastly, while it may be merely a scriviner's error, the proposed plan fails to have the Debtor's signature which raises concerns over whether the Debtor knows the contents of the plan.

As to the Creditor's objections, Creditor holds a deed of trust

secured by the Debtor's residence. The creditor has filed a timely proof of claim in which it asserts $2,179.95 in pre-petition arrearages. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

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.

10. 12-21957-E-13 ALAN/COLLEAN SAENZ **MOTION TO INCUR DEBT**
SLE-1 **12-24-14 [32]**

Final Ruling: No appearance at the February 3, 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 and Office of the United States Trustee on December 22, 2015. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Motion to Incur Debt 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 Incur Debt is granted.

The motion seeks permission to purchase a residence at 703 Loffon Rd., Wheatland, California ("Property"), which the total purchase price is $160,000.00. Alan and Collean Saenz ("Debtors") seek court approval to incur debt with Summit Lending in the estimated amount of $154,000.00, with monthly payments of $1,146.00.

David Cusick, the Chapter 13 Trustee, filed a non-opposition on January 9, 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. 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 Alan and Collean Saenz ("Debtors") are authorized to incur debt pursuant to the terms of the agreement, Exhibit 2, Dckt. 35.

11. 12-24258-E-13 DARRELL WILLIAMS **CONTINUED MOTION TO MODIFY PLAN**
FF-6 **11-14-14 [112]**

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 14, 2014. By the court's calculation, 60 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).

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

Darrell Williams ("Debtor") filed the instant Motion to Confirm the Modified Plan on November 14, 2014. Dckt. 112. Debtor states that his financial circumstances have changed due to an injury that left him unable to work for a period of approximately three months. During that time, the

Debtor was only receiving income from Worker Compensation. The income was significantly less than that of his normal salary. As such, Debtor fell behind in his plan payments.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 15, 2014. Dckt. 119. The Trustee objects to the Motion, stating that the Trustee is uncertain of the Debtor's ability to pay, 11 U.S.C. § 1325(1)(6). The Debtor did not submit Supplemental Schedules I and J in support of the Motion. The most recent Schedule I was filed on March 2, 2012. Dckt. 1. The most recent Schedule J was filed December 5, 2012. Dckt. 71.

JANUARY 13, 2015 HEARING

The court continued the hearing to 3:00 p.m. on February 3, 2015. Dckt. 122.

DISCUSSION

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

The Trustee's objection is well-taken. The reason for the Debtor's instant Motion is a change in financial circumstances, namely the Debtor's injury which left him unable to work. Since this decreased his income and is the basis of his proposed modified plan, the court needs to see the current financial reality of the Debtor in the form of an amended Schedule I and J. Schedules that are three to four years old do not accurately reflect the Debtor's current financial situation, making it impossible to determine if the proposed modified plan is feasible and confirmable. Without this information, the court cannot confirm the plan.

No supplemental pleadings have been filed in connection with the instant Motion since the court continued the matter. (Court's February 1, 2015 review of the Docket.)

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.

12. 13-32861-E-13 JAMES/BETH FRY **CONTINUED MOTION TO CONFIRM PLAN**
PGM-2 **5-15-14 [66]**

No 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 May 15, 2014. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

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

The Chapter 13 Trustee opposes the motion on the basis that Class 4 of Debtors' plan indicates that Debtors are in a trial loan modification effective May 2014. Debtors have filed a Motion to Approve Loan Modification, but the plan does not contain any provisions for the mortgage in the event the trial modification does not become permanent. The motion does not indicate any alternative provision for the mortgage or indicate what the terms of the permanent modification would be.

Additionally, the Trustee argues that the Debtors' plan may not be

the Debtors best effort. Trustee states the Debtors are below median income. The amended plan calls for payments of a total of $7,500 through April 2014 and then $850.00 per month for the remainder of the plan. The most recently filed Schedule J, Dckt. 77, indicates combined monthly income from Schedule I of $4,660.26 per month. Expenses on Schedule J total $3,809.75, leaving net income of $850.51 per month. Item #24 indicates that "Debtor wife has new single job ...." Debtors Declaration in Support of the Motion to Confirm indicates that Debtors are employed by Sacramento City Unified School District and Hallmark Rehab Group but the Declaration does not indicate any changes to the Debtors income.

The most recently filed Schedule I, Dckt. 29, filed on December 2, 2013 indicates Beth Fry is employed by HCR Manor Care, her gross income is $4,742.05 and the net income on the Schedule is $5,627.48 (not $4,660.26 as indicated on the most recent Schedule J). The Trustee is not aware of any other amended Schedule I to date. Debtors may have more than the net income of $850.51 which may be paid into the plan for the benefit of unsecured creditors.

DEBTOR'S RESPONSE

Debtors respond, stating that additional time is needed to address the Trustee's concerns, to provide the Trustee with statements and the financial effect on the disposable income funding the plan.

TRUSTEE'S RESPONSE

On July 30, 2014, the Chapter 13 Trustee filed a supplemental declaration stating that no additional information had been provided to the Trustee. Nothing has been filed with the court as of the September 3, 2014, review for this hearing.

JULY 1, 2014 HEARING

At the July 1, 2014 hearing, based on the foregoing, the court continued the hearing to allow the Debtors to provide the Trustee with the requested documentation and for the Trustee to file additional opposition, if any.

AUGUST 5, 2014 HEARING

At the August 5, 2014 hearing, the court ordered that supplemental pleadings and proposed amendments be filed and served by August 15, 2014, and Reply pleadings, if any, on or before August 22, 2014. Civil Minutes, Dckt. No. 98.

SEPTEMBER 9, 2014 HEARING

At the September 9, 2014 hearing, the court continued the Motion to Confirm the Amended Plan to 3:00 p.m. on October 28, 2014.

Additionally, on this same hearing date, the court denied Debtors' Motion to Approve their Loan Modification, on the basis that the Motion does not identify the responding lender does not set forth the relief requested with the particularity required by Federal Rule of Bankruptcy Procedure

9013. The court has noted that it cannot grant relief against a respondent who is unidentified, or against a respondent whose identity is ambiguous. Fed. R. Bankr. P. 9013. In their Motion filed on August 12, 2014, the Debtors fail to identify the lender who has allegedly entered into an agreement to modify their home loan, rendering the court unable to issue an order affecting the rights of a specified party. The motion was also denied on the basis that a motion that is ambiguous about the respondent cannot give reasonable notice and opportunity for hearing to the party against whom relief is sought. Fed. R. Bankr. P. 9014(a). Motion to Approve Loan Modification, PGM-4.

OCTOBER 21, 2014 HEARING

At the October 21, 2014 hearing, the court heard Debtors' second Motion to Approve their Loan Modification. Dckt. 108. Once again, the court denied the motion on the basis that the Motion does not identify the responding lender does not set forth the relief requested with the particularity required by Federal Rule of Bankruptcy Procedure 9013. The court has noted that it cannot grant relief against a respondent who is unidentified, or against a respondent whose identity is ambiguous. Fed. R. Bankr. P. 9013. Further, the court noted that while the Debtors did name "Green Tree" as the lender, the court still cannot discern whether Green Tree is the actual creditor. Green Tree is a servicing company and no evidence was filed to show that Green Tree is, in fact, the creditor.

NOVEMBER 5, 2014 ORDER

On November 5, 2014, the court issued an order resetting the hearing on the instant Motion to December 16, 2014 at 3:00 p.m. Dckt. 121.

DECEMBER 16, 2014 HEARING

The court continued the hearing to February 3, 2015 at 3:00 p.m. to be heard in conjunction with the Order to Appear. Dckt. 146.

FEBRUARY 3, 2015 HEARING

While the court has granted the Motion to Approve the Loan Modification, thus resolving the Trustee's first objection, there still remains the issue as to whether the Debtors are providing for all disposable monthly income. Particularly, there remains the issue as to whether Debtor Beth Fry is reporting her full income on the schedules.

At the hearing, -------

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the 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 xxxxxx

13. 13-32861-E-13 JAMES/BETH FRY
PGM-5

CONTINUED MOTION TO APPROVE LOAN MODIFICATION
9-23-14 [108]

Final Ruling: No appearance at the February 3, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Green Tree Servicing, LLC, Ocwen Loan Servicing, LLC, Wells Fargo Bank, N.A., Debtor, Chapter 13 Trustee, and Office of the United States Trustee on September 23, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Loan Modification 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. 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 Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by James and Beth Fry ("Debtors") seeks court approval for Debtors to incur post-petition credit. Green Tree Servicing ("Green Tree"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $806.58 a month to $797.63 a month. The modification will create a new principal balance of $109,774.61 and set the interest rate at 5.125%.

The Motion is supported by the Declaration of James and Beth Fry. The Declaration affirms Debtors' desire to obtain the post-petition financing and provides evidence of Debtors' ability to pay this claim on the modified terms.

NOVEMBER 5, 2014 ORDER

On November 5, 2014, the court issued an order resetting the hearing to December 16, 2014 at 3:00 p.m.

DECEMBER 16, 2015 HEARING

The court continued the hearing to February 3, 2015 at 3:00 p.m. to be heard in conjunction with the Order to Appear. Dckt. 147.

DISCUSSION

The court was initially concerned because it could not determine from the evidence presented what, if any, legally recognized entity is the creditor to be bound by this Motion.

As this court has stated on many occasions, the fundamental requirement for any federal court to exercise federal court judicial power is that there must be a case or controversy between the parties for whom relief is sought. U.S. Constitution Article III, Sec. 2. Here, there is nothing to indicate that there are two real parties in interest whose rights are being impacted. While the Debtors are before the court, it appears that a servicing company is being inserted into the Loan Modification Agreement as a "placeholder," who may or may not be authorized to modify the creditor's rights and claim.

However, the Debtor and Green Tree has provided sufficient documentation and authenticated evidence to show that Green Tree, for purposes of this loan, is the holder and has the legal authority to modify the terms of the underlying security agreement.

As discussed in the court's Order to Appear (DCN: RHS-1), Green Tree, due to the Debtor's bankruptcy and Green Tree's assertion that they are the holder of the lien, are in fact the holder on the agreement between Green Tree, FNMA, and Ally Bank. As such holder, the court is satisfied that Green Tree has the authorization and right to modify the terms of Debtor's loan.

Under the modification, the new principal balance includes all amounts and arrearages that were past due. The new principal balance is $109,774.61. The new interest rate is 5.125% which begins to accrue as of July 1, 2014. The modified payment amount is $797.63 which includes $538.45 for principal and interest and $253.93 for escrow. The Debtor will make this payment for 480 months. The first payment was due on August 1, 2014.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by James and Beth Fry 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 court authorizes James and Beth Fry ("Debtor") to amend the terms of the loan with Green Tree Servicing, LLC (as the holder of the Note) which

is secured by the real property commonly known as 5966 Raymond Way, Sacramento, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 111.

14. 13-32861-E-13 JAMES/BETH FRY **CONTINUED ORDER TO APPEAR**
RHS-1 **11-5-14 [123]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order to Appear was served by the Clerk of the Court on Debtors' attorney, Creditor, United States Trustee, and other such other parties in interest as stated on the Certificate of Service on November 5, 2014, 2014. The court computes that 41 days' notice has been provided.

The court's decision is to Discharge the Order to Appear.

The court issued an Order to Appear on November 5, 2014. Dckt. 123.

ORDER TO APPEAR

The court has been presented with a Motion to Approve a Loan Modification between James and Beth Marie Fry, the consumer Debtors, and Green Tree Servicing, LLC. Motion, DCN: PGM-5, Dckt. 108. The document titled "Loan Modification Agreement" is provided as Exhibit A, Dckt. 111, which makes the following representations and statements:

a. "THIS INFORMATIONAL NOTICE IS NOT AN ATTEMPT TO COLLECT A DEBT. IF YOUR LOAN WAS DISCHARGED IN BANKRUPTCY WITHOUT A REAFFIRMATION, GREEN TREE IS NOT ATTEMPTING TO COLLECT OR RECOVER THE DISCHARGED DEBT AS YOUR PERSONAL LIABILITY."

b. The Loan Modification Agreement is between the Debtors and "Green Tree Servicing LLC ('Lender')."

c. The amount payable under the Note and Security instrument is $109,774.61, and a payment schedule is specified.

d. The Loan Modification Agreement is executed by Green Tree Servicing, LLC as "Lender," and does not purport to enter into the Loan Modification Agreement as the agent of any other person.

This court on prior occasions has ordered Green Tree Servicing, LLC and its attorneys to appear and address whether it was the actual creditor in the bankruptcy case or the loan servicer. It has been presented to the court that Green Tree Servicing, LLC is the loan servicer – not the Creditor, as defined in 11 U.S.C. § 101(10) and (5) to whom the obligation is owed. This court has ordered Green Tree Servicing, LLC to accurately identify the creditor on all proofs of claims and pleadings filed in bankruptcy cases nationwide. Further, this court ordered that Green Tree Servicing, LLC not misrepresent that a claim has been transferred to it when Green Tree Servicing, LLC merely acquires the loan servicing rights from another loan servicer.

Several of the cases and orders issued thereon by this court include the following: Edwin and Cynthia Crane, Case No. 11-27805, see Civil Minutes, Dckt. 111 and Order, Dckt. 124, filed February 14, 2012; Hohn W. and Susan Jones, Case No. 11-31713, see Response, Dckt. 100, Declaration, ¶¶ 4, 5, 7, 8, Dckt. 102, In the prior cases Green Tree Servicing, LLC clearly presented to the court that it was the "servicer" for the creditor, not the creditor, as that term is defined in 11 U.S.C. § 101(10) and (5).

When Green Tree Servicing, LLC presented itself as a "creditor" in the present case, there was no basis shown for Green Tree Servicing, LLC, a self admitted loan servicing company, presenting itself as the "creditor" in this case for the obligation which is the basis for Proof of Claim No. 5. The Deed of Trust attached to Proof of Claim No. 5 identifies the "Lender" (as the defined term in the Deed of Trust) to be GMAC Mortgage Corporation DBA ditech.com. The Note attached to Proof of Claim No. 5 states that the "Lender" (defined term in the Note) is GMAC Mortgage Corporation DBA ditech.com. The Note has a blank endorsement, ("Pay to the Order of" with no name completed). No testimony or documentation was provided that Green Tree Servicing, LLC is in possession of various notes endorsed in blank for this client or other clients. A copy of an unrecorded Corporate Assignment of Deed of Trust (with various non-consumer appearing information redacted with a marker) is attached to Proof of Claim No. 5. This unrecorded Assignment of Deed of Trust states that Mortgage Electronic Registration Systems, Inc., as Nominee for GMAC Mortgage, assigns the Deed of Trust to Green Tree Servicing, LLC (and what appears to be another entity whose name is redacted out with a marker). See Cervantes v. Countrywide Home Loans, Inc. et. al., 656 F.3d 1034 (9th Cir. 2011); Seidell v. Tuxedo Land Co., 216 Cal. 165, 170 (1932); Carpenter v. Longan, 83 U.S. 271, 274 (1872); and Cal. Civ. Code § 2936 (concerning the inability to separate the lien from the person who is owed, or has the right to enforce, the debt). FN.1.

FN.1. Notwithstanding what has long been the law in California, in one case Green Tree Servicing, LLC wrongly argued that it was the "creditor," stating,

> In response to the Court's concerns regarding the nature of Green Tree's interest in the property, Green Tree submits that the subject deed of trust was assigned to Green Tree on December 3, 2011. Therefore, Green Tree is a creditor, as defined by § 101(10) and has standing to bring the Motion [for relief from the automatic stay].

In re Matthew and Kristi Separovich, E.D. Cal. Case No. 11-42848; Response to Order to Show Cause, Dckt. 49. While a loan servicing company may have standing to bring a motion for relief from the automatic stay so that the servicing company, its' principal (the creditor), and successors in interest may enforce lien rights, such standing does not a "creditor" make.

The court found it necessary to order Green Tree Servicing, LLC, and the attorneys at MALCOLM ◆ CISNEROS to appear and present evidence of Green Tree Servicing, LLC to be the creditor for Proof of Claim No. 5 and the right to modify, in its own name and not in the representative capacity of the creditor, the Note as provided in the Loan Modification Agreement.

If Green Tree Servicing, LLC was not the creditor when Proof of Claim No. 5 was filed, then it appears that it was violating the prior order of this court as well as making false statements under penalty of perjury in the proof of claim. Further, by perpetrating such fraud in the "Loan Modification," it could well be that Green Tree Servicing, LLC is actively participating with its creditor clients to mislead consumers into thinking that they have entered into bona fide loan modification. Then, when advantageous the creditor (or primary, secondary, tertiary, or more remote assignee debt buyer), such as an increase in the value of real estate, the actual creditor could deny the loan modification, assert that Green Tree Servicing, LLC was never authorized to make the modification, and demand more money from the consumer under the threat of taking away the consumer's home. By that time, Green Tree Servicing, LLC could have been "wound down," all of the profits generated disbursed, and be nothing but a shrunken, withered husk from which no recovery could be made for the consumer because of Green Tree Servicing, LLC's "unauthorized conduct."

The conduct of a bona fide loan servicer acting as the agent for the principal, the creditor, is a very simple and basic concept. All that the loan servicer has to do is identify the principal in the Loan Modification Agreement and then execute the Loan Modification Agreement for the creditor clearly stating the loan servicer's agent status. Such conduct is routine in commercial transactions every day. That Green Tree Servicing, LLC and the attorneys at MALCOLM ◆ CISNEROS appear to be actively working to hide the identity of the creditor could well appear to indicate a well-conceived scheme to defraud the consumer debtors, creditors, and the federal court.

GREEN TREE SERVICING LLC'S NOVEMBER 2014 RESPONSE

Green Tree Servicing LLC and MALCOLM ◆ CISNEROS Law Firm filed a response to the court's Order on November 26, 2014. Dckt. 128.

In the response, the parties state that Green Tree is a creditor in this case because it is the holder of the endorsed promissory note and is entitled to payment on the Note. Green Tree argues that the Debtors' loan was acquired from GMAC by FNMA with the servicing right retained by GMAC. The loan was owned by FNMA as of January 31, 2013, when Green Tree purchased the right to service the Debtors' loan from GMAC. Effective February 1, 2013, the right to collect payments from the Debtors pursuant to the note and Deed of Trust were transferred to Green Tree pursuant to an Asset Purchase Agreement dated January 31, 2013 between GMAC Mortgage, LLC and Residential Funding Company, LLC as sellers, and Green Tree, Walter Investments Management Corp., and Ocwen, as purchasers. The Note is located

at Ally Bank in Waterloo, Iowa, where it has been held since Green Tree acquired the servicing rights from GMAC on January 31, 2013. Ally Bank is a document custodian who maintains the Note in secure facility on behalf of Green Tree.

Green Tree also states that it is contractually entitled to modify the terms of the Debtor's Note and deed of trust pursuant to a Limited Power of Attorney whereby FNMA appointed Green Tree as its true and lawful attorney-in-fact via a Limited Power of Attorney between Green Tree and FNMA. Pursuant to the Limited Power of Attorney "FNMA appointed Green Tree as its true and lawful attorney-in-fact, and in FNMA's name, place and stead and for its use and benefits, to execute, endorse, and acknowledge all documents customarily and reasonably necessary and appropriate for," among other things, "4. The modification or extension of a mortgage or deed of trust." Dckt. 132, Exhibit 5. Green Tree further argues that the Servicing Guide provides for authorization to modify since it provides that "[t]he servicer is authorized to execute legal documents related to. . . mortgage loan modifications. . . for any mortgage loan for which it. . .is the owner of record." Dckt. 132, Exhibit 7.

JANUARY 15 2015 ADDITIONAL RESPONSE

Green Tree Servicing, LLC has provided additional arguments, documents, and evidence to support it's contention that it is the "creditor" and not the agent for the actual creditor. These arguments are:

A. Green Tree Servicing, LLC is the "holder" of the note which is endorsed in blank, and thereon is the person entitled to payment on the note.

B. Possession of the Note is Ally bank in Waterloo, Iowa.

C. Ally Bank is the custodian of the Note for the owner of the Note, FNMA. A copy of the Custodial Agreement is filed with the court, Dckt. 151.

D. Ally Bank serves temporarily as the custodian for Green Tree Servicing, LLC when it initiates legal proceedings (including bankruptcy matters and claims) in its own name for the FNMA notes it is servicing.

E. The temporary transfer of "possession" via the custodian holding the Note for Green Tree Servicing, LLC rather than for FNMA is automatic and no act of FNMA or the custodian is required.

F. As the holder of the Note, Green Tree Servicing, LLC can modify the terms of the Note.

G. Though Green Tree Servicing, LLC asserts that it is a creditor and that it is modifying the Note which is the subject of the Debtor's motion which generated this order to appear, "Green Tree is nota party to Debtors' Motion to approve Loan Modification..."

Included with the January 15, 2015 Response is a copy of the FNMA Custodial Agreement with Ally Bank. Dckt. 151. Portions of the Custodial Agreement relevant to the current assertion that Ally Bank is the custodian for Green Tree Servicing, LLC and holds possession for Green Tree Servicing, LLC, include:

A. Ally Bank "will maintain custody of the Documents on behalf of, and as custodial agent for, Fannie Mae subject to and in compliance with Fannie Mae's Guides and Requirements and the applicable MBS Trust Document. Recitals, pg. 3.

B. "[t]he parties hereto intend that [Ally Bank's] custody of the Documents shall provide Fannie Mae with legal possession thereof, as the term 'possession' is used in the Uniform Commercial Code, at all times upon and after the related Mortgage Loans are acquired by Fannie Mae, except insofar as Fannie Mae may provide. *Id.*

C. The "Custodian [Ally Bank] at all times acts for the sole benefit of Fannie Mae." Section 3, ¶ (b).

D. The Custodian will subscribe to the Guides issued by Fannie Mae, which includes the Fannie Mae Servicing Guide. Section 3, ¶ (b) and Section 1, ¶ (h).

E. "All Documents are held solely and Exclusively for Fannie Mae. Subject only to that limitation, Custodian [Ally Bank] shall made disposition of Documents solely in accordance with instructions furnished by Fannie Mae in the Guides, the Requirements, or otherwise by notice from Fannie Mae." Section 6, ¶ (a).

F. "Section 6(a) notwithstanding, Custodian [Ally Bank] shall release any of the Documents to Lender [Green Tree Servicing, LLC as servicer] from time to time, as required to service the related Mortgage Loans, and as permitted by the Guides and/or Requirements..." Section 6, ¶ (d).

G. In interpreting the Custodial Agreement, inconsistencies between that Agreement and other documents are resolved in the following hierarchy of controlling documents:

   1. The MBS Trust Documents prevail over the Custodial Agreement or Guides.

   2. The Custodial Agreement controls over Guides. Section 18, ¶ (b).

Green Tree Servicing, LLC has requested that the court take "Judicial Notice" of FNMA Servicer Guide. Request for Judicial Notice, Dckt. 131 (as part of the November 2014 Response). This request is made pursuant to Federal Rule of Evidence 201. The Request does not state how the FNMA Guide is something subject to judicial notice.

While the FMNA Servicer Guide does not appear to be something for

which a court may properly take judicial notice – limited to a non-adjudicative fact which is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction ro can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned. Fed. R. Evid. 201(a) and (b). However, Brian Corey, a senior vice president for Green Tree Servicing, LLC provides his testimony under penalty of perjury that a true and correct copy of the relevant excerpt of he Guide, as used by Green Tree Servicing, LLC in performing its duties, is provided as Exhibit 7 to the Request for Judicial Notice. This document, as authenticated by Mr. Corey, is considered by the court in connection with the later provided Custodial Agreement.

The FMNA Guide for Servicers (Exhibit 6, Dckt. 132), provides:

A. "Fannie Mae is at all time the owner of the mortgage note..." A2-1-04 Introduction.

B. "In addition, Fannie Mae at all times has possession of and is the holder of the mortgage note, except in the limited circumstances expressly described in this topic." *Id.*

C. "If Fannie Mae possess the note through a document custodian, the document custodian has custody of the note for Fannie Mae's exclusive use and benefit." *Id.*

D. "In order to ensure that a servicer is able to perform the services and duties incident to the servicing of the mortgage loan, Fannie Mae temporarily gives the servicer possession of the mortgage note whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions, bankruptcy cases, probate proceedings, or other legal proceedings." *Id.*

E. "This temporary transfer of possession occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding." *Id.*

F. "When Fannie Mae transfers possession, if the note is held by a document custodian on Fannie Mae's behalf, the custodian has possession of the note on behalf of the servicer so that the servicer has constructive possession of the note and the servicer' shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer' for Fannie Mae's benefit." *Id.*

G. At the conclusion of the servicer's representation of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding, or upon the servicer ceasing to service the loan for any reason, possession automatically reverts to Fannie Mae, and Fannie Mae resumes being the holder for itself, just as it was before the foreclosure, bankruptcy, probate, or other legal proceeding. If the

servicer has obtained physical possession of the original note, it must be returned to Fannie Mae or the document custodian, as applicable." *Id.*

Green Tree Servicing, LLC has also asserted that it is empowered to modify the Note pursuant to the Limited Power of Attorney given to it by FNMA. Response filed November 26, 2014, pg. 2:23-28, 5:4-13, 8:19-21.Dckt. 128. A copy of the Limited Power of Attorney is provided as Exhibit 5 to the request for Judicial Notice, Dckt. 131. Again, Green Tree Servicing, LLC does not explain why a court would take judicial notice of a power of attorney, but in his Declaration Brian Corey testifies under penalty of perjury that the Limited Power of Attorney is a true and correct copy of the one given by GNMA to Green Tree Servicing, LLC. Declaration ¶ 8, Dckt. 134.

The Limited Power of Attorney provides,

A. GNMA grants a power of attorney to Green Tree Servicing, LLC to be "its [FNMA's] true and lawful Attorney-in-Fact, and in its [FNMA] name, [FNMA's] place, and [FNMA's] stead and for its [FNMA] use and benefit, to execute, endorse, and acknowledge all documents customarily and reasonably necessary and appropriate for:

1. the release of a borrower from personal liability under the mortgage or deed of trust following an approved transfer of ownership of the security property;

2. the full satisfaction or release of a mortgage or the request to a trustee for·a full reconveyance of a deed of trust;

3. the partial release or discharge of a mortgage or the request to a trustee for a partial reconveyance or discharge of a deed of trust;

4. the modification or extension of a mortgage or deed of trust;

5. the subordination of the lien of a mortgage or deed of trust;

6. [foreclosure proceedings];

7. [conveyance of properties to mortgage insurers or MERS];

8. tho assignment or endorsement of mortgages, deeds of trust or promissory notes to [mortgage insurers or MERS].

B. FNMA "gives to [Green Tree Servicing, LLC] full power and authority to execute such instruments and to do and perform

all and every act and thing requisite, necessary and proper to carry into effect the power or powers granted by or under this Limited Power of Attorney..."

DISCUSSION

The court discerns from Green Tree's response that they are alleging two situations in which they are authorized to enter into loan modifications: (1) under the Limited Power of Attorney Agreement with FNMA; and (2) as the holder of the endorsed promissory note.

The Limited Power of Attorney Agreement (Dckt. 132, Exhibit 5) states Green Tree is the lawful Attorney-in-Fact for FNMA "in its name, place and stead and for its use and benefits, to execute endorse, and acknowledge all documents customarily and reasonably necessary and appropriate for:. . . 4. The modification or extension of a mortgage or deed of trust." The Limited Power of Attorney itself acknowledges that the mortgage or deed of trust is different from the promissory note it secures. See Paragraph 8 of Limited Power of Attorney which states [emphasis added], "the assignment or endorsement of mortgages, deeds of trust, **or promissory notes** to [FMHA and other identified entities]...." Exhibit 5, Dckt. 132.

However, the Limited Power of Attorney does not state that Green Tree has the authorization to modify the underlying obligation. Instead, it merely states that it may modify the security instruments of the underlying obligation. The same holds true for the Servicing Guide, which only addresses the security instrument and not a modification of the underlying obligation.

The Limited Power of Attorney in one part expressly distinguishes between a mortgage, deed of trust, and promissory note, and in another expressly stating that Green Tree Servicing, LLC is empowered only to modify the mortgage or deed of trust. The court cannot find Green Tree Servicing, LLC's contention that the Limited Power of Attorney give it essentially carte blache authority to execute modifications of promissory notes in its own name is supported by the Limited Power of Attorney. Even if the court were to stretch the language to include the term promissory note in the modification paragraph where only mortgage and deed of trust is stated, the Limited Power of Attorney required Green Tree Servicing, LLC to act in the name of FNMA, not in the name of Green Tree Servicing, LLC.

Green Tree Servicing, LLC as the "Holder" of the Note

From the Custodial Agreement and Servicer Guide, it appears that FNMA and Green Tree Servicing, LLC may have created a situation where the note moves from the owner, FNMA, to a holder, Green Tree Servicing, LLC, without there being overt manifestation of Green Tree Servicing, LLC taking possession of the note. This "possession" turns on how and what duties that Ally Bank, the custodian under the Custodial Agreement, performs its duties and to whom it looks to as its principal.

As the parties are well aware, the U.S. Constitution, Art. III, Sec. 2, requires that a federal court have before it the real parties in interest and an actual case or controversy between those parties. *Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1, 11-12 (2004). Here, Green Tree Servicing,

LLC asserts that it is the real party in interest who has the right to enforce, and modify, the note. Therefore, it may execute a contract with Debtor for purposes of having that contract presented to the court.

The court begins with the legal argument presented by Green Tree Servicing, LLC that it is the holder of the Note, and as the holder may modify the Note. Green Tree Servicing, LLC directs the court to the California Commercial Code to support its standing to enforce, and modify, the Note as the holder.

A promise or order payable to an identified person, in this case GMAC Mortgage Corporation DBA Ditech.com (see promissory note attached to Proof of Claim No. 5), may become payable to the bearer if endorsed in blank pursuant to California Commercial Code § 3205(b). Cal. Com. Code § 3109(c). A "blank endorsement" is one in which the endorsement does not identify the person to whom it makes the instrument payable. Cal. Com. Code § 32015(a), (b). The Note attached to Proof of Claim No. 5 is such a "blank endorsement," with no name filed in following the words "Pay to the Order of." Proof of Claim No. 5.

The person entitled to enforce an instrument, the Note in this case, includes the "holder of the instrument." Cal. Com. § 3301. The Commercial Code defines "holder" to be,

> " (21) 'Holder,':
>
> (A) means the person in possession of a negotiable instrument that is payable either to bearer or, to an identified person that is the person in possession; or
>
> (B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession."

Cal. Com. 1201(21). Here, Green Tree Servicing, LLC asserts that it, through the custodian under the Custodial Agreement, is in "possession" of the Note which is made payable to bearer (being endorsed in blank).

Green Tree Servicing, LLC asserts that is has "possession" of the Note by virtue of it being physically in possession of Ally Bank, with Ally Bank serving as Green Tree Servicing, LLC's agent. Consideration of that contention begins with the Custodial Agreement by which Ally Bank undertakes the obligations to serve a principal.

The Custodial Agreement (Dckt. 151) first provides that Ally Bank will be the custodial agent for FNMA. It will so serve, subject to the Guides and MBS Trust Document. (Custodial Agreement Recitals.)

Without qualification, in Paragraph 3(b) of the Custodial Agreement Ally Bank is required to at all times it acts for the sole benefit of FNMA. Further, that all documents (which includes the Note at issue) are held "solely and exclusively for [FNMA]." Custodial Agreement ¶ 6(a).

However, the facially absolute possession of the documents for FNMA required by Paragraph 6(a), Ally Bank, as custodian, is to release documents

to Green Tree Servicing, LLC as servicer as permitted by the Guides. Custodial Agreement ¶ 6(d). Any release of documents to the servicer requires a requested on a form designated by FNMA.

On its face, the Custodial Agreement permits Ally Bank, as custodian, to release (deliver physical possession of) documents to Green Tree Servicing, LLC when properly requested. Green Tree Servicing, LLC directs the court to page 3 of the Custodial Agreement for the proposition that Ally Bank's duties as custodian are subject to FNMA's Guides and Requirements, which would include the Servicer Guide. Response filed January 15, 2015, Dckt. 149. The word "Guides" is defined in the Custodial Agreement to include the FNMA Servicing Guide. Custodial Agreement, Definitions, ¶ 1(h).

The FNMA Guide for Servicers provides for an automatic, non-physical change in possession of a note held by custodian Ally Bank, removing from the "possession" of FNMA and giving possession to the servicer. Exhibit 6, Dckt. 132. This change in possession, and the servicer having the right to possession of the note over FNMA occurs automatically whenever "whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions, bankruptcy cases, probate proceedings, or other legal proceedings." *Id.* The guide expressly provides, "This temporary transfer of possession [of the note to Green Tree Servicing, LLC] occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding." *Id.* Only "At the conclusion of the servicer's representation of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding..." does possession of the note return to FNMA. *Id.*

What is painfully obvious to any person, business, judge, quasi-governmental entity, regulator, and elected official is that the residential mortgage process was the subject to misfeasance and malfeasance in the 2000's. From liar loans, "to big to fail" government bank bailouts, robo-signing of declarations, and through to the recent regulatory action and consent agreements by various loan servicers, it is clear that better practices are in order. Here, FNMA and Green Tree Servicing, LLC have created a contractual shifting of possession for which there is no shown internal documentation or notice. It appears that Ally Bank, at any point in time, can have no idea for whom it is the fiduciary in holding possession of the notes. Further, FNMA may not have knowledge of notes for which it does not have possession.

When Green Tree Servicing, LLC chooses to file a Proof of Claim, motion, have a contract presented to the court for approval, object to a plan, or otherwise appear in a bankruptcy case as a creditor, it is a party in that case. Thus, by operation of the Guide and Custodial Agreement, the possession of the note by Green Tree Servicing, LLC throughout the five years of the Chapter 13 case (or possibly the decades of a Chapter 11 case).

For there to be some order in bankruptcy cases, there are several, simple steps which Green Tree Servicing, LLC (and other servicers who assert to be automatically in possession of notes held by an agent of the owner though the unilateral act of the servicer) needs to take for there to be judicial order in these federal proceedings. Merely because a copy of a

note endorsed in blank is attached to the proof of claim, that does not demonstrate the "average" loan servicer is in possession of the note.

The is court has dealt with servicers who were not the actual creditor (either transferee of the debt or "holder" of the endorsed in blank note), which has included Green Tree Servicing, LLC when representing other clients, but who misrepresented to the court, debtor, and other parties in interest that the servicer was the creditor. This led to potentially defective service of process and ineffective court orders being issued in the name of the servicer.

Federal Rule of Bankruptcy Procedure 3001 specifies what is required for a proof of claim. The writing upon which the claim is based and documents showing perfection of the lien must be attached. For "holders" such as Green Tree Servicing, LLC who can self-effectuate a change in "possession" of a note held by a third-party custodian, disclosing (1) how it is in possession and (2) the custodian is important information which can be supplied with a minimal effort.

Green Tree Servicing, LLC and FNMA should also recognize that once Green Tree Servicing, LLC elects to act as the creditor based on being the "holder" of the note in a bankruptcy case, that transfer of possession can well be effective for a number of years. Further, that debtors, creditors, the U.S. Trustee and other parties in interest may well take action against the "holder" which could significantly effect whatever interests and rights FNMA may have after "possession" is "returned" to it.

This court will not create, or subject Green Tree Servicing, LLC, to a special set of "better practices" for creditors submitting claims in this situation. While the good faith, bona fide business reasons for not acting as the agent and fairly disclosing to the generally least sophisticated consumer debtors with whom they are actually contracting, but instead hide the identity of the creditor mystifies the court, Green Tree Servicing, LLC and FNMA can make that business decision. If, through sloppy business practices a servicer misrepresents it has possession or the creditor (or subsequent assignee of the creditor) disputes that the servicer had possession or the right to enforce the note, there are significant civil and criminal consequences to filing inaccurate pleadings and proofs of claims.

The court discharges the Order to Appear. The above concerns will be forwarded to the rules committee and District Court for consideration of these practices in the federal courts.

In discharging the Order to Appear the court makes no determination as to the effect of the Custodial Agreement and Guides, or whether under the specifics of this case Green Tree Servicing, LLC is actually in possession of a note endorsed in blank. Green Tree Servicing, LLC and its attorneys have made such representations to the court. Absent a party in interest believing or having information that such representations are incorrect, the court does not "litigate" those issues.

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 continued hearing on the Order to Appear 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 Order to Appear is discharged, with no further appearances pursuant thereto required.

15. 14-30070-E-13 LEAH CHERRY
MRL-2

MOTION TO VALUE COLLATERAL OF VANDERBILT MORTGAGE AND FINANCE, INC.
1-15-15 [32]

Tentative Ruling: The Motion to Value 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, creditors, parties requesting special notice, and Office of the United States Trustee on January 15, 2015. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

The Motion to Value 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 Value secured claim of Vanderbilt Mortgage and Finance, Inc.("Creditor") is set for an Evidentiary Hearing on xxxxxx.

The Motion to Value filed by Leah Cherry ("Debtor") to value the secured claim of Vanderbilt Mortgage and Finance, Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 137 Hap Arnold Loop, Roseville, California ("Property"). Debtor seeks to value the Property at a fair market value of $51,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir.

2004).

Debtor offers the Declaration of Jim K. Nishimura, a licensed real estate appraiser with 12 years of experience, who opines that the value of the property is $51,000.00. Mr. Nishimura states that on November 7, 2014, he conduced an interior and exterior appraisal of the Property. Mr. Nishimura states that he utilized the Sales Comparison Approach, and utilized site and improvements, a locational analysis of the neighborhood and city, and an economic analysis of the market for properties such as the Property.

CREDITOR'S OBJECTION

Creditor filed an opposition to the instant Motion on February 2, 2015. Dckt. 38. Creditor's opposition boils down to two arguments: (1) the unpaid property taxes are not priority debts under 11 U.S.C. § 507 and (2) the Debtor's valuation of the Property is too low and

To address the first grounds, the Creditor cites to 11 U.S.C. § 507. It appears that the Debtor's classification of the property tax as a "first priority tax lien" led the Creditor down the wrong code section. 11 U.S.C. § 507 deals with the priority treatment of unsecured claims, not secured claims. While Debtor's counsel used the word "priority," it is in the context of saying the "senior lien," not a priority unsecured claim in bankruptcy.

Under California Revenue and Taxation Code, "[e]very tax, penalty, or interest, including redemption penalty or interest, on real property is a lien against the property assessed." Cal. Rev. & Tax. Code § 2187. As such:

> Every tax declared in this chapter to be a lien on real property, and every public improvement assessment declared by law to be a lien on real property, have priority over all other liens on the property, regardless of the time of their creation. Any tax or assessment described in the preceding sentence shall be given priority over matters including, but not limited to, any recognizance, deed, judgment, debt, obligation, or responsibility with respect to which the subject real property may become charged or liable.

Cal. Rev. & Tax. Code § 2192.1.

Both the Debtor and Creditor agree that the property tax is in fact a lien, and, as such, a secured claim under the California Revenue and Taxation Code. The Creditor appears to confusing 11 U.S.C. § 506 with § 507 in making its argument on priority. Since California law determines the states of the tax lien as priority "over all other liens on the property," the entirety of the tax lien is considered secured and, thus, priority in its secured status.

Therefore, the Creditor's first objection is overruled.

As to the Creditor's second objection, it appears that there is a valuation issue over the Property. Creditor provides the declaration of Barry Cleverdon, a licenses real estate appraiser since 1982. Dckt. 40. Mr.

Cleverdon provides an appraisal value on the Property of $148,000.00. Mr. Cleverdon states that his report is based on the visual inspection of the interior and exterior of the property along with a review of comparable property values in the immediate area where the Property is located.

DISCUSSION

After a review of the Motion and the Creditor's objection, there remains the contention over the proper valuation of the Property. Both parties have provided appraisal reports which value the Property at nearly $100,000.00 difference. To provide the parties the opportunity to address the conflicting valuations and to present evidence in support, the court sets the Motion for an Evidentiary Hearing. The court makes the following determinations:

a. This Motion to Value is a core matter pursuant to 28 U.S.C. § 157, for which jurisdiction in this bankruptcy exists pursuant to 28 U.S.C. § 1334 and the reference to this bankruptcy court by the United States District Court for the Eastern District of California.

b. On or before xxxxxx, 2015, Creditor shall file with the court and serve on the Debtor a list of witnesses and exhibits (excluding possible rebuttal witnesses and exhibits) to be presented at the evidentiary hearing for Creditor's case in chief.

c. On or before xxxxxx, 2015, Debtor shall file and serve on Creditor a list of witnesses and exhibits (excluding possible rebuttal witnesses and exhibits) to be presented at the Evidentiary Hearing for Debtor's case in chief.

d. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.

e. Creditor, shall lodge with the court and serve their Testimony Statements and Exhibits on or before xxxxxx, 2015.

f. Debtor, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before xxxxxx, 2015.

g. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before xxxxxx, 2015.

h. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before xxxxxx, 2015.

i. The Evidentiary Hearing shall be conducted at xxxxxx.m. on xxxxxx, 2015.

16. 12-31671-E-13 CHRISTIAN NEWMAN

CONTINUED ORDER TO APPEAR RE: PROOFS OF CLAIM NOS. 9 AND 10 AND OBJECTION TO NOTICE OF POST-PETITION MORTGAGE CHANGE 10-10-14 [189]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's attorney, Trustee, the Office of the United States Trustee and other parties in interest on October 16, 2014.

The court's decision is to discharge the Order to Appear.

Christian Lynn Newman ("Debtor") filed an Objection to Notice of Post-Petition Mortgage Change. The court addressed several deficiencies in the information and supporting evidence in the Objection. See Civil Minutes for October 7, 2014 hearing on Motion DCN: PGM-6. The court identified possible deficiencies in Proof of Claim No. 9, Proof of Claim No. 10, Notice of Mortgage Payment Change filed on June 3, 2014, and Notice of Mortgage Payment Change filed on June 7, 2013.

To address the Objection filed by Debtor, competing assertions of the secured claims stated in Proof of Claim No. 9, the Notices of Mortgage Payment Changes for Proof of Claim No. 9, and Proof of Claim No. 10, and good cause appear, the court issued this order for the following parties to appear and respond to the court and appear at the continued hearing on this Objection. Dckt. 189. Specifically, the court ordered.

> **IT IS ORDERED** that the continued hearing on this Objection to Notice of Post-Petition Mortgage Change is continued to 3:00 p.m. on November 18, 2014. No telephonic appearances are permitted for any of the persons ordered to appear at the November 18, 2014 hearing and their respective counsel.
>
> **IT IS FURTHER ORDERED** that U.S. Bank, National Trust Association, as Trustee for Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1, shall appear at the continued hearing at 3:00 p.m. on November 18, 2014, through an officer familiar with the claim asserted for it in this case, and,
>
> 1.Confirm whether the Bank, as Trustee, is the creditor in this case for the claim identified in Proof of

Claim No. 10, as amended.

2.State whether the Bank, as Trustee, has transferred its claim to "America Servicing Company." If transferred, provide documentation of the transfer.

3.State whether the Bank, as Trustee, is (1) a creditor in this case and, (2) authorized "America Servicing Company," or any other person, to represent that it was the creditor for the obligation which is the subject of Proof of Claim No. 10, as amended.

4.Whether Proof of Claim No. 10 or Proof of Claim No. 9 is the correct secured claim for the debt upon which Proof of Claim No. 10 is based.

5.Provide a written analysis of the computation of its claim, the current mortgage payment, and the correct computation of principal, interest, and any escrow payments for the debt which is the subject of Proof of Claim No. 10, as amended.

IT IS FURTHER ORDERED that Wells Fargo Bank, N.A. and America's Servicing Company shall appear at the continued hearing at 3:00 p.m. on November 18, 2014, through an officer familiar with the claim asserted for it in this case, and,

1.Explain whether Wells Fargo Bank, N.A. does business as America's Servicing Company, whether America's Servicing Company is a fictitious name by which Wells Fargo Bank, N.A. does business, and where in the documents and pleadings filed with the court is the identity of America's Servicing Company as Wells Fargo Bank, N.A. disclosed to the court and parties in interest.

2.Explain how the court, Debtor, Chapter 13 Trustee, U.S. Trustee, or other parties in interest identify who America's Servicing Company is that is appearing in this case and how federal court jurisdiction is exercised (proper service of process) over the America's Servicing Company appearing in this case (such as Secretary of State registration, FDIC data base, etc.).

3.State whether America's Servicing Company asserts that it is a creditor in this case, or if it is a servicing company for a creditor in this case.

4.If America's Servicing Company asserts that it is a creditor, provide competent, credible, and admissible evidence of such status in this bankruptcy case.

5.If America's Servicing Company asserts that it is the servicing agent for the creditor, identify the creditor.

6.Explain why Notices of Mortgage Payment Changes filed on June 3, 2014 and June 7, 2013 were filed by America's Servicing Company in this case which (1) identify the creditor as "America Servicing Company" and (2) why the Notice of Mortgage Payment Changes is for Proof of Claim No. 9, a secured claim for only $12,000.00.

7.State the computation of the claim, whether it is the creditor or it is the servicing agent for the creditor, the current mortgage payment, the correct computation of principal, interest, and any escrow payments for the debt which is the subject of Proof of Claim No. 9 and Proof of Claim No. 10, as amended.

IT IS FURTHER ORDERED that Christian Lynn Newman, Debtor, personally or through his attorney, shall appear at the continued hearing at 3:00 p.m. on November 18, 2014, and,

1.State whether Proof of Claim No. 9 accurately states the claim of "America Servicing Company," and whether America Servicing Company has a secured claim of only $12,000.00 in this case.

2.State the basis for identifying "America Servicing Company" as the creditor having a $12,000.00 secured claim in this case, the basis of the obligation, and the collateral which secures the claim, and provide copies of the Note, Deed of Trust, and other documents evidencing the obligation and collateral.

3.State the computation, according to the Debtor, of Proof of Claim No. 9 and Proof of Claim No. 10, the current mortgage payment, the correct computation of principal, interest, and any escrow payments for the debt which is the subject of Proof of Claim No. 10, as amended.

IT IS FURTHER ORDERED that each of these parties ordered to provide the above information and documentation shall clearly show the basis for how they compute the principal and interest, which shall include how the debt is computed based on the Note, and any modifications thereto, and any additional amounts asserted to be owed pursuant to specific provisions of the Note and the Deed of Trust which secures the Note.

IT IS FURTHER ORDERED that each of the above parties shall provide written responses, supported by competent, credible, and properly authenticated evidence, which shall be filed and served on the other parties named above, the Chapter 13 Trustee, and the U.S. Trustee, Sacramento Division, on or before October 24, 2014. Replies, if any, shall be filed and served on or before November 3, 2014.

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Along with the Order to Appear, the court issued Supplemental Findings and an order for various parties in interest to appear and provide supplemental pleadings necessary to address this Objection. Dckt. 191. The court discussed the following:

The title of the Objection to Post-Petition Mortgage Change states that it is an objection to such charges of "US Bank/America's Servicing Company." The court could not identify any entity with such name that is, or can be, brought before the court. For a federal court to exercise federal judicial power, the judge must be confident that it has before it the real parties in interest for whom there is an actual case or controversy as required by Article III, Section 2, of the United States Constitution.

Debtor has objected to the Notice of Mortgage Payment Change which was filed on June 3, 2014. The Notice identifies the creditor as "America Servicing Company." The last four digits of the Debtor's account number are 6021. The Uniform Claim Identifier is stated to be "WFCMGA1231671CAE46306021." The new Principal, Interest, and Escrow payment is stated to be $1,601.36. The Notice states that it relates to Proof of Claim No. 9. June 3, 2014 Docket Entry.

A prior Notice of Mortgage Payment was filed on June 7, 2013, which also states that it relates to Proof of Claim No. 9. The creditor is stated to be "America Servicing Company." This Notice of Payment Change identifies the same last four digits for the account number and references the same Uniform Claim Identifier. This Notice states that the Principal, Interest, and Escrow payment is $1,556.37. June 7, 2014 Docket Entry. On September 25, 2014, a "Notice of Withdrawal of Notice of Payment Change (Court Claim No. 9)" was filed for the June 7, 2013 filed notice. This Notice of Withdrawal states that America's Servicing Company is withdrawing the Notice of Payment Change. September 25, 2013 Docket Entry.

The two Notices of Mortgage Payment Change identify the creditor as "America Servicing Company." However, the two Notices of Mortgage Payment Change and the Notice of Withdrawal are signed by representatives of "America's Servicing Company."

While this is a slight difference, it is a difference.

Debtor asserts that the $1,601.36 amount in the June 3, 2014 Docket Entry is incorrect.

<u>Proofs of Claims No. 9 and 10</u>

Proof of Claim No. 9

Proof of Claim No. 9 in this case was filed by the Debtor on April 25, 2013. It states the following information relating to the claim:

A. Name of Creditor..... "America Servicing Company"

B. Amount of Debt..... $12,000.00

C. Consideration for Debt..... "Mortgage Arrears"

D. Security Interest is held for Claim.... No Collateral Identified

E. Notice of Filing to be sent by court to

Chapter 13 Trustee
P.O. Box 1858
Sacramento, CA 95812

America Servicing Company
P.O. Box 14547
Des Moines, IA 50306-4547

Proof of Claim No. 9, Registry of Claims for Case No. 12-31671.

Proof of Claim No. 10

On May 20, 2013, less than one month later, a Proof of Claim was filed by U.S. Bank National Association, as trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007 EQI ("U.S. Bank, National Association, Trustee"). Proof of Claim No. 10. The elements of Proof of Claim No. 10 are,

A. Name of Creditor..... U.S. Bank, National Association, Trustee

B. Entity to Receive Payments and Notice..... "Americas Servicing Company"

C. Person Executing Proof of Claim ... Attorney for Creditor (agent)

D. Amount of Claim.....$256,692.94

E. Amount of Pre-Petition Arrearage.....$ 16,393.91

F. Secured Claim, Collateral Identified..... 30 Cattail Ct

G. Last Four Digits of Account Number..... None Listed

H. Uniform Claim Identifier..... None Listed

Attached to Proof of Claim No. 10 is Mortgage Proof of Claim Attachment. The principal and interest on the claim is computed to be $251,206.78, which breaks down as,

A. Principal.....$246,003.59

B. Interest.....$5,203.78

1.2.000% interest for the period June 1, 2011 through June 21, 2012 (date bankruptcy case was filed).

The attachment computes the pre-petition fees, expenses, and charges to be $4,291.00, and the pre-petition payment arrearage to be $12,256.92 (12 monthly payments of $1,021.41 each).

First Amended Proof of Claim No. 10 - Filed July 25, 2013

On July 25, 2013, a First Amended Proof of Claim No. 10 was filed by U.S. Bank, National Association, as Trustee. This amended proof of claim adjusts the claim amount to $256,278.57 and reduces the pre-petition arrearage to $15,979.54. Amended Proof of Claim No. 10 adds the following information to this claim:

A. Last Four Digits of Account Number..... 6021

B. Uniform Claim Identifier..... WFCMGA1241671CAE46306021

Second Amended Proof of Claim No. 10 – Filed June 9, 2014

On June 9, 2014, U.S. Bank, National Association, as Trustee, filed a Second Amended Proof of Claim No. 10. In this amended proof of claim, the amount of the claim was changed to be $252,865.81 and the pre-petition arrearage was reduced to $14,424.54.

Attached to Second Amended Proof of Claim No. 10 is Mortgage Proof of Claim Attachment. The principal and interest on the claim is computed to be $250,154.07, which breaks down as,

a. Principal.....$244,972.71

b. Interest.....$ 5,181.36

I. 2.000% interest for the period June 1, 2011 through June 21, 2012 (date bankruptcy case was filed).

The attachment computes the pre-petition fees, expenses, and charges to be $3,868.31, and the pre-petition payment arrearage to be $12,256.92 (12 monthly payments of $1,021.41 each).

Identity of Creditor and Valid Claim

In this case, the court was concerned that the parties have failed to properly identify the creditor which has a claim secured by the 30 Cattail Ct. property and the claim which is secured. The "confusion" begins with the filing of Proof of Claim No. 9, which states that there is only a $12,000.00 claim, for which America Servicing Company is the creditor, and it is secured by an unidentified assets. America's Servicing Company, on two separate occasions, has confirmed that the creditor is "America Servicing Company" and that Proof of Claim No. 9 is the correct claim. Further, that this claim is the one for which the Last Four Digits of the Account Number is 6021 and the Uniform Claim Identifier is WFCMGA1241671CAE46306021. Notices of Mortgage Payment Change, June 7, 2013 and June 3, 2014 Docket Entries.

Conflicting with this is Proof of Claim No. 10, as amended, which states that U.S. Bank, N.A., as Trustee, is the creditor. The Last Four Digits of the Account Number and the Uniform Claim Identifier for Proof of Claim No. 10 is the same as that stated to be the basis for the claim of "America Servicing Company" as stated in Proof of Claim No. 9 and the two Notices of Mortgage Payment Changes.

From the various documents filed the creditor is asserted to be

"America Servicing Company" (by Debtors and America's Servicing Company), "America's Servicing Company," or U.S. Bank, N.A., Trustee.

Then, there is confusion over whether the secured claim in this case is $12,000.00 or $252,865.81. While Proof of Claim No. 9 appears incomplete, on several occasions America's Servicing Company has directed the court to that Proof of Claim as the one to which the post-petition mortgage payments relate.

Finally, there is an issue as to what changes, if any, are properly made for the current monthly payment for the secured claim. The court's records show that only the secured claim evidenced by Proof of Claim No. 9 is the one for which there is a post-petition change in the amount of the monthly payment. No Notice of Mortgage Payment Change has been filed which relates to Proof of Claim No. 10.

Further Hearing, Briefing, and Appearance of Parties

The court determined that it was necessary and proper to have each of these three parties – the Debtor, U.S. Bank, N.A., as Trustee, and America's Servicing Company – come forward and clarify for the court, Chapter 13 Trustee, U.S. Trustee, and other parties in interest the correct identity of the creditor and whether Proof of Claim No. 9, as advanced by Debtors and America's Servicing Company, is the correct claim to be paid in this case or, if it is Proof of Claim No. 10, for which U.S. Bank, N.A., as Trustee, is the creditor. Though one may intuit the correct answer, parties have made conflicting statements under penalty of perjury and subject to Federal Rule of Bankruptcy Procedure 9011.

The court ordered the following parties to respond to the court and appear at the continue hearing on this Objection:

U.S. Bank, National Trust Association, as Trustee for Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1:

A. U.S. Bank, N.A., as Trustee, through an officer familiar with the claim asserted for it in this case, shall appear, and,

1. Confirm whether the Bank, as Trustee, is the creditor in this case for the claim identified in Proof of Claim No. 10, as amended.

2. State whether the Bank, as Trustee, has transferred its claim to "America Servicing Company." If transferred, provide documentation of the transfer.

3. State whether the Bank, as Trustee, if a creditor in this case, authorized "America Servicing Company," or any other person, to represent that it was the creditor for the obligation which is the subject of Proof of Claim No. 10, as amended, and hide the identity of U.S. Bank, National Association, as Trustee, as the true creditor in this case.

4. Whether Proof of Claim No. 10 or Proof of Claim No. 9 is

the corrected secured claim for the debt upon which Proof of Claim No. 10 is based.

B. Provide a written analysis of the computation of its claim, the current mortgage payment, and the correct computation of principal, interest, and any escrow payments for the debt which is the subject of Proof of Claim No. 10, as amended.

Wells Fargo Bank, N.A. and America's Servicing Company:

A. Whether Wells Fargo Bank, N.A. does business as America's Servicing Company, whether America's Servicing Company is a fictitious name by which Wells Fargo Bank, N.A. does business, and where in the documents and pleadings filed with the court is the identify of America's Servicing Company as Wells Fargo Bank, N.A. disclosed to the court and parties in interest.

B. How the court, Debtor, Chapter 13 Trustee, U.S. Trustee, or other parties in interest identify America's Servicing Company and how federal court jurisdiction is exercised (proper service of process) over the America's Servicing Company appearing in this case (such as Secretary of State registration, FDIC data base, etc.).

C. America's Servicing Company, or Wells Fargo Bank, N.A. if it is operating under that name, through an officer familiar with the claim asserted for it in this case, shall appear, and,

1. State whether America's Servicing Company asserts that it is a creditor in this case or if it is a servicing company for a creditor in this case.

2. If America's Servicing Company asserts that it is a creditor, provide competent, credible, and admissible evidence of such status in this bankruptcy case.

3. If America's Servicing Company asserts that it is the servicing agent for the creditor, identify the creditor.

4. Explain why Notices of Mortgage Payment Changes filed on June 3, 2014 and June 7, 2013 were filed by America's Servicing Company in this case which (1) identify the creditor as "America Servicing Company" and (2) why the Notice of Mortgage Payment Changes are for Proof of Claim No. 9, a secured claim for only $12,000.00.

5. State the computation of the claim, whether it is the creditor or it is the servicing agent for the creditor, the current mortgage payment, the correct computation of principal, interest, and any escrow payments for the debt which is the subject of Proof of Claim No. 9 and Proof of Claim No. 10, as amended.

Christian Lynn Newman, Debtor:

A. State whether Proof of Claim No. 9 accurately states the

claim of "America Servicing Company," and whether America Servicing Company has a secured claim of only $12,000.00 in this case.

B. State the basis for identifying "America Servicing Company" as the creditor having a $12,000.00 secured claim in this case, the basis of the obligation, and the collateral which secures the claim, and provide copies of the Note, Deed of Trust, and other documents evidencing the obligation and collateral.

C. State the computation, according to the Debtor, of Proof of Claim No. 9 and Proof of Claim No. 10, the current mortgage payment, the correct computation of principal, interest, and any escrow payments for the debt which is the subject of Proof of Claim No. 10, as amended.

For each of these parties ordered to provide the above information and documentation, the court ordered that they shall clearly show the basis for how they compute the principal and interest, which shall include how the debt is computed based on the Note, and any modifications thereto, and any additional amounts asserted to be owed pursuant to specific provisions of the Note and the Deed of Trust which secures the Note.

Each of the above parties were ordered to provide written responses, supported by competent, credible, and properly authenticated evidence, which shall be filed and served on the other parties named above, the Chapter 13 Trustee, and the U.S. Trustee, Sacramento Division, on or before October 24, 2014. Replies, if any, were ordered to be filed and served on or before November 3, 2014.

U.S. BANK, N.A. TRUSTEE, RESPONSE

On November 18, 2014, the attorneys for U.S. Bank, N.A., Trustee, filed a Response to the court's Order to Appear. In the Response the attorneys argued a number of facts. However, U.S. Bank, N.A., Trustee, failed to provide any testimony to support such arguments. Rather, the court was told merely to believe what has been argued by the attorneys for U.S. Bank, N.A., Trustee.

The arguments made by U.S. Bank, N.A., Trustee, include the following:

a. U.S. Bank, N.A., Trustee, is the creditor for the claim identified in Proof of Claim No. 10. (U.S. Bank, N.A., Trustee is named as the creditor on Proof of Claim No. 10, which the court can accept as evidence of such fact.)

b. U.S. Bank, N.A., Trustee has not transferred the claim to "America Servicing Company," "America's Servicing Company" or "any other person." (No evidence is provided in support of this argument.)

c. U.S. Bank, N.A., Trustee's duties are narrowly circumscribed and mostly "ministerial" in nature. (No evidence is provided in support of this argument.)

d. The Loan Servicer for this claim is given the "sole responsibility and authority for servicing the assets of the trust (for which this claim is an asset)." (No evidence is provided in support of this argument.)

e. The Loan Servicer is not the agent of U.S. Bank, N.A., Trustee, "in a broad sense." (No evidence or legal authorities are provided for this argument.)

f. U.S. Bank, N.A., Trustee, has not authorized any other person to represent that they are the creditor for Proof of Claim No. 10. (No evidence or legal authorities are provided for this argument.)

g. U.S. Bank, N.A., Trustee, admits that it cannot provide a computation of its claim, but that it is the sole responsibility of the Loan Servicer (who is not U.S. Bank, N.A., Trustee's, agent "in a broad sense") to compute what U.S. Bank, N.A., Trustee's, claim in this bankruptcy case.

U.S. Bank, N.A., Trustee, Response, Dckt. 203.

WELLS FARGO BANK, N.A. RESPONSE

Wells Fargo Bank, N.A. filed its Response on November 20, 2014. Dckt. 207. The Wells Fargo Bank, N.A. Response is supported by three declarations which appear to provide testimony to support the facts argued in the Wells Fargo Bank Response. Declarations, Dckts. 208, 209, 210.

Wells Fargo Bank, N.A., responded, stating that one of its dba's is America's Servicing Company. Wells Fargo Bank, N.A., using its dba America's Servicing Company, is the Loan Servicer for the loan upon which the claim in this case of U.S. Bank, N.A., Trustee, is based. In the Response, Wells Fargo Bank, N.A. made the interesting reference that it is the Loan Servicer for the "trust," and does not state that it is the Loan Servicer for the trustee of the trust. Wells Fargo Bank, N.A. did not provide a legal explanation as to how it is the servicer for a "thing," the trust, rather than the trustee of the trust. No explanation is given as to how Wells Fargo Bank, N.A. communicates to the trust, gets instructions from the trust, and who is responsible for ensuring that Wells Fargo Bank, N.A. is properly performing its duties for the trust.

Wells Fargo Bank, N.A. addressed the issue why it filed a Notice of Mortgage Payment Change identifying itself as the "Creditor" and misstating its name to be "America Servicing Company." In the two Notices of Mortgage Payment Change, Wells Fargo Bank, N.A. misidentifies itself two times when it identifies itself as the Creditor, but then correctly states its name to be "America's Servicing Co." on the second page of each notice in the signature block. The purported reasonable business basis for this misidentification by Wells Fargo Bank, N.A. was so that it would be "consistent" with the name used by the Debtor for Proof of Claim No. 9. This explanation rings hollow as this Bank, as other corporate entities, routinely file pleadings correctly identifying themselves and stating that they have been misnamed in the complaint or motion.

This explanation also did not explain why under penalty of perjury Wells Fargo Bank, N.A. stated in both Notices that it, Wells Fargo Bank, N.A. (using the inaccurate dba America Servicing Company) states that it is the creditor – not the agent for the creditor. Wells Fargo Bank, N.A. affirmatively checked the box stating, under penalty of perjury that "I am the creditor." Wells Fargo Bank, N.A. did not check the box for the statement "I am the creditor's authorized agent. (Attach a copy of power of attorney, if any.)" Such affirmative misstatements could well be misconstrued by a court as an intentional effort to mislead debtors' attorneys to preclude effective service being made on the actual creditor and to actively defraud the federal courts. (The court notes that the proof of claim is filed by a Vice President for the Bank, so it appears that it is unlikely that some minimum wage, entry level clerical person, in a state of utter confusion as to what is a creditor and agent, merely checked the incorrect affirmative statement.)

STIPULATION AND ORDER CONTINUING THE HEARING

On December 2, 2013, the Parties filed a stipulation with the court. Dckt. 216. The Parties agreed that the court was to further continue the hearing and delay the appearances of these Parties as ordered by the court. Stipulation, Dckt. 213. The Parties further agreed to continue the deadlines set by the court for filing documents in response to the court's Order to Appear and explain who the creditor is in this case, as well as the identification, or misidentification, or the creditor. Additionally, the Parties agreed that they will further modify the court's prior order to set new time periods to file responsive pleadings.

The reason given in the Stipulation for the Parties agreeing to modify the court's order are "[t]o give the undersigned parties adequate time to fully address the Court's questions and concerns." Dckt. 213 at 2:2-3. No explanation was offered to the court as to why in the two months that had transpired from issuance of the Order to Appear that the parties could not properly and fully address the simple questions raised by the court concerning the identity of the creditor and the names used by the Parties in representing to the court the identity of the creditor.

The Stipulation continued to include a series of findings of fact and conclusions of law which the Parties have chosen to make in connection with the Court's Order to Appear. These include a determination as to which proof of claim is correct, that the Notice of Post-Petition Mortgage Change is "deemed" timely filed by one of the Parties. The Parties, in addition to stating that they are amending the court's prior order, they are also relieving the court of the burden of making findings of fact and conclusions of law for issues which may effect all creditors and clearly impact the use, or abuse, of the federal judicial process.

The Parties instructed the court that they have determined, and thereon excuse, Wells Fargo Bank, N.A., dba America's Servicing Company and U.S. Bank, N.A., Trustee, from appearing as ordered by the court, concluding that such appearance and participation is "no longer vital to the resolution of the issues before the Court as the Debtor and Chapter 13 Trustee are satisfied...." These Parties also relieved the court of the burden of having to actually make such determinations concerning the conduct of the Parties in these federal proceedings.

In light of the stipulation, the court issued an order continuing the matter, stating the following:

> **IT IS ORDERED** that the December 9, 2014 hearing on the Objection to Notice of Post-Petition Mortgage Fees, Expenses, and Charges is continued to **3:00 p.m. on February 3, 2015**.
>
> **IT IS FURTHER ORDERED** that the hearing on the Court's Order to Appear Re: Proofs of Claim Nos. 9 and 10 and Objection to Notice of Post-Petition Mortgage Change is continued to **3:00 p.m. on February 3, 2015**.
>
> **IT IS FURTHER ORDERED** that Counsel for Wells Fargo Bank, N.A., Counsel for U.S. Bank, N.A., as Trustee for the Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1; and Counsel for Christian Lynn Newman, and each of them, shall appear in person at the continued hearing at **3:00 p.m. on February 3, 2015, No Telephonic Appearances Permitted.**
>
> **IT IS FURTHER ORDERED** that the Officer of Wells Fargo Bank, N.A., and the Officer of U.S. Bank, N.A., as Trustee for the Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 shall appear at the continued hearing at **3:00 p.m. on February 3, 2015. Telephonic Appearances Are Permitted for the Bank Officers and other persons other than the attorneys appearing for the Banks.**
>
> **IT IS FURTHER ORDERED** that supplements to or additional written responses, supported by properly admissible testimony and authenticated exhibits, shall be filed and served on or before **January 9, 2015.** Replies, if any, to the supplemental or additional responses shall be filed and served on or before **January 20, 2015.**
>
> **IT IS FURTHER ORDERED** that on or before **January 9, 2015**, U.S. Bank, N.A., as Trustee for the Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1, shall file and serve supplemental response pleadings which shall include:
>
> (1) Admissible, properly authenticated evidence in support of the factual arguments made by counsel in its Response;
>
> (2) Additional response and evidence to establish the scope of its duties, responsibilities, and authorities as Trustee for the Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1;
>
> (3) Documentation of the agency relationship

between U.S. Bank, N.A., as Trustee for the Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 and Wells Fargo Bank, N.A., which shall include clearly showing the scope of such agency authority;

(4) The legal definition of the stated position that Wells Fargo Bank, N.A. agent of U.S. Bank, N.A., as Trustee for the Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 U.S. Bank, N.A., Trustee, "in a broad sense," and to what "not in a broad sense" Wells Fargo Bank, N.A. is its agent; and

(5) Provide the legal and factual basis for the court to determine when, and when not, Wells Fargo Bank, N.A. is the agent of U.S. Bank, N.A., as Trustee for the Structured Asset Security Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 U.S. Bank, N.A., Trustee.

U.S. BANK RESPONSE

On January 9, 2015, U.S. Bank filed a response to the Order. Dckt. 224. U.S. Bank responded as follows:

1. As is referenced in the U.S. Bank's November 18, 2014 Response, the U.S. Bank's duties are limited to those expressly set forth in the Trust Agreement (Dckt. 226. Ex. A § 6.01(a)), and are narrowly circumscribed and mostly ministerial in nature (see, e.g., id. §§ 2.02, 5.01). U.S. Bank attached the Trust Agreement between Structured Asset Securities Corporation (Depositor), Aurora Loan Services, LLC (Master Servicer), Wells Fargo Bank, N.A. (Securities Administrator), Clayton Fixed Income Services, Inc. (Credit Risk Manager), and U.S. Bank (Trustee) in support of this assertion. U.S. Bank argues that the language of the Trust Agreement evidences that U.S. Bank is merely functioning in a ministerial nature.

2. The Trust Agreement and Securitization Subservicing Agreement demonstrate that U.S. Bank did not appoint or hire Wells Fargo Bank, N.A. in its role as Servicer. Instead the servicer was appointed by Lehman Brothers Holdings Inc., as Seller and Aurora Loan Services LLC, as Master Servicer (See, id. Ex. B at 1). U.S. Bank is not even a party to the Securitization Subservicing Agreement pursuant to which Wells Fargo Bank, N.A. was appointed as servicer. Instead, the U.S. Bank merely acknowledged the Agreement. (See, id.)

3. Pursuant to the Securitization Subservicing Agreement, the Servicer is authorized by contract with the Master Servicer and the Seller to take any necessary or appropriate actions to service the mortgage loans held by the Trust in accordance with the Securitization Subservicing Agreement. (See, id. § 3.01). This is enumerated in the limited power of

attorney described in the Securitization Subservicing Agreement, which only assigns a limited power of attorney on behalf of U.S. Bank.

The Limited Power of Attorney authorizes the Servicer to take certain, limited actions in the U.S. Bank's name where necessary for the Servicer to perform its duties with respect to the Trust. Specifically, it provides that U.S. Bank National Association solely in its capacity as trustee of the Trust, "not in its individual capacity," appoints Wells Fargo Bank, N.A. as "Attorney-In-Fact … to execute and acknowledge in writing … all documents customarily and reasonably necessary and appropriate for" certain specific tasks listed in the Limited Power of Attorney. Id. Ex. C at 1. Those specific tasks include to "[d]emand, sue for, recover, collect and receive each and every sum of money, debt, account and interest (which now is, or hereafter shall become due and payable) belonging to or claimed by [the Trustee], and to use or take any lawful means for recovery by legal process or otherwise." Id.

4. It is the Master Servicer and not U.S. Bank who oversees Wells Fargo. Section 9.05 of the Trust Agreement provides that the Master Servicer shall enforce the obligations of each Servicer under the related Servicing Agreement, and shall, in the event that a Servicer fails to perform its obligations in accordance therewith, terminate the rights and obligations of such Servicer thereunder … and either act as servicer of the related Mortgage Loans or cause the other parties hereto to enter into a Servicing Agreement. (See, Id. § 9.05).

5. The U.S. Bank is also not charged with overseeing the Master Servicer. Instead, the Master Servicer, like any other contracting party, is bound by contract to fulfill its contractual duties and, if it fails to do so, may be subject to a claim by the contacting parties and any third party beneficiaries for breach of contract. (See generally id. Ex. A.)

6. The U.S. Bank stated in its November 18, 2014 Response that "[a]lthough the Loan Servicer must take certain actions in the name of the U.S. Bank on behalf of the Trust and its beneficiaries, the Loan Servicer is not the agent of the U.S. Bank in a broad sense. Instead, both have separate and complementary duties that they each perform on behalf of the Trust." Dckt. 199 at 3.) By this statement, U.S. Bank intended to explain that the Servicer is not the general agent of the U.S. Bank. When limited actions must be taken in the name of the U.S. Bank, the Servicer is authorized by the Securitization Subservicing Agreement and the Limited Power of Attorney to act as the agent of the U.S. Bank for those limited purposes.

Thus, the Servicer is not the U.S. Bank's agent "in a broad sense"-i.e., for all purposes. Rather, the Servicer is the agent of the U.S. Bank only to the extent that it is authorized to act in the name of the U.S. Bank when necessary or appropriate to service the mortgage loans held by the Trust, which includes the filing and prosecution of claims in bankruptcy proceedings. (See dckt. 226 Ex. C).

7. Because the filing and prosecution of the claim at issue in this bankruptcy must be done in the name of the U.S. Bank as the holder of the Debtor's loan and is necessary or appropriate to service and administer the Debtor's loan, which is held by the Trust, the Servicer acts as the U.S. Bank's agent, in its capacity as Trustee, with respect to this proceeding.

DISCUSSION

The U.S. Constitution, Art. III, Sec. 2, requires that a federal court have before it the real parties in interest and an actual case or controversy between the parties. *Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1, 11-12 (2004).

This Order has been continued since October 2014 to allow U.S. Bank the opportunity to explain how it is the creditor in this case and who has the authority to modify the terms of the underlying obligation. After multiple supplemental pleadings and exhibits, U.S. Bank has provided the agency agreements between the parties to illuminate the relationships between the trustee, servicer, subservicer, etc.

A review of the Trust Agreement, the Securitization Subservicing Agreement and Power of Attorney shows that Wells Fargo Bank, N.A. is the subservicer and Aurora Loan Services, LLC is the master servicer. In this capacity, U.S. Bank does not have day to day oversight over Wells Fargo Bank, N.A. subservicer role but did grant Wells Fargo Bank, N.A. limited power of attorney in order to act "in the inderest of U.S. Bank National Association as Trustee."

While the original presentation of the relationship a Wells Fargo Bank, N.A. as a agent "not in a broad sense" was insufficient, the supplemental documentation filed as well as the explanation of U.S. Bank clarified that U.S. Bank was merely trying to highlight that Wells Fargo Bank, N.A. is not a direct agent of U.S. Bank but instead is acting under the subservicer agreement under the regulation of Aurora. The Trust Agreement, Securitization Subservicing Agreement and Power of Attorney clarifies that Wells Fargo Bank, N.A. does have the authority to "[e]xecute bonds, notes, mortgages, deeds of trust, and other contracts, agreements and instruments regarding the Borrowers and/or the Property, including but not limited to the. . . .conveying or encumbering the Property in the interest of U.S. Bank National Association, as Trustee." Dckt. 226, Exhibit C.

Though the parties have provided sufficient evidence to satisfy the court's inquiry into the relationships of the parties, the court notes that the parties should be careful when filing Proofs of Claims and who they are filing the Proofs of Claims on behalf of. The court will not issue order effecting the rights of creditors when the court is unable to discern who the actual creditor is and who is able to act as an agent on behalf of the real creditor. Until the court has actual evidence before it supporting that a party may act on behalf of a real creditor effecting the rights of an underlying security interest, the court will not issue "maybe effective" orders. It is important and constitutionally required that the real parties of interest are present and noticed.

Additionally, on December 2, 2014, the parties filed a stipulation regarding the instant Objection. Dckt. 213. The parties stipulated to the following:

1. Proof of Claim #9 is hereby withdrawn.

2. Proof of Claim #10, as amended, is the controlling Proof of Claim.

3. Notice of Post-Petition Mortgage Change filed in the Claims Register on June 3, 2014 under claim 9-1 shall be deemed timely filed by Wells Fargo Bank, N.A., dba America's Servicing Company, the loan servicers for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 and is effective as of July 1, 2014.

4. That neither Wells Fargo Bank, N.A., dba America's Servicing Company's nor U.S. Bank National Association for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1, appearance is necessary at the hearing as their participation is no longer vital to the resolution of issues before the Court as the Debtor and Chapter 13 Trustee are satisfied that:

   i. U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 is the creditor for the claim identified in Proof of Claim No. 10, as amended.

   ii. Wells Fargo Bank, N.A., dba America's Servicing Company is the loan servicer for the Debtor's loan at issue in this case.

   iii. The current principal and interest payment on the subject loan is $1,178.62.

   iv. The current monthly escrow payment for the period between July 1, 2014 and June 30, 2015 is $422.74.

   v. Correct Proof of Claim #10-3 accurately reflects that the total outstanding balance due and owing on the subject loan at the time the Debtor filed his bankruptcy petition was $252,865.81.

   vi. The arrears set forth in Proof of Claim 10-3 totaling $14,424.54 are accurate

In light of the fact that the parties have provided authenticated and competent evidence outlining the agency relationship between the parties, the amended plan was confirmed, and the parties stipulated to the correct amount on the mortgage arrears, the court discharges the Order to Appear.

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 continued hearing on the Order to Appear 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 Order to Appear is discharged, with no further appearances pursuant thereto required.

17. 12-31671-E-13 CHRISTIAN NEWMAN
PGM-6

CONTINUED OBJECTION TO NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES
8-19-14 [180]

Final Ruling: No appearance at the February 3, 2015 hearing is required.

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 19, 2014. However, the court cannot determine if proper service was provided because the identity of the actual creditor is unknown. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Objection to Notice of Postpetition Mortgage Fees, Expenses, and Charges 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 Objection to Notice of Post-petition Mortgage Fees, Expenses, and Charges is overruled.

Christian Newman ("Debtor") has filed this Objection to Notice of Post-petition Mortgage Fees, Expenses and Charges on August 19, 2014. Dckt. 180.

The Objection asserts the following:

A. Debtor asserts that the increase in the Class 1 mortgage payment of an unidentified creditor from $1,021.40 to $1,601.60 is incorrect.

B. An entity identified as "ACS" (which is not more specifically identified) has amended "their" proof of claim three times, each time lowering the arrearage. Further, that the proofs of claim state incorrect "escrow payment" amounts, and have failed to take into an account "an apparent note rate change."

C. On April 25, 2014, Counsel for Debtor filed a proof of claim on behalf of "America's Servicing Company" in the amount of $12,000.00 for a mortgage arrearage. Proof of Claim No. 9. FN.1.

FN.1. While stating the arrearage amount, Counsel for Debtor does not state the total claim which is owed by Debtor on this claim.

D. On May 20, 2014, "America Servicing Company ("ACS") filed a proof of claim asserting a $16,393.91 arrearage, of which $2,442.98 is for pre-petition escrow shortages. FN.2.

FN.2. This claim was actually filed for U.S. Bank National Association, as Trustee (full name of the trust included in the proof of claim). The claim is for $256,692.94, not merely an arrearage. While "Americas Servicing Company" filed the proof of claim as the agent for U.S. Bank, National Association, as Trustee, the servicing company is not the creditor.

E. In the Original and Amended Proof of Claim No. 10, the monthly payment is identified as being $1,021.41.

F. Debtor identifies America [sic] Servicing Company as the "secured creditor." FN.3.

FN.3. In light of this court for four years now having stressed the need to correctly identifying the creditor (whether for a secured or unsecured claim) as defined by 11 U.S.C. § 101(10) and (5), and U.S. Bank, National Association, as Trustee, being identified as the creditor on Proof of Claim No. 10, little reason exists for the Debtor affirmatively misidentifying the creditor.

G. On June 7, 2013, "ACS" filed a Notice of Payment Change, increasing the monthly escrow payment from $268.35 to $377.75. This Notice was withdrawn.

H. Amended Proof of Claim No. 10 states the arrearage to be $15,979.54, which includes $2,442.98 for pre-petition escrow shortages.

I. On June 3, 2014, "ACS" filed a Notice of Payment Change

stating the monthly payment to be $1,601.38, which consists of $1,178.62 for principal and interest, and $422.74 for escrow payments.

J. The analysis of these payments includes a charge for "Flood Insurance," which is not "a requirement for the property."

K. On June 9, 2014, Proof of Claim No. 10 was further amended to state the arrearage to be $14,424.54, of which $2,442.98 (the amount was not changed) for pre-petition escrow shortage.

L. On July 28, 2014, the Chapter 13 Trustee notified Debtor that the Class 1 mortgage payment for this claim was increased to $1,601.36.

Objection, Dckt. 180.

Debtor states that the principal and interest payment amount was changed under the Note. Debtor believes that the principal and interest payment should continue to be $753.06, not the $1,178.62 stated by "ACS."

Debtor asserts that he escrow analysis ending for June 2014, the "lowest projected balance" was ($1,513.28). However, for 2014 the lowest projected balance was a positive $2,442.98.

OCTOBER 7, 2014 HEARING

The court continued the hearing to 3:00 p.m. on November 18, 2014 to allow the parties to file supplemental pleadings to show the computation of the principal and interest, which was ordered to include how the debt is computed based on the Note and any modifications. Dckt. 188.

NOVEMBER 11, 2014 ORDER

On November 11, 2014, the court issued an order continuing the hearing to 3:00 p.m. on December 9, 2014. Dckt. 198.

DECEMBER 9, 2014 HEARING

The court continued the hearing to 3:00 p.m. on February 3, 2015. Dckt. 218.

DECEMBER 2, 2014 STIPULATION

On December 2, 2014, the parties filed a stipulation regarding the instant Objection. Dckt. 213. The parties stipulated to the following:

1. Proof of Claim #9 is hereby withdrawn.

2. Proof of Claim #10, as amended, is the controlling Proof of Claim.

3. Notice of Post-Petition Mortgage Change filed in the Claims Register on June 3, 2014 under claim 9-1 shall be deemed timely filed by Wells Fargo Bank, N.A., dba America's

Servicing Company, the loan servicers for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 and is effective as of July 1, 2014.

4. That neither Wells Fargo Bank, N.A., dba America's Servicing Company's nor U.S. Bank National Association for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1, appearance is necessary at the hearing as their participation is no longer vital to the resolution of issues before the Court as the Debtor and Chapter 13 Trustee are satisfied that:

   i. U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 is the creditor for the claim identified in Proof of Claim No. 10, as amended.

   ii. Wells Fargo Bank, N.A., dba America's Servicing Company is the loan servicer for the Debtor's loan at issue in this case.

   iii. The current principal and interest payment on the subject loan is $1,178.62.

   iv. The current monthly escrow payment for the period between July 1, 2014 and June 30, 2015 is $422.74.

   v. Correct Proof of Claim #10-3 accurately reflects that the total outstanding balance due and owing on the subject loan at the time the Debtor filed his bankruptcy petition was $252,865.81.

   vi. The arrears set forth in Proof of Claim 10-3 totaling $14,424.54 are accurate

DISCUSSION

The parties having filed a stipulation resolving the instant Objection, the amended plan being confirmed on January 30, 2015 (Dckt. 228), and the Order to Appear being discharged, the instant Objection is overruled without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Notice of Post-petition Mortgage Fees, Expenses and Charges 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 Objection is overruled without

prejudice

18. 12-31671-E-13 CHRISTIAN NEWMAN
PGM-6

CONTINUED EVIDENTIARY HEARING RE: MOTION TO CONFIRM PLAN
2-13-14 [149]

Final Ruling: No appearance at the February 3, 2015 hearing is required.

The court having issued an Order Confirming Debtor's Fifth Amended Plan filed on February 13, 2014 (Dckt. 228), **the matter is resolved and removed from the calendar.**

19. 12-31671-E-13 CHRISTIAN NEWMAN
PGM-6

CONTINUED MOTION TO CONFIRM PLAN
2-13-14 [149]

Final Ruling: No appearance at the February 3, 2015 hearing is required.

The court having issued an Order Confirming Debtor's Fifth Amended Plan filed on February 13, 2014 (Dckt. 228), **the matter is resolved and removed from the calendar.**

20. 14-27971-E-13 KENDALL/CYNTHIA BERTRAND TAG-3

MOTION FOR COMPENSATION FOR TED A. GREENE, DEBTORS' ATTORNEY 12-31-14 [57]

Final Ruling: No appearance at the February 3, 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, parties requesting special notice, and Office of the United States Trustee on December 31, 2015. By the court's calculation, 34 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. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Ted A. Greene, the Attorney ("Applicant") for Kendall Bertrand and Cynthia Bertrand, the Debtors ("Client"), makes a § 330 Final Request for the Allowance of Fees in this case. As ordered by the Court on December 11, 2014, the Applicant was to file an application for additional attorneys' fees pursuant to 11 U.S.C. § 330 and Local Bankruptcy Rule 2016-1(c) on or before January 2, 2015. Dckt. 53. The Applicant has promptly filed his application to obtain $2,361.00 (1% of short sale) in monies to be paid and disbursed to the Chapter 13 Trustee directly from escrow, to be held pending further order of the Court.

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 fees and expenses without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to 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 short sale negotiations in the amount of $2,361.0 (1% of the purchase price) were beneficial to the Client and bankruptcy estate and reasonable.

"No-Look" Fees

In this District the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

"(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."

...

(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 is $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 Subpart, 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 postconfirmation 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)."

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $3,000.00 in attorneys fees, less than the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Exhibit A Dckt. 62. Applicant prepared the order confirming the Plan.

If Applicant believes that there has been substantial and unanticipated legal services which have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). He may file a fee application and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides an Addendum showing that the buyer will pay short sale attorney fees (Exhibit C, Dckt. 61), and a copy of the Residential Purchase Agreement stating the buyer will pay 1% of the purchase price at close of escrow (Exhibit D, Dckt. 61). These are described in more detail in the following main categories.

Addendum and Purchase Agreement: Applicant spent time negotiating on

the behalf of the Debtor's in Possession for a short sale purchase price of the real property 9436 Feickert Dr. Elk Grove, California ("Property). The Applicant was able to reach a short sale purchase price of $236,310.00, and in return for his efforts obtains a 1% no look fee from the purchase price totaling $2,361.00.

David Cusick, on January 13, 2015, filed a non-opposition to the instant Motion.

FEES AND COSTS & EXPENSES ALLOWED

Fees

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

Fees $2,361.00

pursuant to this Application as final fees 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 Ted A. Greene ("Applicant"), Attorney 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 Chapter 13 Trustee is authorized to pay the following fees allowed by this Order from the available funds of the escrow from the sale of the real property described as 9436 Feickert Dr., Elk Grove, California in a manner consistent with this order of distribution:
>
> Fees in the amount of $2,361.00

21. 14-32085-E-13 PATRICIA MELMS **FINAL HEARING RE: MOTION TO**
MRL-1 **EXTEND AUTOMATIC STAY**
12-17-14 [7]

Final Ruling: No appearance at the February 3, 2015 hearing is required.

Local Rule 9014-1(f)(2) Motion- Final Hearing

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 18, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court. 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 Motion to Extend the Automatic Stay is granted.

Patricia Melms ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 14-21205) was dismissed on October 14, 2014, after Debtor failed to file an amended plan and motion to confirm. *See* Order, Bankr. E.D. Cal. No. 14-21205, Dckt. 104, October 14, 2014. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors – including those used to determine good faith under §§ 1307(c)

and 1325(a) – but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?

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

Elliot-Cook, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as her previous law firm did not communicate with her in a timely manner concerning the need to file a new Plan by September 29, 2014. Specifically, the Debtor states that her previous firm requested the information from Debtor late and used an e-mail address that the Debtor told the firm she does not check.

JANUARY 8, 2015 HEARING

At the hearing, the court found that the Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The court granted the motion and extended the automatic stay for all purposes and parties through and including February 13, 2015, unless terminated by operation of law or further order of this court.

The court further ordered that a final hearing on the Motion on February 3, 2015, at 3:00 p.m. would be conducted. Written Opposition, if any, to the Motion was ordered to be filed and served on or before January 21, 2015, and Replies, if any, were to be filed and served on or before January 28, 2015.

DISCUSSION

No supplemental pleadings have been filed in connection with the instant motion. No creditors or other party in interest has filed an opposition to the Motion.

The Motion is granted and the automatic stay is extended for all purposes and persons until terminated by further order of the court or operation of law.

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

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

automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and persons until terminated by further order of the court or operation of law.

22. 13-27986-E-13 DEBORAH CANDATE **MOTION TO MODIFY PLAN**
MET-3 **12-30-14 [70]**

Final Ruling: No appearance at the February 3, 2015 hearing is required.

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, all creditors, parties requesting special notice, and Office of the United States Trustee on December, 20 2014. By the court's calculation, 45 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. 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 grant the Motion to Confirm the Amended Plan.

Deborah M. Candate ("Debtor") filed the instant Motion to Modify Plan on December 30, 2014. Dckt. 75. Debtor is seeking to amend their plain in the following manner: payments of totaling $12,253.00 have already been paid into the plan through December 2014. The Debtor seeks to increase her per month payments by $50.00 to $425.00 commencing in January. The Plan is to remain a 0% payment to general unsecured creditors.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on January 20, 2015. Dckt. 25. The Trustee objects on the following grounds:

1. The Creditor Wells Fargo is incorrectly classified in the proposed modified plan. The Debtor's proposed modified plan lists the creditor Wells Fargo as a class 2 secured non-purchase money security interest for the pre-petition mortgage arrears in the amount of $2,355.844. However, the Court's Order confirming the plan (Dckt. 66) states that after payment of the class 1 pre-petition arrearage claim, Wells Fargo shall automatically revert to a class 4 claim to be paid outside the plan.

Although the Trustee will withdraw the objection if classification is corrected in the order confirming.

2. The amended schedules I and J are on incorrect forms. The Debtor's instant schedules were effective December 1, 2007; when the latest forms were effective December 1, 2013. However, the Trustee is not opposed to the information on the schedules, but may move to reduce the amount of attorney fees if the incorrect forms are continued to be used.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor's counsel, Mary Ellen Terranella, filed a supplemental declaration on January 21, 2015. Dckt. 80. In the Declaration, Debtor's counsel addresses the Trustee's objections, stating that she has corrected the treatment of the Wells Fargo claim. Attached to the Declaration is a proposed Order Modifying Plan which states in connection with the Wells Fargo claim: "As the pre-petition mortgage arrears of Class 2 secured creditor Wells Fargo Bank, N.A. have been paid, said creditor is removed from Class 2. Disbursements made by the Trustee under the previously confirmed plan are authorized." Dckt. 81, Exhibit A.

Debtor's counsel also attached correct supplemental Schedules I and J on the proper forms. Dckt. 81, Exhibit B and C.

DISCUSSION

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

Here, the Trustee's objections are well taken. The Debtor has both improperly classified Wells Fargo as a class 2 claim as well as used the out-dated Schedules I and J forms. However, as the Trustee notes, these are more scrivener's error rather than a substantiative errors.

The supplemental Declaration and exhibits filed by Debtor's counsel addresses the Trustee's objections and corrects the treatment of Wells Fargo Bank, N.A. and also provides the supplemental Schedule I and J on the correct forms.

Because Debtor and Debtor's counsel have corrected the plan, satisfying the Trustee's objections, the Trustee's objections are overruled.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the 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 December 30, 2014 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, correcting the treatment of the Wells Fargo Bank, N.A. to revert from a Class 1 claim to a Class 4 claim after the pre-petition mortgage arrears have been paid, 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.

23. 10-46287-E-13 KENNETH/CHERYLN WINN **MOTION TO RECONSIDER DISMISSAL OF CASE**
SDH-2 **12-31-14 [95]**

No Tentative Ruling: The Motion to Reconsider Order Dismissing Chapter 13 and Request to Vacate Dismissal 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 and Creditors on December 31, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion to Reconsider Order Dismissing Chapter 13 and Request to Vacate Dismissal 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 Reconsider Order Dismissing Chapter 13 and Request to Vacate Dismissal is granted.

Kenneth and Cheryl Winn ("Debtors") filed the instant The Motion to Reconsider Order Dismissing Chapter 13 and Request to Vacate Dismissal on December 31, 2014. Dckt. 95. The Debtors state that the Motion is brought pursuant to 11 U.S.C. § 350 and Fed. R. Civ. P. 59 and 60.

Debtors state that the amended plan which was confirmed on January 18, 2011 (Dckt. 37), contains additional provisions that increased the plan payments from $908.00 a month to $1,100.00 a month in month 33 of the plan (July 2013) due to the completion of the 401(k) loan repayment.

Debtors' 401(k) loan was paid off in July 2013, but the Debtors

forgot about the step-up in payments. The Debtors continued to pay $908.00 a month after July 2013. As a result, the Trustee filed and served a Notice of Default on the Debtors on July 10, 2014.

However, the Debtors had moved and did not file a Notice of Change of Address so did not receive the Notice. The Trustee mailed the notice to the last known address on file with the court. The Debtors did not find out about the default until after the case was dismissed on November 17, 2014 and the Trustee contacted Debtors' counsel about a refund in December 2014. Dckt. 91.

Once the Debtors learned of the dismissal, the Debtors filed a Notice of Change of Address and the instant Motion.

Debtors state that they are "ready, willing and able to make up the difference in the increased plan payments and have been instructed by counsel to start paying $1,100.00 a month starting December 25, 2104." The Debtors state that they are working with the chapter 13 Trustee to determine the amount of the default.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response to the instant Motion on January 20, 2015. Dckt. 101. The Trustee states the following:

1. At the time of the hearing on the Trustee's Motion to Dismiss (Dckt. 86), the case was still delinquent and no response was filed by Debtors' attorney. The motion was granted and an Order Dismissing was entered on November 17, 2014. Dckt. 91. Debtors have made four payments after dismissal in the amounts of $908.00, on November 26, 2014, and three other payments on January 8, 2015 in the amounts of $200.00, $900.00 and $3,258.00.

2. According to Trustee's records, dismissal was proper based on delinquency and no opposition filed. The Debtors' attorney has explained that Debtors forgot about the step up in payments after the 401(k) loan was paid off in July 2013 per the amended plan confirmed January 18, 2011. Debtors' attorney also explained that the Debtors moved and did not file a Change of Address and therefore did not receive the Notice of Default. Once the Debtors realized case was dismiss, they filed a Change of Address and the Motion to Vacate the Dismissal.

3. The plan has not yet completed, but unsecured claims have been paid more than the minimum 25% called for under the confirmed plan.

4. The Trustee has no opposition to the instant Motion.

APPLICABLE LAW

Local Bankruptcy Rule 9014-1(d)(5) states that each motion, opposition and reply shall cite the legal authority relied upon by the filing party. Movant has failed to provide the legal authority for the court to grant the relief sought.

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

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

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

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

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

DISCUSSION

As stated by the Trustee, the reason for the court granting the dismissal of the instant case was due to the Debtors failing to step up plan payments following the completion of the 401(k) loan repayment. The Trustee notes that the Debtors have made payments to the Trustee after the dismissal

in an effort to become current.

The reason for the dismissal appears to have been exasperated by the Debtors failing to file a change of address, therefore causing them not receiving notice of the delinquency arising out of the failure to step-up the plan payments.

As stated in the Debtors' declaration, the Debtors are close to completing the Chapter 13 plan, which allows for a 24.5% distribution to unsecured creditors. As the Debtors state, it was a failure to communicate with the Debtors, Debtors' counsel, and the court that led to the eventual dismissal of the case.

While the Debtors have not specifically argued that a "mistake, inadvertence, surprise, or excusable neglect" justifies the vacating the order dismissing the Chapter 13 case, the court reads the failure to file a Notice of Change of Address and failure to step-up the plan payments as alleged "inadvertence" and "excusable neglect."

However, the Debtors are not appearing in pro se, but are represented by counsel. Though the Debtors assert that they did not receive the notice of default, their counsel did. No testimony has been presented as to what Debtors' counsel did when he received notice of the Notice of Default. No testimony has been provided as to whether the Debtors moved and failed to tell their attorney, who is being paid fees to continue to represent the Debtors in this bankruptcy case. No effort was made to respond to the Notice, notify the Trustee and court that the attorneys' clients were "Missing in Action" but payments were continuing to be sent in, and afford counsel the opportunity to track down his clients. Counsel and the Debtors just allowed the case to be dismissed.

The court does acknowledge that the failure to vacate the dismissal will cause significant prejudice to the Debtors. The Debtors would lose the discharge of the general unsecured claims after having endured almost five years of performing a bankruptcy plan.

Furthermore, Federal Rule of Civil Procedure 60(b)(6) provides that the court may vacate an order "for **any other reason** which justifies relief." [Emphasis added.] Under these facts, the "reason" is the Debtors' substantial performance under the plan and substantial payments made to the Trustee.

Such "reason" is conditioned on the Debtors reimbursing the Chapter 13 Trustee for the wasted legal time and expense in addressing the order dismissing the case (not for filing the motion to dismiss) and the present motion to vacate the dismissal. This is consistent with how the court has addressed a debtor's failure to oppose a motion to dismiss a Chapter 13 case and then seek to vacate the dismissal. The court has previously, and continues to do so in this case, concludes that a $250.00 an hour fee for Trustee's counsel is reasonable (and actually reflects a discounted rate for such experienced counsel). For this case, the court allocates one hour of counsel time relating to the dismissal order, one hour for considering the motion to vacate the dismissal, and one hour for the hearing on this motion. Thus, the Debtors' failure to oppose the motion to dismiss and seek having that order vacated has cost the Chapter 13 Trustee at least $750.00 in legal

expenses.

In having to address the dismissal of the case and the present Motion, in addition to the waste of court resources caused by the missing Debtors, the Trustee has incurred otherwise unnecessary legal fees. Applying a discounted rate of $250.00 an hour, and projecting three hours of time for this motion and one hour of time after the time to respond to the Notice of Default expired, the Debtors neglect has cost the Chapter 13 Trustee $1,000.00 in legal fees.

The vacating of this order is conditioned on the [Debtors/Debtors' Counsel] reimbursing the Chapter 13 Trustee $1,000.00 for the otherwise unnecessary legal expenses cause by the failure to oppose the motion to dismiss and filing this Motion to Vacate. The payment of the $1,000.00 in expense reimbursement is required in addition to all payments required under the confirmed Chapter 13 Plan, and no order granting the Debtors a discharge will be entered until the $1,000.00 in reimbursement of the attorneys' fee expense has been paid to the Trustee by [Debtors/Debtors' Counsel].

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 Set Aside Dismissal of Case filed by 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 granted and the order of the court dismissing the case filed on November 17, 2014 (Dckt. 91) is vacated.
>
> **IT IS FURTHER ORDERED** that [Debtors/Debtors' Counsel], shall pay $1,000.00 to the Chapter 13 Trustee to reimburse the Trustee for legal expenses incurred upon the court entering the order dismissing this case and addressing Debtors' motion to vacate the dismissal. No discharge shall be entered for the Debtors, and each of them, until the $1,000.00 to reimburse the Chapter 13 Trustee for these legal expenses has been paid in full.

24. 12-27387-E-13 ERROL/MELANI LAYTON MOTION TO CONFIRM PLAN
MET-6 12-21-14 [133]

Final Ruling: No appearance at the February 3, 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 (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 21, 2014. By the court's calculation, 44 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 creditors.

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on January 20, 2015. Dckt. 143. However, on January 21, 2015, the Trustee filed a Notice of Withdrawal of the Objection stating that it was made in error and that the Trustee does not oppose the proposed plan. Dckt. 146.

Therefore, 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 December 21, 2014 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.

25. 14-30389-E-13 MELISSA JONES
DPC-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
11-24-14 [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 - Final Hearing.

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 November 24, 2014. By the court's calculation, 50 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 sustain the Objection.

Trustee opposes confirmation of the Plan on the basis that:

1.The Plan is not the Debtor's best effort, 11 U.S.C. § 1325(b). The Debtor is under the median income and proposes plan payments of $125.00 for 48 months with a 1% dividend to unsecured creditors, which totals $510.00. The Debtor provided the Trustee with her 2013 income tax return, which reflected a refund in the amount of $6,124.00. The Debtor has failed to propose to pay this into the Plan for the benefit of her creditors. The Debtor has not proposed to pay any future income tax refunds into the Plan.

The Debtor list an expense of $332.98 per month on schedule J for auto insurance. This expense does not appear reasonably necessary for the maintenance and support of the Debtor or the Debtor's dependants. The Debtor has the following automobiles listed on Schedule B:

1997 Honda Civic (Daughter's Car)
1999 Ford Expedition (Barely Driveable)
2004 Mercedes E500
2005 Honda Civic (poor condition)

The Debtor admitted at the first Meeting of Creditors that she has her boyfriend on her auto insurance, so that he can drive her car.

2.The Plan fails the Chapter 7 Liquidation analysis. It appears that the Plan fails the chapter 7 liquidation analysis, under 11 U.S.C. § 1325(a)(4). The Debtor admitted at First Meeting of Creditors held on November 20, 2014 that she created the "Melissa Jones Living Trust" two months prior to filing this bankruptcy case and all assets listed in the Petition are held in the Trust. The Debtor has listed the Trust on Schedule B with no value, stating that all of the assets are listed on other parts of Schedule B. It does not appear that the Debtor is entitled to any of the exemptions listed on Schedule C as the assets are held in the Debtor's trust, therefore the non-exempt equity is $108,776.00 and the Debtor is proposing a 0% dividend to unsecured creditors.

3.The Debtor cannot make the payments, 11 U.S.C. § 1325(a)(6). The Debtor lists income of $250.00 on Schedule I from friends and family, however the Debtor has failed to provide a Declaration regarding the willingness and ability of family and friends to contribute this monthly income.

DEBTOR'S RESPONSE

The Debtor filed a reply to the Trustee's objection on December 30, 2014. Dckt. 22. The Debtor responds in the order of the Trustee's objections as such:

The Debtor received a tax refund in 2013 of $6,124.00 and the Trustee objected because the Debtor failed to "propose to pay any future income tax refunds into the Plan."

The Trustee fails to consider the source of the "refunds" which has been provided.

A review of the 2013 tax return reveals that $15,965.00, include $4,738.00 in paid income taxes, $9,677.00 in form 1098 interest, and $1,550.00 in charity, for a total of $15,965.00, deduction against a $45,936.00 income for the Debtor and her dependant son.

The Debtor receives a deduction for the interest the Debtor receives on the forms: #8396 ($2,689.00) and #8813 ($1,000.00). However, after allowing for the standard exemptions of $7,800.00, the Debtor's taxable income is only $22,171.00, and a tax of $2,689.00, and which $5,124.00 was withheld, or $2,424, or $202.92 per month.

In this case, the Debtor and her son have yearly needs, i.e. school year demands, unexpected medical, car registration, cost of tax return preparations which readily account for the tax refunds which the Debtor historically receives.

Debtor's car insurance is $332.98, for four cars and which includes an additional driver, which could be apportioned to approximately $120.00 per month.

As such, the Debtor has an additional $120.00 per month disposable income which could be remedied in the Order Confirming

The reality of this case reflects that the Debtor has an interest in $8,776.00 in personal assets and $100,000.00 in real property.

Whether the "trust" was perfected or even created properly by the Debtor, and whether the "res" includes the home or is merely a probate living will for medical purposes has not been established.

Debtor requests that the Objection be denied and that the Plan be continued for thirty days for a determination.

JANUARY 13, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on February 3, 2015. Dckt. 32.

DISCUSSION

This Debtor appears to have several serious issues to address, which go directly to her credibility and ability to prosecute this Chapter 13 case in good faith. Debtor fails to list any transfers in response to Question 10 on the Statement of Financial Affairs. Dckt. 1 at 43. If the transfers were made and the property is in the Trust, then that needs to be accurately disclosed. It cannot be, "there is a trust, no there's not a trust, guess where the assets are today."

When the Debtor filed the case she knew that her expenses included $120.00 insurance payment for her boyfriend. That was not disclosed, and some creditors may argue that it was intentionally hidden to defraud creditors and divert money to the boyfriend. The question then arises whether the Debtor is providing a vehicle to her boyfriend at the creditor's expense.

Additionally, while the Debtor's attorney argues the "facts" stated above, the Debtor has failed, or refuses, to provide such testimony under penalty of perjury. This failure causes further questions to arise concerning the credibility of the Debtor and any statements she may seek to present to the court.

To date, the Debtor has not filed any supplemental pleadings to address the Trustee's concerns. The Trustee's issues remain unanswered and are sufficient grounds to sustain the objection.

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.

26. 14-30389-E-13 MELISSA JONES **CONTINUED OBJECTION TO DEBTOR'S**
DPC-2 **CLAIM OF EXEMPTIONS**
11-24-14 [18]

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, and Debtor's Attorney on November 24, 2014. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Objection to Debtor's Claim of 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 Objection to Debtor's Claim of Exemptions is sustained and the exemptions are disallowed in their entirety as to the "Melissa Jones Living Trust".

David Cusick, the Chapter 13 Trustee, filed the instate Objection to Debtor's Claim of Exemptions on November 24, 2014. Dckt. 18. The Trustee objects to Melissa Jones' ("Debtor") exemptions on the following grounds:

1.The Debtor is not entitled to the exemptions claimed on Schedule C. The Debtor is not entitled to any of the exemptions claimed on Schedule C as the Debtor admitted at First Meeting of Creditors held on November 20, 2014 that she created the "Melissa Jones Living Trust" two months prior to filing this bankruptcy case and all assets listed in the Petition are held in the Trust.

2.The Debtor has improperly exempted the Trust on Schedule C. The debtor lists the "Melissa Jones Living Trust- setup intended for probate purposes; all assets listed in petition" on Schedule C and exempts 75% of $0.00 under the Code of Civil Procedure § 704.070. This Code section

provides an exemption for paid earning, which the Debtor has failed to provide any evidence that the income from her employment as a project analyst for the State of California is listed as a trust asset.

DEBTOR'S REPLY

Debtor filed a reply to the Trustee's Objection on December 30, 2014. Dckt. 24. The Debtor requests a continuance of the hearing for 30 days in order to provide the Trustee with the "Melissa Jones Living Trust" documentation and evidence that it was properly created.

JANUARY 13, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on February 3, 2015 to be heard in conjunction with the Trustee's Objection to Confirmation. Dckt. 33. The court ordered that the Debtor shall file supplemental pleadings on or before January 20, 2015. Any response or objection was ordered to be filed on or before January 27, 2015.

TRUSTEE'S SUPPLEMENTAL RESPONSE

The Trustee filed a supplemental response on January 27, 2015. Dckt. 34. The Trustee states that the Debtor has failed to file supplemental pleadings by January 20, 2015 as ordered. The Trustee states that the instant Objection and the Objection to Exemptions remain unresolved.

On January 29, 2015, the Chapter 13 Trustee filed a further Supplemental Response. Dckt. 38. This was to address Amended Schedules B and C filed by Debtor on January 27, 2015. Dckt. 37. The Trustee addresses to the court's attention,

A. Amended Schedule B has now added all of the assets in the Trust as assets of the bankruptcy estate.

B. This includes $10,000.00 "cash" not listed on Original Schedule B.

C. Debtor has offered no testimony or other evidence that this information is accurate (other than signing the Amended Cover Sheet under penalty of perjury) or explanation as to why these assets, including $10,000.00 cash, were not previously disclosed.

D. On Amended Schedule C Debtor exempts $8,800.00 of the newly listed assets, leaving $12,401.00 of the cash and other assets not being exempt.

APPLICABLE LAW

California Code of Civil Procedure § 704.070 states:

Paid Earnings

(a) As used in this section:

(1) "Earnings withholding order" means an earnings withholding order under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law).

(2) "Paid earnings" means earnings as defined in Section 706.011 that were paid to the employee during the 30-day period ending on the date of the levy. For the purposes of this paragraph, where earnings that have been paid to the employee are sought to be subjected to the enforcement of a money judgment other than by a levy, the date of levy is deemed to be the date the earnings were otherwise subjected to the enforcement of the judgment.

(3) "Earnings assignment order for support" means an earnings assignment order for support as defined in Section 706.011.

(b) Paid earnings that can be traced into deposit accounts or in the form of cash or its equivalent as provided in Section 703.080 are exempt in the following amounts:

(1) All of the paid earnings are exempt if prior to payment to the employee they were subject to an earnings withholding order or an earnings assignment order for support.

(2) Seventy-five percent of the paid earnings that are levied upon or otherwise sought to be subjected to the enforcement of a money judgment are exempt if prior to payment to the employee they were not subject to an earnings withholding order or an earnings assignment order for support.

DISCUSSION

The Trustee's objections are well-taken. The Debtor has not provided any supplemental pleadings as to the "Melissa Jones Living Trust." As the Trustee highlighted, the Debtor is attempting to claim an exemption under California Code of Civil Procedure § 704.070. However, the Debtor does not provide any evidence or information that the "Melissa Jones Living Trust" does, in fact, qualify for this exemption. While the Debtor promised to provide documentation as to the legitimacy of the claim of exemption, the Debtor failed to meet the court-ordered deadline to provide that evidence.

With the information provided to the court, the court finds that the Debtor improperly claimed an exemption under California Code of Civil Procedure § 704.070. Therefore, the Objection is sustained and the claimed exemption of the "Melissa Jones Living Trust" is disallowed in its entirety.

Debtor has filed an Amended Schedule C, rather than responding to the Trustee and court with respect to the matter before the court. While

the court would not expect improper conduct from Debtor's counsel, some other attorneys and pro se parties could use the "amended schedules" ploy as a device to defraud the court and wear down the Chapter 13 Trustee. Having chosen to bollix up the claims exemption process by filing amendments while there are ongoing contested matters before the court concerning the claimed exemptions, the court extends the deadline for filing objections to the exemptions claimed on Amended Schedule C to, and including, March 31, 2013.

Further, the court orders the Debtor to turn over the $10,000.00 cash which is property of the Estate to the Trustee, who shall hold said monies pending further order of the court. This serves several purposes. First, as the fiduciary of the estate, it is not prudent or consistent with a fiduciary to be holding $10,000.00 cash of estate assets. The Chapter 13 Trustee can safely hold the money in the manner consistent with that of a fiduciary. Second, this Debtor has not been forthcoming about the existence of the assets which she had put into a trust or that she was holding $10,000.00 cash. While, with the guidance of her counsel, Debtor may be able to navigate this case successfully, the lack of candor causes the court concern that the $10,000.00 may "disappear" if the case does not go the Debtor's way.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Debtor's Claim of Exemptions filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained and the claimed exemption of the "Melissa Jones Living Trust" is disallowed in its entirety.
>
> **IT IS FURTHER ORDERED** that the deadline for filing objections to any and all of the exemptions claimed in Amended Schedule C (Dckt. 37) is extended to March 31, 2015, for the all parties in interest.
>
> **IT IS FURTHER ORDERED** that on or before noon on February 6, 2015, Melissa Hoang Jones, the Debtor, shall deliver the $10,000.00 cash listed on Amended Schedule B, which may be delivered in the form of a cashier's check or certified funds, to the Office of David Cusick, the Chapter 13 Trustee.
>
> **IT IS FURTHER ORDERED** that the Chapter 13 Trustee shall hold the $10,000.00 in monies delivered by the Debtor pending further order of this court.

27. 11-26293-E-13 JOHN/MARY CROTHERS **MOTION TO VALUE COLLATERAL OF**
SDB-2 **BANK OF AMERICA, N.A.**
1-5-15 [39]

Final Ruling: No appearance at the February 3, 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, creditors, parties requesting special notice, and Office of the United States Trustee on January 6, 2015. By the court's calculation, 28 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 Bank of America, National Association successor by merger to BAC Home Loan Servicing, L.P. ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by John and Mary Crothers ("Debtor") to value the secured claim of Bank of America, National Association successor by merger to BAC Home Loan Servicing, L.P. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 1506 El Prado Lane, Suisun City, California ("Property"). Debtor seeks to value the Property at a fair market value of $159,000.00 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.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $242,274.66. Creditor's second deed of trust secures a claim with a balance of approximately $74,073.31. 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 John and Mary Crothers ("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 Bank of America, National Association successor by merger to BAC Home Loan Servicing, L.P. secured by a second in priority deed of trust recorded against the real property commonly known as 1506 El Prado Lane, Suisun City, 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 $159,000.00 and is encumbered by senior liens securing claims in the amount of $242,274.66, which exceeds the value of the Property which is subject to Creditor's lien.

28. 13-24993-E-13 DENNIS/SANDRA CUVA
PGM-5

CONTINUED MOTION TO MODIFY PLAN
11-7-14 [76]

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 November 7, 2014. 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.

Dennis and Sandra Cuva ("Debtors") filed the Instant Motion to Modify Chapter 13 Plan on November 7, 2014. Dckt. 76.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 2, 2014. Dckt. 85. The Trustee objects on the following grounds:

1.The Debtors are delinquent $2,700.00 under the proposed plan. The plan states: monthly plan payments of "2,700.00," for the duration of 60 months. Dckt. 80. The case was filed on April 12, 2013, and 19 payments have come due under the plan; payments totaling $51,300.00 have become due under

the proposed modified plan. The debtor has paid the Trustee $48,600.00 with the last payment of $2,700.00 posted October 27, 2014.

2.The Trustee is uncertain if Debtors can afford monthly plan payment. There is no current statement of income and statement of expenses on file. The Debtors last Supplemental Schedules I & J were filed on July 12, 2013. Dckt. 45, pgs 4-6). The Debtors' income appears to be based on future work projects and self employment taxes are not reflected on the expense statement. Additionally, the Debtors' Schedule J reflects a minimal amount of $5,.00 for home maintenance and $5.55 for medical and dental expenses. The Trustee questions if plan payment is affordable if higher expenses occurred during the life of the Chapter 13 plan.

3.The Motion to Confirm Modified Plan may not comply with the requirements of Fed. R. Bankr. P. 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The Trustee believes the Debtor should have included information such as: a detailed explanation as to why the Debtors thought their confirmed plan could pay unsecured creditors 100% and if the reason is based on the advice from Debtors' counsel, an explanation from Debtors' counsel as to what steps he has taken to make certain that this error will not continue to occur.

DEBTORS' REPLY

The Debtors filed a reply to the Trustee's objection on December 9, 2014. Dckt. 88. The Debtors reply as follows:

1.The Debtors are current.

2.The Debtors' counsel requests that further time be allowed for the Debtors to bring evidence of the ability to make said payments absent the proof "being in the pudding" as the Debtor has had physical limitations related to the time of healing.

3.They had received a Chapter 7 discharge in case no. 11-38896, which included the same creditors and thus had no new unsecured creditors. The Debtors did not include claim #4 and 5, which were pre-chapter 7 claims, as were all the Debtors' claims because no new debt was accumulated between this case and the Chapter 7 discharge. As such the Debtors' intent was to propose a plan that was not merely a perfunctory Chapter 13 plan as the Debtors intended to pay the unsecured creditors to the best of their ability.

The curing of the arrearage and saving the family residence, and payment of several pre-petition claims represent a real, substantial plan and financial reorganization for these Debtors. At the present time, the ability to strip a lien in a Chapter 7 is pending and could resolve and clarify the steps needed for counsel to successfully assist debtors in "stripping" undersecured claims without the need to resort to a Chapter "20."

DECEMBER 16, 2014 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on February 3, 2015. Dckt. 92. The court ordered that Debtor shall file

supplemental pleadings and evidence on or before January 16, 2015. Any responses or objections was ordered to be filed on or before January 20, 2015.

DEBTOR'S SUPPLEMENTAL REPLY

Debtor filed a supplemental reply on January 20, 2015. Dckt. 103. Debtor responded as follows:

1.The Debtor is still current and seeking a loan modification.

2.The Debtor have submitted updates on the sources of their income.

3.The Debtor has submitted a declaration in support of the motion.

TRUSTEE'S RESPONSE

The Trustee filed a response to the Motion on January 20, 2015. Dckt. 100. The Trustee responds as follows:

1.The Debtor is now current under the proposed modified plan.

2.The Debtor has not filed a current Schedules I and J. The Trustee is not confident if Debtor will be able to afford the plan payments.

DEBTOR'S SUPPLEMENTAL PLEADINGS

On January 27, 2015, the Debtor filed supplemental Schedule I and J as well as a supplemental declaration. The supplemental Schedule I and J list a disposable income of 2,500. Dckt. 106.

Debtor's supplemental declaration states that he had hip surgery in 2012 which caused him to reduce the amount his work load. Debtor states that he is entitled to work and also collect Social Security income. He states that he and his non-filing spouse have learned to live on less while still pursue a loan modification

DISCUSSION

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

While the Debtor is current under the proposed modified plan, the Debtor's supplemental Schedules I and J show that the Debtor's are short $200.00 in their disposable income for what the proposed plan payments calls for. Supplemental Schedule J states that the monthly net income is $2,500.00. Under the proposed plan, the Debtor was to make monthly payments of $2,700.00. Thus, the Debtor does not appear to be able to make the plan payments.

Furthermore, the Debtor states that they are attempting to get a loan modification which appears to suggest that the proposed plan is contingent on getting this loan modification. The fact that the Debtor is current under the terms is promising, but without a Motion to Approve Loan Modification on file, the court is concerned if the Debtor can actually

perform under the terms of the proposed plan.

This bankruptcy case was filed in April 2013. It is now almost two years later. Debtors confirmed a Plan in September 2013, which they now show they cannot afford to pay. While the confirmed plan provides for the Debtor to make adequate protection payments and diligently prosecute a loan modification, no loan modification has been presented to the court.

Debtor has not shown that this plan can be confirmed. Debtor has not sought permission to enter into either a trial or final loan modification.

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.

29. 13-24993-E-13 DENNIS/SANDRA CUVA **CONTINUED MOTION TO DISMISS CASE**
DPC-1 **10-15-14 [69]**

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 Debtors, Debtors' Attorney, and Office of the United States Trustee on October 15, 2014. 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 dismiss the case.

David Cusick, the Chapter 13 Trustee, filed the Motion to Dismiss on October 15, 2014. Dckt. 69. The Trustee asserts that Dennis and Sandra Cuva ("Debtors") are in material default pursuant to section 5.03 of their plan. This section provides that the plan must complete in a period not to exceed 60 months. The Trustee's calculations show that the plan will complete in 278 months as opposed to the 60 months proposed.

Debtors' Plan confirmed on September 17, 2013 proposes to pay unsecured creditors 100% of their claims. Debtors' plan estimated that unsecured claims totaled $11,285.62. This amount did not include the under-collateralized portion of secured claims in Class 2C. Unsecured filed claims total $197,747.87. Debtors' monthly plan payment is $2,700.00. After trustee's fees and Debtors' monthly contract installment are allocated, $800.60 remains available to pay unsecured creditors on a monthly basis. The remaining approximate amounts to be paid total $208,629.00, including secured principal and interest and unsecured claims. That total, divided by $800.60 yields 261 months remaining to complete the plan. Debtors have completed 17 months of their plan to date, bringing the plan's overall duration to 278 months.

DEBTOR'S RESPONSE

Debtors state that they received a prior discharge of the unsecured portions of secured claims in Case No. 11-38896. While the claim has been filed, the payment of the unsecured portion should be limited to the mathematical calculation allowed by payments disbursed by the Trustee. Debtors request that the court allow the Debtors 30 days to file, set, and serve a new plan that decreases the percentage paid to unsecured creditors.

Debtors assert that a 100% plan is not otherwise required. Debtors do not have any non-exempt assets, nor were Debtors subject to a 100% plan based on the B22C form. The creditors holding unsecured claim numbers 4 and 5 have been contacted regarding the fact that their claims had been discharged in the prior bankruptcy and both creditors have agreed to withdraw claims.

NOVEMBER 12, 2014 HEARING

At the November 12, 2014 hearing, the court continued the hearing to 3:00 p.m. on December 16, 2014, to be hear in conjunction with the Motion to Confirm the proposed First Modified Chapter 13 Plan.

DECEMBER 16, 2014 HEARING

At the December 16, 2014 hearing, the court continued the hearing to 3:00 p.m. on February 3, 2015, to be hear in conjunction with the Motion to Confirm the proposed First Modified Chapter 13 Plan.

JANUARY 27, 2015 SUPPLEMENTAL SCHEDULES

On January 27, 2015, Debtors filed Supplemental Schedules I and J. Dckt. 106. The Debtors report that they now have $3,639.29 in Combined Monthly Income (after withholding for taxes, Social Security, and insurance). When this case was filed in April 2013, Debtors reported that they had $6,908.54 in Combined Monthly Income. Schedule I, Dckt. 1 at 32.

DISCUSSION

On November 7, 2014, Debtor filed a First Modified Plan. Dckt. 80. The basic terms of the proposed Plan are:

A. Debtor shall make $2,700.00 monthly plan payments for sixty months.

B. The Claim secured by Debtor's residence is the subject to loan modification negotiations and provided in the Additional Provisions.

C. The Class 2 Secured Claims provide for an aggregate $525.00 monthly dividend.

D. For Class 7 General Unsecured Claims, Debtor provides for a 3% dividend on a total of $186,544.16 in such claims.

The Motion to Confirm the proposed First Modified Chapter 13 Plan may not comply with the requirement that it state with particularity (Fed. R. Bankr. P. 9013) the grounds for confirming a modified plan as required by 11 U.S.C. §§ 1329, 1325(a), and 1322. Such grounds stated in the Motion are:

A. Debtor filed bankruptcy.

B. Debtor confirmed a plan on September 17, 2013.

C. Debtor cannot complete the confirmed plan due to unsecured claims being greater than projected.

D. Debtor has paid $48,600.00 into the confirmed plan to date.

E. Debtor will "resume" making $2,700.00 monthly plan payments in November 2014 for twenty-four months.

F. The Plan term is sixty months.

G. Debtor has paid the required fees, charges, or other required amounts.

H. The First Modified Plan has been filed in good faith.

I. The Modification modifies the rights of the holder of the Class 1 Claim, providing for adequate protection payments while Debtor pursues a loan modification.

J. The modification reduces the unsecured dividend from 100% to 3%.

Dckt. 76.

On its face, the Motion indicates that there has been a default in the plan payments, with them to "resume" in November 2014. It is not stated that the proposed First Modified Plan meets the Chapter 7 liquidation standard.

The evidence in support of the Motion may also be insufficient. Debtor provides testimony that modification is necessary because of several "changes/problems" they have encountered.. These factors "include," but would not appear to be limited to, the filed general unsecured claims being greater than Debtor projected at the commencement of the case. Declaration, Dckt. 78. Debtor offers no testimony as to how they so grossly understated the unsecured claims to be only $11,285.62 (Chapter 13 Plan, Dckt. 51) and the actual $186,544.16 (1,653% increase).

This case was filed on April 12, 2013, and Debtor now seeks to confirm a First Modified Plan nineteen months later. No current financial information was provided by Debtor. On July 12, 2013, Debtor filed Supplemental Schedules I and J. Dckt. 45. At that time Debtor stated monthly net income of $4,448.54 (which included projected commissions from future work installing solar panels).

No provision is made on Amended Schedule J for any taxes arising from Debtor income generated from solar installation contracts – just income of $1,840.00 a month. No provision is made for payment of self employment taxes from this business.

In reviewing Amended Schedule J the court notes that Debtor provides only $5.00 a month for home maintenance, only $5.55 for medical and dental expenses, and $0.00 for business expenses. It appears that the expenses on Amended Schedule J have been "made as instructed" so as to achieve a preconceived $2,700.00 monthly net income so as to "support" confirmation of the Chapter 13 Plan in 2013. (This is commonly called a "Liar Declaration" by the court.)

It may well be problematic whether Debtor can confirm the Modified Plan. However, the court affords Debtor, the Chapter 13 Trustee, and creditors to address such issues at confirmation.

FEBRUARY 3, 2015 HEARING

At the February 3, 2015 hearing, the court denied the Motion to Modify the Plan, namely due to no supplemental Schedules I and J being filed to allow the court to determine if the plan is feasible. The Debtor admits that they are seeking a loan modification, which suggests that the plan may be contingent on such modification. To date, no Motion to Approve Loan Modification has been filed nor have any supplemental pleadings been filed in connection with this instant Motion.

While the Debtors have enjoyed the protection of this bankruptcy case, they cannot show that they can prosecute the bankruptcy case.

The Motion is granted and the bankruptcy 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.

30. 14-31993-E-13 DAVID/ROWENA ABBOTT **MOTION TO VALUE COLLATERAL OF**
SJS-1 **STERLING JEWELERS**
1-15-15 [21]

Tentative Ruling: The Motion to Value secured 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 Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 15, 2015. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

The Motion to Value secured 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. At the hearing ----------.

The Motion to Value is denied.

David Bradly Abbott and Rowena Abbott ("Debtors") filed the instant motion to value the secured claim of Sterling Jewelers ("Creditor"),

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. David Bradly Aboott and Rowena Abbot (hereinafter "Debtors") hereby move this Court to value the collateral of Sterling Jewelers at $100.00, limit Sterling Jewelers at $100.00,

> limit Sterling Jewelers' secured claim to $100.00 and that any amount in excess be treated as a general unsecured claim, pursuant to 11 U.S.C. §§ 506 and 1322(b)(2) and 9014 which determination shall become part of the Debtors' confirmed Chapter 13 Plan.

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states the request sought without stating the grounds for such release.. This is not sufficient.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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

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

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

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

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

The court also notes that in failing to comply with Rule 9013, one of the key missing grounds is whether the valuation of the secured claim is barred by the "hanging paragraph" following 11 U.S.C. § 1325(a)(9), which provides [emphasis added],

> "For purposes of paragraph (5), **section 506 shall not apply to a claim** described in that paragraph if the **creditor has a purchase money security interest securing the debt that is the subject of the claim**, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49 [49 USCS § 30102]) acquired for the personal use of the debtor, **or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing."**

On Schedule D the Debtors state under penalty of perjury that account with this Creditor was opened on January 1, 2014. This bankruptcy case was filed on December 10, 2014 – less than one year after the account was opened. Clearly, any of the debt on that account was incurred within the one-year period preceding the commencement of this case. This precludes the valuation of the claim secured by the personal property. It appears that this "incomplete pleading" is part of a scheme to mislead the court into issuing an order not permitted under applicable law. This calls into question the Debtors' good faith in filing this case and the attempt to prosecute any plan in this case.

Therefore, due to Debtors failure to plead with particularity, the Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by David Bradley Abbot and Rowena Abbott ("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 denied.