

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Christopher M. Klein**

Chief Bankruptcy Judge

Sacramento, California

**February 4, 2014 at 2:00 p.m.**

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1. [13-22801](#)-C-13 REX REYES MOTION TO MODIFY PLAN  
JMC-3 Joseph M. Canning 12-19-13 [[59](#)]

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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, all creditors, parties requesting special notice, and Office of the United States Trustee on December 19, 2013. 35 days' notice is required. That requirement was met.

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

**The Motion to Confirm the Modified Plan is granted.** No appearance required. The court makes the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

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

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

**February 4, 2014 at 2:00 p.m.**

**IT IS ORDERED** that the Motion is granted, Debtors' Chapter 13 Plan filed on December 19, 2013 is confirmed, and counsel for the Debtors 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.

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2. [13-34507](#)-C-13 JOHN FITZPATRICK  
NLE-1 Michael David Croddy  
Thru #3

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-7-14 [[44](#)]

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Local Rule 9014-1(f)(2) Motion. No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 7, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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 Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

(1.) The Debtor has improperly classified mortgage with Seterus, Inc. in Class 4 of the Plan. The Debtor indicated at his 341 Meeting that he is delinquent on his mortgage payments. Based on the plain language of the plan, all delinquent secured claims that mature after the completion of this plan are classified in Class 1. The Debtor's delinquent mortgage should be provided for in Class 1 or in additional provisions.

(2.) The Debtor relies on two pending motions: (1) the Motion to Value Collateral of IRS, CA-1 and (2) the Motion to Avoid Lien of CIT Bank, CA-2. The motions were set for hearing on January 14, 2014 and were continued to February 25, 2014. If the motions are not granted, Debtor cannot afford to make the payments or comply with the plan. 11 U.S.C. §1325(a)(6).

(3.) Monthly disbursement payments normally must be no less than \$15.00 per month. FRBP 3010(b). The Debtor's proposed monthly dividend payment to secured creditor Lake Mission is \$13.00 per month.

(4.) All sums required by the plan have not been paid. 11 U.S.C. §1325(a)(2). The Debtor is \$1,894.00 delinquent in plan payments to the Trustee. The Debtor has paid \$0.00 into the plan to date.

(5.) The Debtor fails to allow for the expense of ongoing payments in Schedule J. The debtor indicated at the 341 Meeting that he has two homeowners associations; Lake mission is paid \$170 per year and Oso Valley is paid \$123 per quarter. However, the Debtor lists the two homeowners associations in Class 2 of the plan. Debtor cannot make the payments or comply with the plan, 11 U.S.C. §1325(a)(6).

**Debtor filed a statement of non-opposition.** (Dkt. 66).

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

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

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

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

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

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3. [13-34507](#)-C-13 JOHN FITZPATRICK OBJECTION TO CONFIRMATION OF  
SHL-3 Michael David Croddy PLAN BY CIT SMALL BUSINESS  
LENDING CORPORATION  
1-10-14 [[55](#)]

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Local Rule 9014-1(f)(2) Motion. No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on January 10, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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:

CIT Small Business Lending Corporation ("Creditor") opposes confirmation of the Plan on the basis that the plan undervalues Debtor's real property located in Mission Viejo, CA. Debtor seeks to value the property at \$369,000.00 and Creditor utilizes Trulia.com to value the property at a minimum of \$610,000.00. Creditor maintains that the Debtor attempts to strip its lien entirely and render it an unsecured creditor under the plan set to receive 0% dividend.

Although Debtor indicates that there are two liens senior to Creditor's lien against the property, Creditor maintains that even after accounting the two senior lien holders of that property, it has a secured claim of at least \$122,500.00 based on the property value of at least \$610,00.00.

Creditor states that Debtor's plan must provide for payments to Creditor on the secured portion of its claim, with interest, over the life of the plan, and maintains that the amount of its secured claim, based on the value of the property, should be no less than \$122,500.00. Based on that amount, and under 11 U.S.C. § 1322(d), Debtor would be required to make monthly payments of more than \$2,000.00 to Creditor for 60 months. However, as proposed by the plan and as indicated in the Debtor's Schedules, Debtor's disposable monthly income is \$1,894.00. Debtor would not be able to make payments under the plan or to comply with the plan after accounting Creditor's claim. Creditor maintains that Debtor's plan fails to propose payments to Creditor on account of its secured claim, rendering the plan

infeasible.

Debtor's plan is not confirmable. As detailed by Creditor, Debtor is attempting to value the secured claim of CIT Bank; however, the Motion to Value the secured claim of CIT is still pending (set for February 25, 2014). The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

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

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

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4. [13-33312](#)-C-13 ROBERT/CHRISTINA QUINLAN CONTINUED AMENDED OBJECTION TO  
TSB-1 Peter G. Macaluso CONFIRMATION OF PLAN BY DAVID  
P. CUSICK  
12-4-13 [[21](#)]

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Local Rule 9014-1(f)(2) Motion. No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Debtor and Debtor's Attorney on November 21, 2013. 14 days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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:

#### **Prior Hearing**

On December 19, 2013, the court heard Trustee's Amended Objection to Confirmation of Debtors' plan. At the hearing, the court continued the matter to February 4, 2014 and ordered that by January 6, 2013, the Trustee was to file supplemental pleadings and further ground for objection. Debtors' opposition was due by January 21, 2014.

The docket reflects that nothing was filed by either the Trustee or the Debtors. Therefore, the court's previous tentative decision will remain unchanged.

#### **Objection to Confirmation**

The Chapter 13 Trustee opposes confirmation of the Plan because, according to Debtors' Schedule I, average monthly income increased by \$1,591.22 while monthly net income only increased by \$65.22. Debtors filed amended Schedules I & J on November 20, 2013 based on Debtor Mr. Quinlin gaining new employment.

At the hearing on this matter, Debtors will need to explain to the court the discrepancy between the increase in average monthly income and the increase in net monthly income.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The

objection is sustained and the Plan is not confirmed.

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

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

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

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

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5. [13-33414](#)-C-13 TINA LESTER  
MRL-2 Mikalah R. Liviakis

MOTION TO CONFIRM PLAN  
12-16-13 [[38](#)]

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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 Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 16, 2013. Forty-two days' notice is required; that requirement was met.

**Tentative Ruling:** 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 Trustee having filed an opposition, the court will address the merits of the motion. 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 tentative decision is to deny the Motion to Confirm the Plan.**

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 Chapter 13 Trustee opposes confirmation of Debtor's plan because it does not reflect Debtor's best efforts, pursuant to 11 U.S.C. § 1325(b). Debtor is below median income and proposing to pay \$95.00 for 36 months with a 1.5% dividend to general unsecured claims.

Debtor may not be proposing all disposable income into the plan. On Schedule J (Dkt. 1), Debtor lists an expense of \$1,469.44 per month for rent or mortgage expense; however, on line 19 of Schedule J, Debtor indicates this is a projected expense. Also, Debtor lists herself as residing at 2771 Hillcrest Drive, Shingle Springs, California and Schedule A indicates that Debtor holds an interest in this property. Until the time Debtor moves, rent is not a necessary expense. The plan payment should be increased by \$1,469.44 to \$1,564.44 per month.

Debtor received a combined total of \$12,798 in tax refunds in 2012. No income is reported on Schedule I from tax refunds. The additional incomes would amount to an additional \$1,066 dividend and used monthly to assist in supporting the household.

Finally, Debtor's plan may not pass the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtor indicated at her 341 meeting that she has an outstanding claim for child support arrears. This asset is not disclosed on Schedule B and is not exempt on Schedule C.

The Plan does not comply with 11 U.S.C. §§ 1322 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.

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6. [13-34719](#)-C-13 MICHELLE GARCIA  
NLE-1 Pro Se

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-7-14 [[18](#)]

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Local Rule 9014-1(f)(2) Motion. No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (pro se) on January 7, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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 Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

(1.) The Debtor's plan payment is insufficient to fund the plan. In Class 1 of the Plan, Debtor lists ongoing mortgage payments to Caliber Home Loan, Inc. in the amount of \$1,500.00. However, Debtor proposes a plan payment of only \$850.00 per month. Additionally, Debtor reports an expense for rent or mortgage on Schedule J at \$2,425.00, which might be an attempt to modify the terms of contractual mortgage payments.

(2.) The Debtor's plan might not comply with applicable provisions of the Bankruptcy Code. 11 U.S.C. §1325(a)(1). The Debtor's plan proposes to pay interest on arrears to Caliber Home Loan, Inc. in Class 1. However, this creditor might not be entitled to interest under 11 U.S.C. §1322(e).

(3.) Debtor provides insufficient monthly dividend to mortgage arrears. Debtor reports mortgage to Caliber Home Loan, Inc. totaling \$92,072 but fails to propose a monthly dividend to be paid toward the claim. In order to pay arrears in 36 months, the monthly dividend must be no less than \$2,557.56.

(4.) Debtor misclassified claims. Debtor lists Caliber Home Loan, Inc. in both Classes 1 and 2, but lists only one secured loan to Caliber Home Loan, Inc. on schedule D. Based on the arrearages reported, it appears that the claim in Class 2 is misclassified and that the claim in Class 1 is properly provided for.

Additionally, Debtor lists County Tax Collector in Class 5 of the plan and is listed as Charles Lomeli County Tax Collector on Schedule E. However, it appears that the claim is for the property tax on Debtor's real property and should be provided for in Class 2 of the plan.

(5.) Debtor does not provide income verification with proof of income for the 60 days preceding filing of their bankruptcy. 11 U.S.C. § 521(e)(2)(A); FRBP 4002(b)(3). This is required 7 days before the date set for the first meeting. 11 U.S.C. §§ 521(e)(2)(A)(i).

(6.) Debtor does not provide a tax transcript or copy of her Federal Income Tax Return for the most recent pre-petition tax year, specifically the 2012 Tax Return or a written statement that no such documentation exists. 11 U.S.C. §§ 521(e)(2)(A); FRBP 4002(b)(3). This is required 7 days before the date set for the first meeting. 11 U.S.C. §§ 521(e)(2)(A)(i).

(7.) All sums required by the plan have not been paid. 11 U.S.C. §1325(a)(2). The Debtor is \$850.00 delinquent in plan payments to the Trustee. The Debtor has paid \$0.00 into the plan to date.

(8.) Debtor's plan is not filed in good faith because she did not report all income. 11 U.S.C. § 1325(a)(3). Debtor is below the medium income and proposes a plan of \$850 per month for 36 months. Debtor indicated in her 341 Meeting that she received \$300 per month in child support. This income is not reported in Schedule I.

(9.) Debtor might not be able to make the payments under the plan or comply with the plan. 11 U.S.C. § 1325(a)(6). The Debtor reports that her household includes herself and 4 children. She lists \$200 for monthly food expense, \$30 for clothing, \$25 for personal care, and \$280 for transportation. She lists \$0 expense for recreation, medical/dental expense, and minimal utilities expenses. It does not appear that the Debtor has sufficient income to support a plan payment and her household.

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

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

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

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

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

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7. [13-34720](#)-C-13 CRYSTAL BAULWIN  
SDB-4 W. Scott de Bie  
Thru #8

MOTION TO VALUE COLLATERAL OF  
WELLS FARGO BANK, N.A.  
12-20-13 [[37](#)]

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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, respondent creditor, and Office of the United States Trustee on December 20, 2013. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Value Collateral 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 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 Value Collateral is granted and creditor's secured claim is determined to be \$0.00.** No appearance required. The court makes the following findings of fact and conclusions of law:

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 7625 Princess Diana Court, Vallejo, California. The Debtor seeks to value the property at a fair market value of \$284,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$542,982.00. Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately \$91,890.06. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The 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 Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 7625 Princess Diana Court, 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 \$284,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

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8. [13-34720](#)-C-13 CRYSTAL BAULWIN  
SDB-5 W. Scott de Bie

MOTION TO VALUE COLLATERAL OF  
ONEWEST BANK, FSB  
12-20-13 [[42](#)]

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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, respondent creditor, and Office of the United States Trustee on December 20, 2013. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Value Collateral 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 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 Value Collateral is granted and creditor's secured claim is determined to be \$0.00.** No appearance required. The court makes the following findings of fact and conclusions of law:

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 7625 Princess Diana Court, Vallejo, California. The Debtor seeks to value the property at a fair market value of \$284,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$542,982.00. The second deed of trust secures a loan with a balance of approximately \$91,890.06. Onewest Bank, FSB's third deed of trust secures a loan with a balance of approximately \$87,917.80. Therefore, the respondent creditor's claim secured by a junior deeds of trust is completely under-collateralized. The 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 Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Onewest Bank, FSB secured by a third deed of trust recorded against the real property commonly known as 7625 Princess Diana Court, 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 \$284,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

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9. [13-34922](#)-C-13 ANGELICA IRWIN  
NLE-1 Jared A. Day

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-7-14 [[19](#)]

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Local Rule 9014-1(f)(2) Motion. No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 7, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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 Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

(1.) The Debtor has not filed tax returns during the 4-year period preceding the filing of the Petition according to the IRS's filed Court Claim #4 on January 2, 2014. The specific years are 2010, 2011, and 2012. 11 U.S.C. §§ 1308 & 1325(a)(9).

(2.) The Debtor cannot make the payments under the plan or comply with the plan. 11 U.S.C. § 1325(a)(6). The IRS filed Court Claim #4 on January 2, 2014 and indicated that the Debtor owes \$10,522.58 in unsecured priority tax, which is not provided for in Debtor's plan.

(3.) The Trustee is unable to determine whether the Debtor can make payments under the plan or comply with the plan. 11 U.S.C. § 1325(a)(6). Debtor's Schedule I, DN #1, page 23 shows a \$350.00 family contribution. However, Debtor has not provided Declarations by the contributors to prove that these contributions are likely to occur. The Statement of Financial Affairs, DN #1, pages 27-28, question 1 and 2 do not show any family contributions, and no income for 2011 or 2012.

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

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

holding that:

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

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

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

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10. [13-32432](#)-C-13 JEFFREY/RACHELLE FILER MOTION TO CONFIRM PLAN  
DAO-3 Dale A. Orthner 12-23-13 [[81](#)]  
**Thru #11**

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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 Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2013. Forty-two days' notice is required; that requirement was met.

**Tentative Ruling:** 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). A creditor having filed an opposition, the court will address the merits of the motion. 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 tentative decision is to set the Motion to Confirm the Plan for an evidentiary hearing on [date] at [time].** 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:

#### **Chapter 13 Trustee**

On January 16, 2013, the Chapter 13 Trustee filed a statement of non-opposition to the Motion to Confirm Debtor's Modified Chapter 13 Plan.

#### **Creditor's Opposition**

Creditor, Schools Financial Credit Union, opposes confirmation of Debtors' modified Chapter 13 plan.

Creditor is the holder of a perfected security interest in a 2006 Honda Odyssey. The original plan listed Creditor's claim in Class 4. The court sustained the Chapter 13 Trustee's Objection to Confirmation at a hearing on November 19, 2013.

On November 18, 2013, Debtors filed a Motion to Value the collateral securing Creditor's claim at \$8,000.00. At the hearing on December 17, 2013, the court set the value of the collateral at \$11,800.

On December 11, 2013, Creditor filed a Motion for Relief, which was scheduled for hearing on January 14, 2014 and continued to February 4, 2014 to be heard with this matter.

On December 23, 2013, Debtors filed their Second Amended Chapter 13 Plan, listing Creditor's claim in Class 2, to be paid the sum of \$11,800 on its secured claim at an interest rate of 5% and monthly dividend of \$222.68. Creditor objects to this treatment and contends that the proposed payment is insufficient to pay the dividend of \$222.68 in equal monthly installments.

If payments are made in accordance with the plan, Creditor will not receive its full dividend until month 31 of the plan and it will not receive adequate protection payments during the first 30 months. 11 U.S.C. §§ 1325(a)(5)(B)(iii)(I) & 1325(a)(5)(B)(iii)(I).

Creditor specifically argues that over the four year period Debtors have owned the vehicle, it has decreased in value, based on Kelley Blue Book, a total of \$10,964, or \$225.60 per month. Creditor attributes this depreciation to the high mileage being driven by Debtors. At the time Debtors purchased the vehicle in 2009, the mileage of 41,684 resulted in an add-on of \$1,300 to the wholesale and retail values (Exh. 1, Dkt. 109). The recently heard Motion to Value claimed current mileage of 130,000 and the Kelley Blue Book for effective dates 09/20/13 through 09/26/13 showed a deduction for \$2,289 for high mileage. Creditor states that Debtors are driving the car in excess of 12,000 miles per year and that if Debtors continue driving at the same rate, the vehicle will have an additional 54,572 miles during the first 30 months of the plan. Furthermore, in Debtors' Joint Declaration in Support of the Motion to Value (Dkt. 38), Debtors state that the vehicle has collision damage to the front bumper and a spider crack in the center of the windshield. Creditor states that the value of \$11,800 reflects a deduction of \$2,556 from the Kelley Blue Book retail value for excess wear and tear. This amounts to \$53.25 per month for the 48 months Debtors have owned the vehicle. Taking into account the average monthly depreciation of \$225.60 plus \$53.25 for the wear and tear, overall monthly depreciation is estimated at \$278.85.

Creditor also contends the plan is not feasible as it does not comply with Section 4.02. The proposed plan payment is less than the total monthly payments. Further, Debtors have provided insufficient information to establish that they have the income necessary to fund the plan. 11 U.S.C. § 1325(a)(6).

Creditor highlights a discrepancy in Debtors' representations concerning their Filer Moving and Storage business entity. At times Debtors have represented that Jeffrey Stephen Filer was self-employed and then the Trustee discovered on the California Secretary of State website an online record for Filer Moving and Storage with Jeff Filer as the agent for service of process. After this revelation, Debtors filed an Amended Schedule B (Dkt. 75) and in response to question 13 they stated "Moving business sole proprietorship, no assets, no employees, no measurable goodwill; just the labor of husband." Creditor takes issue with Debtors' lack of explanation for the discrepancy between the schedules and public records and that Debtors have never filed a profit/loss statement for the corporation.

Creditor argues that the sources of Debtors' income, the amount of income and expenses are unclear. Creditor takes issue with recently filed Amended Schedule J because the itemized expenses do not equal the totals listed on the Profit and Loss Statement that was attached to the Amended Schedule J. Creditor also takes issue with Debtors not listing an expense for taxes. Debtors' Amended Form 22 (Dkt. 74) lists the sum of \$1,500 for taxes at line 30; however, it is unknown what taxes the sum includes. If Debtors are self-employed, they owe income and social security tax. If receipts are paid to the corporation, then the corporation would be paying employment taxes; however the corporation would also still owe its own income tax, which is a minimum of \$800.

Finally, Creditor objects on the basis that there is insufficient evidence to establish that Debtors are authorized to operate a moving

business. Creditor asserts that Debtor is not licensed to operate as a moving company and attached a copy of the denial of a household goods moving permit as Exh. 8 in Dkt. 66. The California Public Utilities Commission website discusses the types of permits necessary for household goods movers and office movers. As Debtors solely move office goods, they must comply with these permitting regulations. Debtors have presented no evidence that the business is properly licensed or that any contractors or subhaulers are properly licensed.

## **Discussion**

The court's decision to set Debtors' Motion to Modify for an evidentiary hearing to make a factual determinations on the issues of adequate protection and for Debtors to present evidence demonstrating they are legally permitted to operate their sole proprietorship moving business.

Section 4.02 of Debtors' plan provides the following, in part:

**4.02. Distribution of plan payment.** Debtor's monthly plan payment must total: (a) Trustee's fees; (b) post-petition payments due on Class 1 claims; (c) the monthly dividend specified in section 2.07 for administrative expenses; and (d) the monthly dividends payable on account of Class 1 arrearage claims, Class 2 claims, and executory contract and unexpired lease arrearage claims.

Here, Debtors' proposed monthly plan payment is \$319.80 for a period of 60 months. Section 2.05 provides that the Trustee shall receive up to 10% of plan payments. The current Trustee fee rate is 5%, that equals \$15.99 in this case. Administrative claims in Section 2.07 are to received \$64.52 per month. In Class 2, there is a PMSI claim due \$63.60 per month and objecting creditor's claim due \$222.68 per month. After accounting for the Trustee fee, administrative payment, and Class 2 PMSI claim, there is \$175.69 remaining to pay Creditor's claim. The plan is short \$46.99 per month to pay a monthly dividend to Creditor.

On its face, Debtors' plan is not feasible and the court understands Creditor's concern that payment of \$175.69 for the first 30 months does not provide adequate protection when the vehicle is allegedly depreciating at a rate of \$278.85 per month. However, the court does not have sufficient evidence to make a determination on the amount of depreciation, which is necessary for the court to approximate a monthly adequate protection payment. The court has no information on Debtors prospective use of the vehicle during the plan and cannot simply assume that mileage will continue to accrue at the current rate when considering the feasibility of plan confirmation.

The court is curious as to Debtors' ability to operate their moving company as a sole proprietorship without proper licensing. As the business is the source of income for Debtors' plan, it is important to ensure this source is reliable. If the company is not properly licensed and suspect to regulatory issues rendering it unprofitable, the Debtors may not have sufficient income to make payments into the plan. Therefore, the court will accept evidence from Debtor on its ability to operate the business and projected income based on past profit/loss accounting at the evidentiary hearing.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and the court's decision is to set the matter for an evidentiary hearing on **[date]** at **[time]**.

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 set for an evidentiary hearing on **[date]** at **[time]**.

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11. [13-32432](#)-C-13 JEFFREY/RACHELLE FILER  
RTD-1 Dale A. Orthner

CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
12-11-13 [[62](#)]

SCHOOLS FINANCIAL CREDIT  
UNION VS.

\*\*\*\*

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on December 11, 2013. 28 days' notice is required. This requirement was met.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor, having filed an opposition, the court will address the merits of the motion. 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 tentative decision is to continue the hearing to [date] at [time].** 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: :

#### **Prior Hearing**

The court heard Creditor's Motion for Relief on January 14, 2014. At that hearing, the court continued the matter to be heard at the same time as Debtor's Motion for Confirmation of Chapter 13 Plan. The court also authorized the Trustee to make monthly disbursement to Creditor for the months of October through December 2013, and going forward as provided for in the pending Second Amended Plan.

At the hearing on February 4, 2014, the court is setting an evidentiary hearing on the second amended plan to determine the issues of adequate protection payments and legality of operating Debtors' moving business. As this current Motion for Relief is dependant, in part, on a determination of what amounts to "adequate protection," the court will continue it to [date] at [time], to be consistent with the evidentiary hearing on the issue.

#### **Motion for Relief from Stay**

Lessor, Schools First Credit Union seeks relief from the automatic stay with respect to an asset identified as a 2006 Honda Odyssey Minivan, VIN # ending in 2490. The moving party has provided the Declaration of Kevin Benner to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Benner Declaration, dated December 10, 2013 states that the Debtor is in default for monthly payments due September 25, 2013, through

December 2013. The September 25, 2013 amount due is \$374.44 and the amount due for October through December 2013 in the full monthly payment of \$381.48 each in the amount of \$381.48. As of November 19, 2013, Debtor is delinquent two (2) pre-petition payments and 2 (two) post-petition payments.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$20,511.76. Pursuant to order of the court (Dkt. 76) the value of the vehicle is set at \$11,800.00.

**Debtor's Opposition** (filed 12/23/13, Dkt. 77)

Debtors oppose the Motion. Following the court's order on the Motion to Value the secured claim of Schools First, Debtors filed and served a Second Amended Chapter 13 Plan and Motion to Confirm. This plan lists Movant as a Class 2 Creditor and proposes increasing the plan payment from the initial \$187.00 per month to \$319.80 per month. The hearing on the Motion to confirm is set for February 4, 2014.

By the end of January 2014, Debtors intend to have paid the difference between the Second Amended Plan and the plan initially filed with the court, to make up for lower payments made in October and November 2013. Debtors have paid the pre-petition arrears on the vehicle and the loan payments owed to Movant are current as of the date of filing the petition, September 24, 2013.

**Chapter 13 Trustee** (filed 12/27/13)

On December 27, 2013, the Chapter 13 Trustee filed a statement of non-opposition to Movant's Motion for Relief.

**Creditor's Response** (filed 01/16/13, Dkt. 90)

Creditor does not agree that it has received adequate protection and does not believe the vehicle is necessary for an effective reorganization or that there is a reasonable likelihood that Debtors will be able to reorganize.

Creditor argues the following:

1. There is no equity in the vehicle. Creditors proof of claim, filed October 11, 2013 and amended December 6, 2013, claims a debt due of \$20,570.57. At a hearing on December 17, 2013, the court determining the value of the collateral to be \$11,800.00.
2. The value of the vehicle is rapidly depreciating. Debtor averages 18,428 miles per year driving the vehicle.
3. Debtors originally listed Creditors claim in Class 4 of the plan, but did not make any contract payments. Debtor later filed a second Amended Plan, but has yet to make any post-petition adequate protection payments. Debtors intend to commence making payments afer the plan confirmation hearing in February 14.
4. The proposed plan payment is not sufficient to pay the

**February 4, 2014 at 2:00 p.m.**

**Page 24 of 61**

proposed dividend of \$222.68 per month to Creditor. After accounting for Trustee fees, administrative fees, and a Class to PMSI, there are insufficient funds to meet the payment due to Creditor. The terms of the second amended plan mean that Creditor will not receive the sum of \$222.68 until the 31<sup>st</sup> month of the plan, after the PMSI claim and administrative claims are paid.

5. Debtors have not adequately protected the interest of Creditor because registration fees and smog inspection are due in addition to regular plan payments and the arrears on the plan payment. Debtors have not explained why these sums were not previously paid and how they will be able to make payment in January.
6. The vehicle is not necessary for reorganization because it is not used to generate income. Creditor argues that Debtors should use public transportation and consider purchasing a vehicle that receives better gas mileage.
7. Debtors are not licensed to operate as a moving company and Debtors have not filed a detailed list of their business income and expenses. Parties in interest are unable to determine whether the plan is feasible.

#### **Discussion**

Creditor seeks relief from the automatic stay under 11 U.S.C. §§ 361(d)(1) and (d)(2). Pursuant to § 362(d)(1), a creditor may be granted relief from stay for cause, including lack of adequate protection. The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Since the filing of Creditors Motion for Relief, Debtors have proposed a Second Amended Plan and state that they have cured pre-petition amounts owed, bringing their payments due to Creditor current to the petition date. Creditors main argument concerning adequate protection are better presented at the hearing on the Motion to Confirm the Second Amended Plan, as they are objection to plan terms.

In their Declaration (Dkt. 78), Debtors state that they have made the October and November plan payments and recently sent funds to the Trustee for the December payment in the amount due under the Second Amended Plan. Debtors declare that they have maintained the vehicle in usable form and continue to use the vehicle for themselves and their children, as it is their only means of transportation. Debtors invested \$1,200 in repairs to the vehicle over the last four months, including new tires, brake repair, oil change, battery replacement, and new spark plugs. Debtors further declare they have maintained the required registration on the vehicle and will renew the registration prior to expiration.

The court recognizes that Debtors are taking adequate steps to practically protect the vehicle, itself. The court is concerned about Debtors history of not providing Creditor with payments, pursuant to its previous Class 4 classification; however, Debtors have presented the court with a second Amended Plan, adjusting the treatment of Creditor. Creditors

adequate protection arguments are effectively objections to confirmation under the terms of the Second Amended Plan and are better heard at the hearing on plan confirmation.

Pursuant to § 362(d)(2), a creditor may be granted relief from stay if Debtor lacks equity in the property and if the property is not necessary to an effective reorganization. While the property here is lacking in equity, the court is not convinced it is unnecessary for an effective reorganization. Debtors are a married couple with three children and the subject vehicle is the family's only means of transportation. Creditor cavalierly argues that Debtors can simply use public transportation and that Debtor should obtain a more gas efficient vehicle. The court is not convinced that a family of five are better supported using public transportation and does not agree that a new extension of credit to obtain a more "gas efficient" vehicle is in the best interests of Debtors.

The court's decision is to continue Creditor's Motion for Relief from the Automatic Stay to **[date]** at **[time]**, to be heard concurrently with the evidentiary hearing on Debtors' Motion to Confirm.

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 Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the hearing on Creditor's Motion for Relief is continued to **[date]** at **[time]**.

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12. [13-35335](#)-C-13 DEBRA DUPUIS  
NLE-1 Scott J. Sagaria

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-7-14 [[17](#)]

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Local Rule 9014-1(f)(2) Motion. No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 7, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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 Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

(1.) Debtor did not appear at the First Meeting held on January 2, 2014. The Meeting has been continued to January 30, 2014 at 10:30 a.m. The Trustee does not have sufficient information to determine whether or not the case is suitable for confirmation under 11 U.S.C. § 1325.

(2.) The Trustee is unable to determine whether the Debtor can make payments under the plan or comply with the plan, 11 U.S.C. § 1325(a)(6), or can reasonably afford more, 11 U.S.C. § 1325(b), as well as other criteria for confirmation.

Form 22C reflects that the Debtor is below median (DN #1, page 43) and Schedule I reflects the Debtor has a 20 year old and a 24 year old dependent. However, there is no indication what contribution these dependents make to rent, which is \$1,550.00 per month. The Debtor provides \$200 for food, \$0 for clothing, and \$160 for transportation.

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

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

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

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

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

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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 Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 16, 2013. Forty-two days' notice is required. That requirement was met.

**Tentative Ruling:** 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 Trustee having filed an opposition, the court will address the merits of the motion. 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 tentative decision is to deny the Motion to Confirm the Plan.**

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 Chapter 13 Trustee opposes Confirmation of Debtor's plan on the following grounds:

1. Section 2.07 of the plan does not provide a monthly dividend for attorneys' fees.
2. Debtor did not appear for the First Meeting of Creditors held on December 12, 2013. Trustee lacks sufficient information to determine whether or not the case is suitable for confirmation with respect of 11 U.S.C. § 1325. The meeting was continued to January 16, 2014 and Debtor did appear.
3. The plan does not appear to pass the Chapter 7 liquidation analysis of 11 U.S.C. § 1324(a)(4). Debtor filed an amended Schedule C on December 16, 2013 (Dkt. 18), in which Debtor changed the exemptions claims from C.C.P. § 703.140 to C.C.P. § 704.020, et at. Debtor did not exempt the following assets listed on Schedule B, filed November 7, 2013 (Dkt. 1):
  - a. \$20.00 cash
  - b. \$1.00 checking and savings
  - c. \$750.00 rental security deposit
  - d. \$300.00 PG&E security deposit
  - e. \$3,000 delinquent child support
  - f. \$2,000 projected 2013 tax refunds

The total non-exempt amount is \$6,071.00 and Debtor is proposing a dividend of 7% to unsecured creditors, which totals \$1,694.61.

The Plan does not comply with 11 U.S.C. §§ 1322 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.

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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 Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2013. 35 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee, having filed an opposition, the court will address the merits of the motion. 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 tentative decision is to deny the Motion to Confirm the Modified Plan.** 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:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, opposition to the proposed modifications was filed by Chapter 13 Trustee, David Cusick.

The Chapter 13 Trustee objects to confirmation of Debtors' Modified Plan for the following reasons:

1. Debtors' modified plan proposes to reclassify J.P. Morgan Chase from a Class 3 secured claim satisfied by surrender of collateral to a Class 2 secured claim reduced to \$0.00 based on a motion to value collateral. Creditor filed a secured claim on July 18, 2013 (Claim 7) in an amount of \$147,426. After review of the court docket, the Trustee is unable to locate an order reducing this claim and does not see that Debtor filed a motion to value collateral. Debtor's plan is not feasible unless the claim is valued.
2. Debtor filed amended schedules I and J on December 23, 2013; however, they were not filed using Official Form B 6I and B 6J, effective December 2013.

A review of the docket confirms Trustee's objection regarding reclassification of the J.P. Morgan Chase claim. There is no pending Motion to Value or order valuing the secured claim at \$0.00. The modified Plan does not comply with 11 U.S.C. §§ 1322 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 Modified 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 Motion to Confirm the Plan is denied and the proposed Chapter 13 Plan is not confirmed.

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15. [13-26653](#)-C-13 BARBARA COCKERHAM OBJECTION TO CLAIM OF ASSET  
MMM-3 Mohammad M. Mokarram ACCEPTANCE, LLC, CLAIM NUMBER 2  
12-17-13 [[88](#)]

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Local Rule 3007-1(c)(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, respondent creditor, and Office of the United States Trustee on December 17, 2013. 44 days' notice is required. That requirement was met.

**Final Ruling:** This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(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 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 Objection to Proof of Claim number 2 of Asset Acceptance, LLC is sustained and the claim is disallowed in its entirety.** No appearance required. The court makes the following findings of fact and conclusions of law:

The Proof of Claim at issue, listed as claim number 2-1 on the court's official claims registry, asserts a \$37,843.17 claim. The Debtor objects to the Proof of Claim on the basis that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts the last account transaction took place in 2009, at which point the account was charged-off. There appears to be no lawsuit filed by this creditor, nor any judgment ever entered against Debtor.

#### **Discussion**

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

California Code of Civil Procedure § 337 requires that an action upon any contract, obligation or liability founded upon an instrument in writing, be brought within four (4) years.

Section 337 includes the additional proviso, however, that the time

within which any action for a money judgment for the balance due upon an obligation for the payment of which is a deed of trust or mortgage with power of sale upon real property or an interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is "Money Loaned," and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment.

It appears that the date of the last payment and transaction in the subject claim was March 31, 2009. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the state of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served pursuant to Local Bankr. R. 3007-1(c) and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for collection of contracts in California.

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

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

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

The Objection to Claim of Asset Acceptance, LLC filed in this case 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 objection to Proof of Claim number 2-1 of Asset Acceptance, LLC is sustained and the claim is disallowed in its entirety.

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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, all creditors, parties requesting special notice, and Office of the United States Trustee on December 16, 2013. 42 days' notice is required. That requirement was met.

**Final Ruling:** 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 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

**The Motion to Confirm the Plan is granted.** No appearance required. The court makes the following findings of fact and conclusions of law:

The court will approve a plan that complies with 11 U.S.C. §§ 1322 and 1325(a). Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The 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 6, 2013 is confirmed, and 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.

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17. [13-35864](#)-C-13 CHARLES BEYER  
UND-1 Ulric N. Duverney  
**Thru #18**

MOTION FOR THE APPOINTMENT OF A  
GUARDIAN AD LITEM  
1-6-14 [[22](#)]

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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 Chapter 13 Trustee and Office of the United States Trustee on January 3, 2014. 42 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion for the Appointment of a Guardian Ad Litem 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 Trustee having filed an opposition, 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 tentative decision is to grant the Motion for the Appointment of a Guardian Ad Litem.** 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:

**Relief Requested and Grounds Stated**

Pursuant to Federal Rule of Bankruptcy Procedure 9013(which is similar to Fed. R. Civ. P. 7(b)) requires that the motion itself state both the grounds upon which the relief is based and the relief with particularity. The Motion simply states:

Debtor CHARLES BEYER, with the assistance of his "next friend" Deborah A. Allen, hereby moves this court for an order appointing a Guardian ad litem for debtor pursuant to Federal Rule of Bankruptcy Procedure 1004.1.

This motion is made on the grounds that the debtor is incapacitated as he is afflicted with dementia and would not be capable of pursuing this chapter 13 without the assistance of Guardian ad litem.

Debtor then engages in a brief discussion of why jurisdiction is proper in this matter. From reading the Motion, the court has only a vague idea of why Debtor is requesting that the court appoint a Guardian Ad Litem for his bankruptcy case. Debtor does not cite to the evidence provided, namely, the Declaration of Deborah A. Allen (Dckt. No. 25) in support of Debtor's factual contention that Debtor has dementia and would not be capable of pursuing the Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1004.1.

The court has no way to determine, from the Motion, the facts on which Debtor requests that relief be accorded. It seems that the court is

expected to read the Memorandum of Points of Authorities to determine the bases for this motion. Debtor is essentially asking the court to treat the points and authorities as the "motion."

Debtor is asking that the court accept a combined motion and points and authorities ("Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Debtor. It is not, however, for the court to canvas other pleadings, and wait until the hearing, to receive additional evidence from a movant to "draft the motion" for Movants.

### **Background per Memorandum of Points and Authorities**

The court is forced to look to the body of Debtor's Memodrandum of Points and Authorities to ascertain the relevant facts of the motion. Debtor states that on December 19, 2013, a Chapter 13 petition filed on behalf of Debtor Charles Beyer ("Beyer") by his wife, Deborah Allen ("Allen"), as his "next friend."

In 2007, Beyer took out a reverse mortgage and pledged the family residence as collateral. Before it was placed in the family trust, the property was held as Beyer's separate property. The reverse mortgage required the borrower to maintain insurance on the property and pay the real estate taxes. Beyer breached the agreement by not paying the property taxes, and at times allowed the property insurance to lapse. The reverse mortgage company (Financial Freedom, a division of OneWest Bank, FSB) deemed the non-payment to be a default of the reverse mortgage contract and began foreclosure proceedings. A trustee's sale was scheduled to take place on December 20, 2013.

The Motion states that due to his mental illness, Beyer is unable to prosecute this matter on his own. Beyer's wife, Allen, testifies in her declaration that her husband is afflicted with dementia, and due to his condition, Beyer cannot drive and requires assistance in getting dressed, taking his medication, attending his doctor's appointments, and undertaking normal day-to-day activities. ¶ 5, Declaration of Deborah Allen in Support of Appointment of Guardian Ad Litem, Dckt. 24 at 2. Allen states that Beyer has extremely short term memory, and has become extremely paranoid, and that his condition has deteriorated significantly. *Id.* at 2-3.

Allen's Declaration points to an unauthenticated Doctor's Note, apparently from a physician from the Sutter Medical Foundation (whose name is illegible), and what appears to be an Abstract of the Charles Beyer and Deborah Allen Family Trust, which were both attached to Allen's declaration, and not filed as a separate item on the case docket. The parties are advised that Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. The purported "Doctor's Note" states that,

Patient has Frontal Lobe Dementia can not make Decisions on his own

Doctor's Note, attached to Declaration of Deborah Allen, Dckt. No. 24 at 6.

Movant claims that the Abstract of Trust is a key item of evidence that figures into the determination that Allen should be appointed as a guardian. The Motion states that the fact that Breyer and Allen had a revocable trust prepared for them in May 28, 2008, in which Allen and Bryer were appointed co-trustees, and Allen was appointed as Breyer's attorney in fact, indicates that Breyer placed his trust and reliance in Allen in executing these documents.

### **Trustee's Opposition**

The Chapter 13 Trustee opposes the Motion for the Appointment of Guardian on the following grounds:

1. The Motion was filed 14 days after the petition. Federal Rule of Bankruptcy Procedure 9014(c) provides that Federal Rule of Bankruptcy Procedure 7017 applies to contested matters. Federal Rule of Civil Procedure 7017 applies to contested matters. Federal Rule of Civil Procedure 17(a)(3) allows for a reasonable time for ratification of the joinder of substitution before dismissal of a proceeding, when not pursued by the real party in interest.

The Petition was filed with no additional documents on December 19, 2013, and was signed by the moving party. Because there were no additional documents filed, the Trustee is uncertain if the present motion was filed within a reasonable time, as the petition lacked the Debtor's signature and the person who had signed the petition had no explicit authority to do so.

2. Allen is seeking appointment as guardian litem. Trustee argues that the judicial appointment of Allen, who does appear to be an attorney, may not be advisable but the appointment of the movant as next friend may be. *In re Meyers*, 350 BR 760 (Bankr. N.D. OH 2006). California law normally accords a guardian ad litem extensive powers, and may require that a guardian ad litem in civil proceedings be represented by an attorney, or be an attorney. California Judicial Council Form CIV-010. Moving counsel has indicated that he is the counsel for the Debtor. (*In re Meyers*, infra at 764, holding that no distinction may exist between guardian ad litem and next friend).
3. Trustee believes that there are three particulars that Debtor has not addressed in his Motion that must be addressed before the Motion is granted: (1.) Movant has not addressed how long they believed the incapacity existed; (2.) Movant refers to a question regarding whether they are currently married to the debtor, which may need to be addressed further; (3.) Movant refers to a trust and durable power of attorney, which appears to have their estates settled and an authority of a successor trustee of Debtor's.

On the last point, Trustee asserts that it is not clear whether the success or trustee has been consulted, whether the bankruptcy can accomplish its goal of retaining the property, and cure the arrears if Debtor remains in default, and how the default occurred to begin with.

### **DISCUSSION**

Federal Rule of Bankruptcy Procedure 1004.1 allows "a

representative, including a general guardian, committee, conservator, or similar fiduciary," to file a voluntary petition on behalf of an incompetent person.

Federal Rule of Bankruptcy Procedure 1004.1 further states:

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

Rule 1004.1 is patterned after Federal Rule of Civil Procedure 17(c), which applies to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7017. ("The following representatives may sue or defend on behalf of a minor or an incompetent person: (A) a general guardian; (B) a committee; (C) a conservator; or (D) a like fiduciary. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."). Fed. R. Civ. P. 17(c).

The Motion states that this instant matter is a "classic situation where a guardian ad litem would be necessary," but does not provide competent evidence on when Breyer was diagnosed with the condition, and when the incapacity began and Breyer's current relationship with Allen (if they are still married). The documents connected to Breyer and Allen's self-settled trust would only be indicative of Breyer and Allen's relationship of confidence and trust, if the trust was executed before Breyer's decision-making capabilities were compromised by his condition.

More importantly, the Motion to Appoint a Guardian Ad Litem was not concurrently filed with Breyer's bankruptcy petition, which is troubling to the the court on two fronts: (1.) Breyer may not have had the capacity to certify that the information provided in his petition and schedules are correct; and (2.) Allen did not have express authority to sign the petition as Breyer's next friend. The voluntary Chapter 13 petition was filed on December 18, 2013 that was signed by both Breyer, and Allen as the "next friend." Dckt. No. 1 at 3. There is not additional documentation, explaining Breyer's condition or evincing Allen's intent to be appointed as Debtor's guardian ad litem. The parties did not file any paperwork showing that Allen was authorized to sign the bankruptcy petition on behalf of Breyer.

The instant motion was filed on January 6, 2014, more than two weeks after the petition was filed. The Bankruptcy Code does not prescribe a time for when the guardian ad litem should file the bankruptcy petition for the person who does not have the capacity to maintain the action. As Trustee points out, one bankruptcy court has ruled that such a motion must be made at the time of the petition. *In re Lane*, BR 12-36873-ELP7, 2012 WL 5296122 (Bankr. D. Or. Oct. 25, 2012). In that case, the bankruptcy court cited concerns about the potential for abuse that exists with regard to motions to appoint a next friend under Fed. R. Bankr.P. 1004.1, nothing the high

standard required by conservatorship statutes in Oregon to establish that guardians are dedicated to the best interests of the debtor. The court determined that a motion under Rule 1004.1 be accompanied by, among other things: a copy of the power of attorney giving movant authority to act for the debtor; a comprehensive declarations from the person seeking appointment; and that notice be given to all creditors, the UST, relatives, governmental entities disbursing funds to the debtor, etc. *In re Lane*, BR 12-36873-ELP7, 2012 WL 5296122 (Bankr. D. Or. Oct. 25, 2012).

Lastly, it is unclear why Breyer and Allen chose to file a petition seeking an appointment of Allen as a guardian ad litem, and not "next friend" under Federal Rule of Civil Procedure 17. Allen seems to have assumed the designation of "next friend," according to the bankruptcy petition and Motion, but requests that she be appointed guardian ad litem of Breyer instead.

**CONCLUSION**

The court is not necessarily opposed to the motion, but will require more than the letter from the debtor's physician regarding Beyer's ability to conduct his own financial affairs and Beyer's Power of Attorney to grant the motion. It is uncertain that Allen has comprehensive knowledge of Beyer's financial situation, and is committed to Beyer's best interests throughout the bankruptcy process.

Although this court will not require that the parties follow these specific procedures outlined in the persuasive case of *In re Lane*, BR 12-36873-ELP7, 2012 WL 5296122 (Bankr. D. Or. Oct. 25, 2012), the court will require at a minimum, a more in-depth explanation of when Breyer was afflicted by the condition, the circumstances in which the petition and bankruptcy paperwork was prepared-and who signed it, and the exact status of Breyer's current relationship with Allen. Until these matters are addressed, the court cannot appoint Deborah Allen as the guardian ad litem of the Charles Beyer.

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 the Appointment of a Guardian Ad Litem 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 for the Appointment of a Guardian Ad Litem is denied without prejudice.

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18.	<a href="#">13-35864</a> -C-13	CHARLES BEYER	MOTION TO WAIVE THE CREDIT
	UND-2	Ulric N. Duverney	COUNSELING REQUIREMENT
			1-6-14 [ <a href="#">27</a> ]

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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 Chapter 13 Trustee and Office of the United States Trustee on January 3, 2014. 42 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Waive the Credit Counseling Requirement 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 Trustee having filed an opposition, 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 tentative decision is to grant the Motion for the Appointment of a Guardian Ad Litem.** 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:

Debtor, Charles Beyer, with the assistance of his "next friend" Deborah A. Allen, moves this court for an order pursuant to 11 U.S.C. § 109(h)(4) to excuse Debtor from having to take the prepetition credit counseling class. Debtor makes the motion on the grounds that Debtor is incapacitated, as he is afflicted with dementia and would be unable to complete the program.

#### **Trustee's Opposition**

Trustee objects on the basis that the movant lacks standing to pursue the present motion, unless the court grants the other pending motion of Debtor, the Motion for Appointment, Dckt. No. 22.

As discussed in the court's ruling on Debtor's Motion for the Appointment of a Guardian Ad Litem, UND-1, the court will not appoint Allen as the guardian ad litem of Beyer until certain evidentiary issues are resolved. As such, Allen will not have standing to pursue this instant motion under U.S. Const. art. III, § 2, as Allen is not the relevant party affected by the events of this case. The court will deny this motion without prejudice.

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

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

The Motion for the Appointment of a Guardian Ad Litem filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to

**February 4, 2014 at 2:00 p.m.**

**Page 41 of 61**

Waive the Credit Counseling Requirement is  
denied without prejudice.

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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 Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 27, 2013. 35 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, 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 tentative decision is to deny the Motion to Confirm the Modified Plan.** 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:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee has filed opposition to Debtors' Motion to Modify the Confirmed Chapter 13 Plan. The grounds for Trustee's opposition are outlined below.

(1.) The plan may not be Debtors' best efforts under 11 U.S.C. § 1325(b). Debtors' modified plan proposes to reclassify Nationstar Mortgage from a Class 1 secured claim to a Class 4 secured claim paid directly by debtor, based on a trial loan modification offering monthly trial period mortgage payments of \$1,604.71 beginning on January 1, 2014.

Debtors' Motion indicates that a monthly plan payment of \$1,178.00 beginning on December 25, 2013, is sufficient to pay all of the unsecured and priority claims in full, including Trustee's and attorneys' fees. Debtors' modified plan proposes a plan payment of \$63,956.00 total, paid in through November 2014, then \$1,178.00 beginning on December 25, 2013 for the duration of the plan. Debtor's plan payment under the confirmed plan is \$6,483.00 for four months, then \$4,782.00 for 56 months. January, 2014, is the 16<sup>th</sup> month of the case, as Debtors' petition was filed on August 24, 2012.

Debtors did not file supplemental Schedules I and J, reflecting their current income and expenses. Debtors' last schedules were filed on February 11, 2013, and supported a plan payment of \$4,782.00. Since Debtors were making the mortgage payment directly as proposed, this would reduce Debtors' plan payment by the amount of the mortgage payment, \$1,604.71, leaving \$3,177.29 available to be paid to other creditors, not the \$1,1780 as proposed. While Debtors continue to propose a 100% plan, a reduction in

the plan payment to an amount below Debtor's available disposable income would result in creditors being paid later, rather than sooner, and would not be in the creditors' best interest and does not reflect the best efforts of the Debtors.

(2.) Debtors' plan proposes to reclassify Nationstar regarding ongoing mortgage and pre-petition arrears from a Class 1 secured creditor, to a Class 4 secured claim paid directly by Debtor, based on a trial loan modification. Under the confirmed plan, the Trustee has disbursed \$32,652.94 in ongoing mortgage payments and \$10,013.72 in pre-petition arrears. Debtors do not authorize these payments in the proposed modified plan.

(3.) Debtors' modified plan proposes to reclassify Nationstar regarding ongoing mortgage and pre-petition arrears from a Class 1 secured creditor, to a Class 4 secured claim paid directly by Debtor based on a trial loan modification. Debtors have submitted a copy of the trial loan documentation as Exhibit 'A.' Debtors have not filed a motion to approve such a modification. The modified plan provides no provision should the plan be approved, and Debtor is not successful in obtaining a permanent 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.

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20. [13-34865](#)-C-13 LARRY/ROSE HESLIN  
NLE-1 Chinonye Ugorji

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-7-14 [[17](#)]

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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 January 7, 2014. 14 days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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 Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtors report gross income of \$6,911.20 on Schedule I, and a net income of \$4,654.78 after all deductions from the payroll.

It appears that Debtors have less net monthly income than they reported. Paystubs for Joint Debtor Larry Heslin show that Heslin has \$825.72 per month deducted for deferred compensation. This deduction is not reflected on Schedule I, however, and Debtors have erroneously deducted \$495.23 for retirement twice, when the paystubs reflected that there was a single deduction of \$552.90 per month for retirement. Debtor Larry Heslin's paystubs reflect a gross income of \$6,916.00 and a net income of \$4,132.42.

Debtors report the net income from Larry Heslin's wages to be \$4,654.78, which is \$522.36 higher than his actual net income. On Schedule J, Debtors report only \$87.78 per month in disposable income after living expenses. Debtors have insufficient net income to afford their living expenses, and do not have the funds to support the proposed plan payment.

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

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

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 19, 2013. 42 days' notice is required. That requirement was met.

**Final Ruling:** 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.** No appearance required. The court makes the following findings of fact and conclusions of law:

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on October 15, 2013 is confirmed, and 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.

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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, all creditors, parties requesting special notice, and Office of the United States Trustee on December 20, 2013. 35 days' notice is required. That requirement was met.

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

**The Motion to Confirm the Modified Plan is granted.** No appearance required. The court makes the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on December 20, 2013 is confirmed, and 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.

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23. [13-34974](#)-C-13 VINCENT/LISA ABILA  
NLE-1 Michael M. Noble

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-7-14 [[19](#)]

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**Final Ruling:** The Chapter 13 Trustee having filed a "Notice of Withdrawal" for the pending Objection to Confirmation, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Notice of Withdrawal" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7014 for the court to overrule without prejudice the Objection to Confirmation, and good cause appearing, **the court overrules without prejudice the Chapter 13 Trustee's Objection to Confirmation of Plan.**

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

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

An Objection to Confirmation of Plan having been filed by the Chapter 13 Trustee, the Chapter 13 Trustee having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rules of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7014, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation of Plan is overruled without prejudice.

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24. [11-34881](#)-C-13 APRIL MAYNARD  
JT-3 John A. Tosney

MOTION TO VALUE COLLATERAL OF  
FIRST TENNESSEE BANK, N.A.  
1-3-14 [[51](#)]

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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, respondent creditor, and Office of the United States Trustee on January 3, 2014. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Value Collateral 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 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 is granted and creditor's secured claim is determined to be \$0.00.** No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 201 Olive Street, Auburn, California. The Debtor seeks to value the property at a fair market value of \$208,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$232,831.00. Creditor First Tennessee Bank, N.A.'s second deed of trust secures a loan with a balance of approximately \$65,952.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The 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 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 First Tennessee Bank, N.A., secured by a second deed of trust recorded against the real property commonly known as 201 Olive Street, Auburn, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$208,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

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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 January 7, 2014. 14 days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to sustain the Objection.** 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 Chapter 13 Trustee opposes confirmation of the Plan on the following grounds.

1. On December 27, 2013, the Internal Revenue Service filed Court Claim No. 5, which indicated that Debtor has not filed various tax returns, including the 4-year period preceding the filing of the Petition. Specifically, income taxes for 2010, 2011, and 2012, and WT-FICA (Social Security and Medicare), for period from 2007 to 2011. 11 U.S.C. § 1308 and 1325(a)(9).
2. Debtor's Plan will complete in 67 months as opposed to 60 months proposed, which exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). The cause of the over extension is that the plan payments are insufficient to pay the claims within 60 months, paying \$1,500 in attorney fees, \$16,362.13 to Ally Bank, \$2,310.05 Franchise Tax Board, and \$14,994.90 to the IRS and an ongoing monthly ongoing mortgage payment of \$825 per month (\$55,275 for a total of \$90,442.08, plus Trustee fees of approximately \$4,760.00. This comes to a total of \$95,202.08. And yet, the plan proposes to pay a total of \$85,500 over 60 months.
3. Debtor's Plan proposes to pay a \$14,994.90 in priority taxes to the IRS. On December 27, 2013, the IRS filed Court Claim NO. 5, which indicated that Debtor owes the IRS \$45,425.03. Debtor's Plan does not have sufficient proceeds to pay this claim in its entirety.

4. The plan is not Debtor's best efforts under 11 U.S.C. § 1325(b). Debtor is below median income, and admitted at the meeting of creditors held on January 2, 2014, that he is not currently paying the 2<sup>nd</sup> Mortgage held by George Bliss. Debtor indicated that he has worked out an arrangement with Bliss, where Debtor performs work for the lender in lieu of payment on the claim. Debtor also indicated that Bliss stated that he would not be filing a claim in the case.

On Schedule J, Debtor deducts \$600 per month to be paid toward the second deed held by George Bliss. It appears that Debtor has additional income to contribute toward the plan.

5. Debtor has not reported his mother's monthly contribution on his Form 22C, which he admitted to receiving at the Meeting of Creditors. Debtor had reported that he was receiving a monthly contribution from his mother within the 6 months prior to filing; this income is not reported on the means test.
6. Trustee is unable to determine whether Debtor can afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor admitted at the Meeting of Creditors that his renter had moved out, and that he is no longer receiving the \$1,000 in rents reported on Schedule I.
7. Trustee is unable to determine whether Debtor can afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6), as Trustee cannot determine the feasibility of the plan. Debtor's Schedule I shows that at least a portion of Debtors' income is from family contributions; however, Debtor has not filed declarations from these contributors, to demonstrate that these contributions are likely to occur.
8. Debtor cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor proposes to value the secured claim of Ally Bank, but has not filed a motion to value collateral. Debtor's plan does not have sufficient monies to pay the claim in full and thus should be denied confirmation.
9. The monthly dividend to Ally Financial in Class 2 must be at least \$269.65 per month to be paid in 60 months. Debtor has currently proposed a dividend of \$260.00.
10. All sums required by the plan have not been paid under 11 U.S.C. § 1325(a)(2). Debtor is \$1,425.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of \$1,425.00 is due on January 25, 2014. Debtor has paid \$0.00 into the plan to date.

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

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

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

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

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

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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, Debtor, and Debtor's Attorney on January 7, 2014. 14 days' notice is required. That requirement was met.

**Tentative Ruling:** 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to set the Objection to Confirmation for an evidentiary hearing at [date] at [time].** 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:

#### REVIEW OF MOTION

Creditor Ally Financial Inc., f/k/a GMAC ("Creditor") has a security interest in Debtor's 2007 Chevrolet Silverado, Vehicle Identification Number ending in #8304. Upon execution of the contract for purchase, Debtor was obligated to pay Creditor \$37,225.20 at an annual percentage rate of 0.00%, spread out over 60 monthly payments of \$620.42. The net payoff under the Debtor's Contract, as of the petition date, was \$17,268.00. Debtor's Plan propose to value the Vehicle at \$14,642.00, payable at 4.00% with a monthly payment \$260.00.

Creditor objects to confirmation of Debtor's Chapter 13 Plan on the basis that Debtor's valuation of the vehicle at \$14,642.00 does not provide creditor with the full value of its claim under 11 U.S.C. § 1325(a)(5)(B)(ii). 11 U.S.C. § 506 provides that value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition.

#### DISCUSSION

Creditor states that the Kelly Blue Book Used Car Guide retail value is \$19,631.00 for a vehicle of like make, model, and condition. Exhibit A, Dckt. No. 17. Creditor asserts that given the circumstances of Debtor's case, the Kelley Blue Book Used Car Guide as the best indicator of the

Vehicle's replacement (market) value.

Pursuant to § 1325(a)(5)(B)(ii), a debtor cannot confirm a chapter 13 plan which provides for the payment of a secured claim unless, *inter alia*, (1) the holder of the secured claim accepts the plan, or (2) the plan provides for payments, as of the effective date of the plan, that are not less than the allowed amount of the secured claim. 11 U.S.C. § 506(a)(1) of the gives the court authority to determine the value of a secured creditor's collateral, and fix the amount of its secured claim, for purposes of plan confirmation.

11 U.S.C § 506 states, with respect to debtors in cases arising under Chapter 7 or 13 of the Bankruptcy Code, that,

(2.)...[V]alue with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

11 U.S.C § 506(2).

Here, the Debtor is an individual in a Chapter 13 case who proposes to retain the Vehicle for personal use. Thus, any valuation of Debtor's vehicle, a 2007 Chevrolet Silverado, must be determined based on the replacement value of the property under 11 U.S.C. § 506(2). The text of 11 U.S.C. § 506(2) indicates that replacement value should factor in the age and the condition of the property, at the time of the value is assessed.

Creditor interprets this to mean that the replacement value of the vehicle should be determined by the retail market places where individuals purchase automobiles for such personal use, and that the Kelley Blue Book calculation of the retail value, \$19,631.00 for the subject vehicle, supplies the best evidence of such market place. The court recognizes, however, that other courts have characterized the Kelley published "retail" price as merely a starting point for the inquiry into the valuation of property. In the case of *In re De Anda- Ramirez*, 359 B.R. 794 (BAP 10th Cir. 2007), the Tenth Circuit court observed that Kelly's published "retail" value is inherently unreliable because it assumes that the subject vehicle is in excellent condition and only applies to about 5% of the vehicles in the market. *In re De Anda-Ramirez*, 359 B.R. 794 at 797.

Of persuasive consideration is the case of *In re Morales*, 387 B.R. 36 (Bankr. C.D. Cal. 2008), which describes the approach of virtually all courts with published decisions on the topic, concluding that,

After reviewing the statute, the available caselaw, and the arguments of the parties, this Court concludes that the correct method for calculating the retail value of a vehicle under § 506(a)(2) ultimately depends on the facts presented in each case. *Cf. Taffi v. United States* (*In re Taffi*), 96 F.3d 1190, 1193 (9th Cir.1996), cert. denied, 521 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 987 (1997). As a general principle, however, this Court further concludes that,

absent unusual circumstances,<sup>3</sup> the retail value should be calculated by adjusting the Kelley Blue Book or N.A.D.A. Guide retail value for a like vehicle by a reasonable amount in light of any additional evidence presented regarding the condition of the vehicle and any other relevant factors. See *In re Coleman*, 373 B.R. 907, 912-13 (Bankr.W.D.Mo.2007); *In re Carlson*, No. 06-40402, 2006 WL 4811331, at \*2 (Bankr.W.D.Wash., Dec.8, 2006); *In re Eddins*, 355 B.R. 849, 852 (Bankr.W.D.Okla.2006). Value should be calculated as of the petition date, not the valuation hearing. The burden in proving the reasonableness of any deviation from the guide retail value rests with the debtor because the debtor has the best access to information about the condition of the vehicle. See *In re Coleman*, 373 B.R. at 913; *In re Eddins*, 355 B.R. at 852. *In re Morales*, 387 B.R. 36, 45 (Bankr. C.D. Cal. 2008)

*Id.* at 45.

The court's holding in *In re Morales* suggests that the general approach of most bankruptcy courts interpreting § 506(a)(2) and with the bankruptcy courts of the Ninth Circuit, is that the approach of reviewing valuations of personal property on a case-by-case basis is more favored under 11 U.S.C. § 506(a)(2) than conflating the replacement value of a car with the retail value suggested by the Kelly Blue Book Guide.

Here, the only evidence that Creditor has provided in support of its valuation of the vehicle in the amount of \$17,268.00 is an unauthenticated copy of the Kelly Blue Book Lending/Suggested Retail Breakdown of Debtor's 2007 Chevrolet Silverado pickup. Exhibit A, Dckt. No. 17. The breakdown factors the manufacturer-provided air condition, power windows, door locks, stereo system, and other components automatically built into Debtor's vehicle. As the valuation is generated by Kelley Blue Book and does not account for Debtor's input (and an independent inspection of the vehicle has not been conducted by Creditor), the suggested price does not account for the current condition of the vehicle, and repairs that may need to be executed in order to be resold.

Additionally, the court reviews the claims registry to determine whether Creditor has supplied additional evidence that might support its valuation of the vehicle. The court notes that Ally Financial filed Proof of Claim No. 3, which asserts a value of \$17,268.00 as the amount of the secured claim for the subject vehicle. Creditor also lists \$18,350.00 as the value of the property.

The Proof of Claim, however, suffers from a potentially fatal defect. Section 502(a) of the Bankruptcy Code provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. FRBP 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. Creditor's does not attach any supporting documentation to the Proof of Claim. There is nothing to substantiate Creditor's valuation of the property, and its claim that the security interest in the vehicle has been perfected, or that the figure cited for the amount of claim is correct. Creditor is advised to

amend its Proof of Claim, to reflect the basis for its filing of the secured claim.

**Debtor's Valuation**

Finally, the issue of Debtors' questionable valuation of the vehicle notwithstanding, Debtor has not presented to the court evidence of how Debtor arrived at the \$14,642.00 figure, as listed as the value of the creditor's interest in the collateral, on his Chapter 13 Plan. Debtor has not responded to Creditor's objection.

Thus, the court finds it more appropriate to set this matter for an evidentiary hearing pursuant to Local Bankruptcy Rule 9014-1(g), where the court can resolve disputed material factual issues over the valuation of the 2007 Chevrolet Silverado pickup. Creditor and Debtor will be able to supply the court with competent evidence of their valuations of the subject vehicle.

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

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

The 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 of Plan is set for an evidentiary hearing for **[date]** at **[time]**.

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27. [13-36084](#)-C-13 LORENZO/CONSUELO LLAMAS MOTION TO VALUE COLLATERAL OF  
TOG-1 Thomas O. Gillis BANK OF AMERICA, N.A.  
12-31-13 [8]

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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, respondent creditor, and Office of the United States Trustee on December 31, 2013. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Value Collateral 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 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 is granted and creditor's secured claim is determined to be \$0.00.** No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 412 Park Drive, Bakersfield, California. The Debtor seeks to value the property at a fair market value of \$79,542.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$115,350.00. Creditor Bank of America, N.A.'s second deed of trust secures a loan with a balance of approximately \$94,600.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The 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 Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and

good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Bank of America, N.A. secured by a second deed of trust recorded against the real property commonly known as 412 Park Drive, Bakersfield, 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 \$79,542.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

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