UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

February 11, 2014 at 3:00 p.m.

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1. 13-32601-E-13 APN-1 | **BRIAN ZIELKE AND AMANDA HILL**
Diana Cavanaugh | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY STERLING JEWELRY, INC.**
11-7-13 [26]

CONT. FROM 12-10-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on November 7, 2013. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

Final 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. The court has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Objection is overruled as moot and confirmation is denied. No appearance required.

PRIOR HEARING

Sterling Jewelry, Inc., dba Jared The Galleria of Jewelry objects to confirmation of the Chapter 13 Plan on the basis that Debtors have failed to include the obligation to Creditor in the plan, excluding it from payment. This Objection is laid out by the Creditor as follows:

a. On July 16, 2013, the Debtors purchased jewelry from Creditor.

b. The Debtors granted Creditor a security interest in the jewelry for obligation of the Debtors to pay for the jewelry purchased.

c. The Debtor's debt secured by the jewelry was $3,958.09, for which Creditor extracted an interest rate of 24.99%. [It could well be argued that Creditor recognized that the Debtors did not have the ability to pay this obligation and

it was likely that the jewelry from these Debtors would be lost. But if such interest rate was replicated among multiple consumers, the loss of this jewelry is being paid by other consumers who are paying an interest rate of 24.99%.]

d. The Debtors' bankruptcy case having been filed on September 27, 2013, the Creditor's secured claim cannot be valued pursuant to 11 U.S.C. § 506(a).

Objection to Confirmation, Dckt. 26.

Debtors respond, stating that Creditor does not have a secured claim. Debtors state they sold the jewelry which was collateral for this claim prior to filing bankruptcy and is listed as item 10 on Debtors' Amended Statement of Financial Affairs (filed simultaneously with this response).

The evidence of this disposition of the Creditor's collateral is set forth in the Declaration of Brian Zielke, one of the Debtors. He states under penalty of perjury,

A. "Over two months prior to filing this bankruptcy, we did purchase a wedding ring, an engagement ring, and two Movado watches from Jared Jewelry."

B. "Our family was in the process of moving from Ohio, and Amanda (my wife) [the co-Debtor] had been looking here for a job."

C. "At the time we made this purchase in July, we thought Amanda was getting a new job here in Sacramento. We thought our finances looked great."

D. "Then, the job offer we thought she was getting fell through."

E. "That's when we ended selling the jewelry to a stranger on Craislist for $1,100.00 in August."

F. "We have filed an amended Statement of Financial affairs to disclose the sale. All of the jewelry which was collateral for Jared was sold."

Declaration, Dckt. 34.

Review of Schedules and Bankruptcy Plan

On September 27, 2013, the Debtors filed their Schedules, stating under penalty of perjury the information stated therein was true and correct. This information includes the following:

e. The Debtors have $410 in cash and in bank accounts; $1,185 in an IRA, 2007 Chevrolet HHR, and a 2012 Kia Sorento for significant personal property on Schedule B. No real property is listed on Schedule A.

f. On Schedule D the Debtors list a claim secured by the Kia Sorento which exceeds the value of the vehicle, a lien of the Chevrolet HHR which exceeds the value of the vehicle, and a PMSI in their sofa and bed.

g. On Schedule F the Debtors list $31,733 in general unsecured claims. This includes a $5,298.17 claim for Jared Jewelry.

Schedules, Dckt. 1.

On Schedule I the Debtors state that they have combined average monthly income (after tax withholding, dues and deductions) of $1,959.90. On Schedule J the Debtors list $1,725.00 in expenses, which includes $0.00 for clothing, $0.00 for laundry, $0.00 for medical and dental, $96 for auto insurance, and $0.00 for vehicle installment payments. Schedules I and J, *Id.*

On the Statement of Financial Affairs the Debtors do state that they sold a "wedding ring set, engagement ring" for $1,800.00 to "Unknown Dayton, OH Stranger." Statement of Financial Affairs Question 10, *Id.*

The Chapter 13 Bankruptcy Plan requires monthly plan payments of $235.00 for 60 months. Dckt. 5. Of this, $2,881.00 is to pay Debtors' counsel, $100.00 a month to the Chapter 13 Trustee, $110.00 to the creditor for the claim secured by the Chevrolet HHR, and $8.00 a month for the claim secured by the sofa and bed. The Debtors are surrendering the 2012 Kia Sorrento.

On November 26, 2013, the Debtors filed an Amended Statement of Financial Affairs which reduces the amount received from the July 2013 sale of the jewelry to a stranger in Ohio to $1,100.00 from the $1,800.00 previously stated by the Debtors. Dckt. 36.

Debtors state they have been attempting to contact the creditor for resolution of these issues and hopes to resolve the matter before the hearing.

Discussion

The Objection to Creditor raises significant issues concerning the Chapter 13 Plan, the treatment of its claim, the good faith of these Debtors, and the accuracy of their statements under penalty of perjury. First, the Debtors purchased fairly expensive jewelry, in light of their very limited income, and then immediately disposed of it to an "unknown stranger." The court realizes that people or businesses pushed to their financial limits may well do desperate things to survive. This may well include saying whatever they think helps them get though the day (such as an intention to pay for jewelry purchased, that the jewelry was "sold" to an "unknown person," the assets they have, and their income.

As discussed above, this Creditor appears to have known when it sold the jewelry that these Debtors had no ability to repay the obligation, and were likely to do something desperate with it to survive. No information is provided as to the income and expense information given to Creditor by

Debtors. Creditor offers no declarations and does not authenticate the exhibits filed with the court. However, it has filed a proof of claim in the amount of $4,257.81. Proof of Claim No. 4-1. This is *prima facie* evidence of this debt. If this debt was amortized over five years at 24.99% interest, the Debtors would be required to make monthly payments of $124.92 and pay $3,238.42 of interest over that short time. (The court computed the loan payment schedule using the Microsoft Excel Simple Loan Calculator program.)

In looking at the receipts attached to the Proof of Claim, the court notes that (1) the engagement ring is listed as having a retail and sales price of $1,199.99, (2) an additional $139.99 of the debt is for a "guarantee", (3) the wedding ring is listed as having a retail and sales price of $1,299.99, (4) an additional $139.99 of the debt appears to be for a "guarantee" of the wedding ring, (5) a Movaldo watch is listed as having a retail and sales price of $395.00, (6) an additional $14.99 is charged for "lifetime battery warranty," (7) $495.00 is listed as the retail and sales price for a Movaldo Watch, and (8) an additional $14.99 is charged for a "lifetime battery warranty."

At this juncture, the court is stuck between the Debtors who have disposed of the creditor's collateral to an "unknown stranger" without any documentation, a month after they purchased the jewelry, and the Creditor who appears to have known that the Debtors had no ability to pay for the jewelry, guarantees, and lifetime battery warranties that were sold.

The court continued the Objection to allow the parties to resolve the matter.

AMENDED PLAN

Subsequent to the hearing of this Motion, the Debtor filed an amended Plan on January 28, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot 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,
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> **IT IS ORDERED** that Objection is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

2. 09-26760-E-13 TIMOTHY/SHARON BROUGHTON MOTION TO RECONSIDER
NLE-1 Piotr G. Reysner 1-13-14 [111]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Reconsider was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 grant the Motion and determine the reasonable amount of the Fixed Fees to be paid counsel for the Debtor pursuant to Local Bankruptcy Rule 2016-1. 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:

David Cusick, Chapter 13 Trustee, requests that the court reconsider its Order approving $3,500.00 of attorney fees to Debtors' attorney, Piotr G. Reysner ("Counsel"). Dckt. No. 97. Counsel is no longer eligible to practice law, and is still showing to be the attorney of record in this bankruptcy case. As shown by a review of the California State Bar website and as addressed by the court in other cases, Counsel has wrestled with issues which impaired his ability to practice law and has stipulated to disbarment, which was effective June 16, 2012. Counsel status with the State Bar was Note Eligible to Practice Law effective from September 18, 2011 through the June 16, 2012 date. http://members.calbar.ca.gov/fal/Member/Detail/210937.

In this case, Debtors paid Counsel $1,500.00 prior to the filing of the bankruptcy. On January 11, 2010, the Honorable Judge Bardwil approved an order confirming Debtors' First Amended Chapter 13 Plan. Dckt. No. 97. The Plan was confirmed, and further ordered that:

> [T]he attorney's fees for the debtor's attorney in the full amount of $3,500 are approved, $1,500.00 of which was paid prior to the filing of the petition. The balance of $2,000.00, provided that the attorney and debtor have

executed and filed a Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall be paid by the trustee from plan payments at the rate specified.

Order Confirming Debtors' First Amended Chapter 13 Plan Filed September 17, 2009. Dckt. No. 97. The fees of $3,500.00 were awarded under Local Bankruptcy Rule 2016-1, which provides in pertinent part,

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).
>
> (4) If an attorney elects to be compensated pursuant to Subpart (c) but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.
>
> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

At the times relevant to this Motion the Local Bankruptcy Rule provided for a maximum of $3,500.00 in fixed fees in non-business Chapter 13 cases. The amount was increased to $4,000.00 in 2012.

The Fixed Fee compensation covers the activities of counsel through the debtor obtaining the discharge in the case. The Local Rules provide for additional fees for substantial and unanticipated additional services which may be required. Completing Chapter 13 Plan as confirmed, reviewing the Trustee's proposed final accounting and making sure that the debtor's discharge entered are included in the Fixed Fee.

In addition to Local Bankruptcy Rule 2016-1, 11 U.S.C. § 329 provides that the court may review all transactions between a debtor and counsel during the one-year period prior to the commencement of the case and during the case, and cancel any agreement for fees or order the return of fees that exceed the reasonable value of the services provided.

The Trustee has paid Counsel $1,699.83 through the Chapter 13 Plan to date, which is in addition to $1,500.00 retainer he received. Trustee has not disbursed the additional $300.17, which otherwise remains to be paid to Counsel for services through the entry of the discharge in this case according to the order confirming. Thus, Trustee asks the court to reconsider paying Counsel the additional fees owed, as he is no longer practicing law and he cannot provide the legal services to Debtor.

DISCUSSION

Trustee asserts that the court should reconsider paying Counsel the balance of the Fixed Fee, as "he is no longer practicing law and has not proved that he has earned these remaining fees." Trustee's Motion to Reconsider, Dckt. No. 111 at 2. Though Trustee makes the arguments under Federal Rule of Civil Procedure 60(b), this is properly reviewed under 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1.

Standard for Attorney Compensation

Here, Counsel executed a Rights and Responsibilities on April 20, 2009, which stated that the initial fees charged in this case would be $3,500 for all preconfirmation services, and acknowledged that of this amount, $1,500 was paid by Debtors before the filing of the petition. Dckt. No. 9. Debtors and Counsel acknowledged that where substantial and unanticipated post-confirmation work would be necessary, the attorney may request the court to approve additional fees. Dckt. No. 9 at 5.

A bankruptcy court can, consistent with provision of Bankruptcy Code governing officer compensation, issue and rely upon presumptive guideline fees for routine services in Chapter 13 cases. 11 U.S.C. § 330. *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The docket reflects that Counsel did not apply for additional compensation.

The Chapter 13 Plan was confirmed in this case on January 11, 2010. Order, Dckt. 97. The term of the Plan is 60 months. Amended Plan, Dckt. 60. The case having been filed on April 10, 2009, the Debtors are closing in on completing the Chapter 13 Plan.

The Fixed Fees includes the amounts for counsel to review the Trustee's Final Report, advise counsel that the monies have been properly accounted for, make sure the post-petition education and any other documents necessary for the discharge are filed, and to confirm that the Debtors'

discharge is entered. Counsel cannot provide those legal services to the Debtors. The court finds that the remaining balance of $300.17 relates to these additional services and that payment of such monies should not be to counsel.

The Motion is granted, the court does not allow the $300.17 in fees to be paid to Counsel, and the Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan (including payment to other counsel who may substitute in to represent Debtors).

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 Reconsider filed by the Trustee having been presented to the court, the Motion stating grounds for a review of counsel for Debtors' fees pursuant to 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1(c)(5), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and attorneys' fees in the amount of $300.17, which remain to be paid through the Chapter 13 Plan as confirmed, are disallowed Debtors' former counsel Piotr Reysner. The Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan, which may include counsel who may substitute in to represent Debtors in this case.

3. 09-31503-E-13 RAYMOND/JEANIE KUNZ — MOTION TO RECONSIDER
NLE-1 Piotr G. Reysner — 1-8-14 [81]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 8, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Reconsider 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.

The court's tentative decision is to grant the Motion and determine the reasonable amount of the Fixed Fees to be paid counsel for the Debtor pursuant to Local Bankruptcy Rule 2016-1. 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:

David Cusick, Chapter 13 Trustee, requests that the court reconsider its Order approving $3,500.00 of attorney fees to Debtors' attorney, Piotr G. Reysner ("Counsel"). Dckt. No. 60. Counsel is no longer eligible to practice law, and is still showing to be the attorney of record in this bankruptcy case. As shown by a review of the California State Bar website and as addressed by the court in other cases, Counsel has wrestled with issues which impaired his ability to practice law and has stipulated to disbarment, which was effective June 16, 2012. Counsel status with the State Bar was Note Eligible to Practice Law effective from September 18, 2011 through the June 16, 2012 date. http://members.calbar.ca.gov/fal/Member/Detail/210937.

In this case, Debtors paid Counsel $1,500.00 prior to the filing of the bankruptcy. On December 14, 2010, the Honorable Judge Bardwil approved an order confirming Debtors' First Amended Chapter 13 Plan. Dckt. No. 60. The Plan was confirmed, and further ordered that:

> [T]he attorney's fees for the debtor's attorney in the full amount of $3,500 are approved, $1,500.00 of which was paid prior to the filing of the petition. The balance of $2,000.00, provided that the attorney and debtor have executed and filed a Rights and Responsibilities of Chapter

13 Debtors and Their Attorneys, shall be paid by the trustee from plan payments at the rate specified.

Order Confirming Debtors' First Amended Chapter 13 Plan Filed August 10, 2009. Dckt. No. 60. The fees of $3,500.00 were awarded under Local Bankruptcy Rule 2016-1, which provides in pertinent part,

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).
>
> (4) If an attorney elects to be compensated pursuant to Subpart (c) but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.
>
> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

At the times relevant to this Motion the Local Bankruptcy Rule provided for a maximum of $3,500.00 in fixed fees in non-business Chapter 13 cases. The amount was increased to $4,000.00 in 2012.

The Fixed Fee compensation covers the activities of counsel through the debtor obtaining the discharge in the case. The Local Rules provide for additional fees for substantial and unanticipated additional services which may be required. Completing Chapter 13 Plan as confirmed, reviewing the Trustee's proposed final accounting and making sure that the debtor's discharge entered are included in the Fixed Fee.

In addition to Local Bankruptcy Rule 2016-1, 11 U.S.C. § 329 provides that the court may review all transactions between a debtor and counsel during the one-year period prior to the commencement of the case and during the case, and cancel any agreement for fees or order the return of fees that exceed the reasonable value of the services provided.

The Trustee has paid Counsel $1,633.17 through the Chapter 13 Plan to date, which is in addition to $1,500.00 retainer he received. Trustee has not disbursed the additional $366.83, which otherwise remains to be paid to Counsel for services through the entry of the discharge in this case according to the order confirming. Thus, Trustee asks the court to reconsider paying Counsel the additional fees owed, as he is no longer practicing law and he cannot provide the legal services to Debtor.

DISCUSSION

Trustee asserts that the court should reconsider paying Counsel the balance of the Fixed Fee, as "he is no longer practicing law and has not proved that he has earned these remaining fees." Trustee's Motion to Reconsider, Dckt. No. 81 at 2. Though Trustee makes the arguments under Federal Rule of Civil Procedure 60(b), this is properly reviewed under 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1.

Standard for Attorney Compensation

Here, Counsel executed a Rights and Responsibilities on June 23, 2009, which stated that the initial fees charged in this case would be $3,500 for all preconfirmation services, and acknowledged that of this amount, $1,500 was paid by Debtors before the filing of the petition. Dckt. No. 16. Debtors and Counsel acknowledged that where substantial and unanticipated post-confirmation work would be necessary, the attorney may request the court to approve additional fees. Dckt. No. 16 at 5.

A bankruptcy court can, consistent with provision of Bankruptcy Code governing officer compensation, issue and rely upon presumptive guideline fees for routine services in Chapter 13 cases. 11 U.S.C. § 330. *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The docket reflects that Counsel did not apply for additional compensation.

The Chapter 13 Plan was confirmed in this case on December 14, 2010. Order, Dckt. 60. The term of the Plan is 60 months. Amended Plan, Dckt. 60. The case having been filed on June 6, 2009, the Debtors are closing in on completing the Chapter 13 Plan.

The Fixed Fees includes the amounts for counsel to review the Trustee's Final Report, advise counsel that the monies have been properly accounted for, make sure the post-petition education and any other documents necessary for the discharge are filed, and to confirm that the Debtors'

discharge is entered. Counsel cannot provide those legal services to the Debtors. The court finds that the remaining balance of $366.83 relates to these additional services and that payment of such monies should not be to counsel.

The Motion is granted, the court does not allow the $366.83 in fees to be paid to Counsel, and the Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan (including payment to other counsel who may substitute in to represent Debtors).

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 Reconsider filed by the Trustee having been presented to the court, the Motion stating grounds for a review of counsel for Debtors' fees pursuant to 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1(c)(5), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and attorneys' fees in the amount of $366.83, which remain to be paid through the Chapter 13 Plan as confirmed, are disallowed Debtors' former counsel Piotr Reysner. The Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan, which may include counsel who may substitute in to represent Debtors in this case.

4. 09-32911-E-13 OSCAR/VALERI GARCIA MOTION TO RECONSIDER
NLE-1 Piotr G. Reysner 1-13-14 [52]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Reconsider 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).

The court's tentative decision is to grant the Motion and determine the reasonable amount of the Fixed Fees to be paid counsel for the Debtor pursuant to Local Bankruptcy Rule 2016-1. 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:

David Cusick, Chapter 13 Trustee, requests that the court reconsider its Order approving $3,500.00 of attorney fees to Debtors' attorney, Piotr G. Reysner ("Counsel"). Dckt. No. 35. Counsel is no longer eligible to practice law, and is still showing to be the attorney of record in this bankruptcy case. As shown by a review of the California State Bar website and as addressed by the court in other cases, Counsel has wrestled with issues which impaired his ability to practice law and has stipulated to disbarment, which was effective June 16, 2012. Counsel status with the State Bar was Note Eligible to Practice Law effective from September 18, 2011 through the June 16, 2012 date. http://members.calbar.ca.gov/fal/Member/Detail/210937.

In this case, Debtors paid Counsel $1,500.00 prior to the filing of the bankruptcy. On January 11, 2010, the Honorable Judge Bardwil approved an order confirming Debtors' Chapter 13 Plan. Dckt. No. 35. The Plan was confirmed, and further ordered that:

> [T]he attorney's fees for the debtor's attorney in the full amount of $3,500 are approved, $1,500.00 of which was paid prior to the filing of the petition. The balance of $2,000.00, provided that the attorney and debtor have executed and filed a Rights and Responsibilities of Chapter

13 Debtors and Their Attorneys, shall be paid by the trustee from plan payments at the rate specified.

Order Confirming Plan Filed July 9, 2009. Dckt. No. 35. The fees of $3,500.00 were awarded under Local Bankruptcy Rule 2016-1, which provides in pertinent part,

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).
>
> (4) If an attorney elects to be compensated pursuant to Subpart (c) but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.
>
> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

At the times relevant to this Motion the Local Bankruptcy Rule provided for a maximum of $3,500.00 in fixed fees in non-business Chapter 13 cases. The amount was increased to $4,000.00 in 2012.

The Fixed Fee compensation covers the activities of counsel through the debtor obtaining the discharge in the case. The Local Rules provide for additional fees for substantial and unanticipated additional services which may be required. Completing Chapter 13 Plan as confirmed, reviewing the Trustee's proposed final accounting and making sure that the debtor's discharge entered are included in the Fixed Fee.

In addition to Local Bankruptcy Rule 2016-1, 11 U.S.C. § 329 provides that the court may review all transactions between a debtor and counsel during the one-year period prior to the commencement of the case and during the case, and cancel any agreement for fees or order the return of fees that exceed the reasonable value of the services provided.

The Trustee has paid Counsel $1,633.17 through the Chapter 13 Plan to date, which is in addition to $1,500.00 retainer he received. Trustee has not disbursed the additional $366.83, which otherwise remains to be paid to Counsel for services through the entry of the discharge in this case according to the order confirming. Thus, Trustee asks the court to reconsider paying Counsel the additional fees owed, as he is no longer practicing law and he cannot provide the legal services to Debtor.

DISCUSSION

Trustee asserts that the court should reconsider paying Counsel the balance of the Fixed Fee, as "he is no longer practicing law and has not proved that he has earned these remaining fees." Trustee's Motion to Reconsider, Dckt. No. 52 at 2. Though Trustee makes the arguments under Federal Rule of Civil Procedure 60(b), this is properly reviewed under 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1.

Standard for Attorney Compensation

Here, Counsel executed a Rights and Responsibilities on July 9, 2009, which stated that the initial fees charged in this case would be $3,500 for all preconfirmation services, and acknowledged that of this amount, $1,500 was paid by Debtors before the filing of the petition. Dckt. No. 20. Debtors and Counsel acknowledged that where substantial and unanticipated post-confirmation work would be necessary, the attorney may request the court to approve additional fees. Dckt. No. 20 at 5.

A bankruptcy court can, consistent with provision of Bankruptcy Code governing officer compensation, issue and rely upon presumptive guideline fees for routine services in Chapter 13 cases. 11 U.S.C. § 330. *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The docket reflects that Counsel did not apply for additional compensation.

The Chapter 13 Plan was confirmed in this case on September 4, 2010. Order, Dckt. 35. The term of the Plan is 60 months. Plan, Dckt. 35. The case having been filed on June 23, 2009, the Debtors are closing in on completing the Chapter 13 Plan.

The Fixed Fees includes the amounts for counsel to review the Trustee's Final Report, advise counsel that the monies have been properly accounted for, make sure the post-petition education and any other documents necessary for the discharge are filed, and to confirm that the Debtors'

discharge is entered. Counsel cannot provide those legal services to the Debtors. The court finds that the remaining balance of $366.83 relates to these additional services and that payment of such monies should not be to counsel.

The Motion is granted, the court does not allow the $366.83 in fees to be paid to Counsel, and the Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan (including payment to other counsel who may substitute in to represent Debtors).

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 Reconsider filed by the Trustee having been presented to the court, the Motion stating grounds for a review of counsel for Debtors' fees pursuant to 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1(c)(5), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and attorneys' fees in the amount of $366.83, which remain to be paid through the Chapter 13 Plan as confirmed, are disallowed Debtors' former counsel Piotr Reysner. The Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan, which may include counsel who may substitute in to represent Debtors in this case.

5. 10-45834-E-13 MICHAEL NULL — MOTION TO RECONSIDER
NLE-1 Piotr G. Reysner — 1-8-14 [32]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 8, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion and determine the reasonable amount of the Fixed Fees to be paid counsel for the Debtor pursuant to Local Bankruptcy Rule 2016-1. 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:

David Cusick, Chapter 13 Trustee, requests that the court reconsider its Order approving $3,500.00 of attorney fees to Debtors' attorney, Piotr G. Reysner ("Counsel"). Dckt. No. 23. Counsel is no longer eligible to practice law, and is still showing to be the attorney of record in this bankruptcy case. As shown by a review of the California State Bar website and as addressed by the court in other cases, Counsel has wrestled with issues which impaired his ability to practice law and has stipulated to disbarment, which was effective June 16, 2012. Counsel status with the State Bar was Note Eligible to Practice Law effective from September 18, 2011 through the June 16, 2012 date. http://members.calbar.ca.gov/fal/Member/Detail/210937.

In this case, Debtors paid Counsel $1,726.00 prior to the filing of the bankruptcy. On December 10, 2010, the Honorable Judge Sargis approved an order confirming Debtors' Chapter 13 Plan. Dckt. No. 23. The Plan was confirmed, and further ordered that:

> [T]he attorney's fees for the debtor's attorney in the full amount of $3,500 are approved, $1,726.00 of which was paid prior to the filing of the petition. The balance of $1,774.00, provided that the attorney and debtor have executed and filed a Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall be paid by the trustee from plan payments at the rate specified in the Guidelines for Payment of Attorney's Fees.

Order Confirming Debtor's Plan Filed September 25, 2010. Dckt. No. 23. The fees of $3,500.00 were awarded under Local Bankruptcy Rule 2016-1, which provides in pertinent part,

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).
>
> (4) If an attorney elects to be compensated pursuant to Subpart (c) but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.
>
> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

At the times relevant to this Motion the Local Bankruptcy Rule provided for a maximum of $3,500.00 in fixed fees in non-business Chapter 13 cases. The amount was increased to $4,000.00 in 2012.

The Fixed Fee compensation covers the activities of counsel through the debtor obtaining the discharge in the case. The Local Rules provide for additional fees for substantial and unanticipated additional services which may be required. Completing Chapter 13 Plan as confirmed, reviewing the

Trustee's proposed final accounting and making sure that the debtor's discharge entered are included in the Fixed Fee.

In addition to Local Bankruptcy Rule 2016-1, 11 U.S.C. § 329 provides that the court may review all transactions between a debtor and counsel during the one-year period prior to the commencement of the case and during the case, and cancel any agreement for fees or order the return of fees that exceed the reasonable value of the services provided.

The Trustee has paid Counsel $975.81 through the Chapter 13 Plan to date, which is in addition to $1,726.00 retainer he received. Trustee has not disbursed the additional $789.19, which otherwise remains to be paid to Counsel for services through the entry of the discharge in this case according to the order confirming. Thus, Trustee asks the court to reconsider paying Counsel the additional fees owed, as he is no longer practicing law and he cannot provide the legal services to Debtor.

DISCUSSION

Trustee asserts that the court should reconsider paying Counsel the balance of the Fixed Fee, as "he is no longer practicing law and has not proved that he has earned these remaining fees." Trustee's Motion to Reconsider, Dckt. No. 32 at 2. Though Trustee makes the arguments under Federal Rule of Civil Procedure 60(b), this is properly reviewed under 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1.

Standard for Attorney Compensation

Here, Counsel executed a Rights and Responsibilities on September 29, 2010, which stated that the initial fees charged in this case would be $3,500 for all preconfirmation services, and acknowledged that of this amount, $1,726.00 was paid by Debtors before the filing of the petition. Dckt. No. 7. Debtors and Counsel acknowledged that where substantial and unanticipated post-confirmation work would be necessary, the attorney may request the court to approve additional fees. Dckt. No. 7 at 5.

A bankruptcy court can, consistent with provision of Bankruptcy Code governing officer compensation, issue and rely upon presumptive guideline fees for routine services in Chapter 13 cases. 11 U.S.C. § 330. *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The docket reflects that Counsel did not apply for additional compensation.

The Chapter 13 Plan was confirmed in this case on December 10, 2010. Order, Dckt. 23. The term of the Plan is 60 months. Plan, Dckt. 5. The case having been filed on September 29, 2010, the Debtors are closing in on completing the Chapter 13 Plan.

The Fixed Fees includes the amounts for counsel to review the Trustee's Final Report, advise counsel that the monies have been properly accounted for, make sure the post-petition education and any other documents necessary for the discharge are filed, and to confirm that the Debtors' discharge is entered. Counsel cannot provide those legal services to the Debtors. The court finds that of the remaining balance of $789.19, the sum of $400.00 relates to further services in the case (including having the Debtors file their certificate of post-petition debtor financial educations)

and $389.19 relates to the services getting the Plan confirmed and getting the case to closing.

The Motion is granted, the court does not allow the $400.00 in fees to be paid to Counsel, and the Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan (including payment to other counsel who may substitute in to represent Debtors).

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 Reconsider filed by the Trustee having been presented to the court, the Motion stating grounds for a review of counsel for Debtors' fees pursuant to 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1(c)(5), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and attorneys' fees in the amount of $400.00, which remain to be paid through the Chapter 13 Plan as confirmed, are disallowed Debtors' former counsel Piotr Reysner. The Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan, which may include counsel who may substitute in to represent Debtors in this case.
>
> **IT IS FURTHER ORDERED** that fees in the amount of $389.19 remain owing to said Counsel, which the Trustee shall pay as provided in the Chapter 13 Plan.

6. 09-48296-E-13 DARWIN/LAURA CRANOR — MOTION TO RECONSIDER
NLE-1 Piotr G. Reysner — 1-13-14 [36]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Reconsider was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 grant the Motion and determine the reasonable amount of the Fixed Fees to be paid counsel for the Debtor pursuant to Local Bankruptcy Rule 2016-1. 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:

David Cusick, Chapter 13 Trustee, requests that the court reconsider its Order approving $3,500.00 of attorney fees to Debtors' attorney, Piotr G. Reysner ("Counsel"). Dckt. No. 23. Counsel is no longer eligible to practice law, and is still showing to be the attorney of record in this bankruptcy case. As shown by a review of the California State Bar website and as addressed by the court in other cases, Counsel has wrestled with issues which impaired his ability to practice law and has stipulated to disbarment, which was effective June 16, 2012. Counsel status with the State Bar was Note Eligible to Practice Law effective from September 18, 2011 through the June 16, 2012 date. http://members.calbar.ca.gov/fal/Member/Detail/210937.

In this case, Debtors paid Counsel $1,726.00 prior to the filing of the bankruptcy. On April 2, 2010, the Honorable Judge Sargis approved an order confirming Debtors' Chapter 13 Plan. Dckt. No. 23. The Plan was confirmed, and further ordered that:

> [T]he attorney's fees for the debtor's attorney in the full amount of $3,500 are approved, $1,726.00 of which was paid

prior to the filing of the petition. The balance of $1,774.00, provided that the attorney and debtor have executed and filed a Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall be paid by the trustee from plan payments at the rate specified.

Order Confirming Debtor's Chapter 13 Plan Filed December 28, 2009. Dckt. No. 23. The fees of $3,500.00 were awarded under Local Bankruptcy Rule 2016-1, which provides in pertinent part,

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).
>
> (4) If an attorney elects to be compensated pursuant to Subpart (c) but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.
>
> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

At the times relevant to this Motion the Local Bankruptcy Rule provided for a maximum of $3,500.00 in fixed fees in non-business Chapter 13 cases. The amount was increased to $4,000.00 in 2012.

The Fixed Fee compensation covers the activities of counsel through the debtor obtaining the discharge in the case. The Local Rules provide for additional fees for substantial and unanticipated additional services which may be required. Completing Chapter 13 Plan as confirmed, reviewing the Trustee's proposed final accounting and making sure that the debtor's discharge entered are included in the Fixed Fee.

In addition to Local Bankruptcy Rule 2016-1, 11 U.S.C. § 329 provides that the court may review all transactions between a debtor and counsel during the one-year period prior to the commencement of the case and during the case, and cancel any agreement for fees or order the return of fees that exceed the reasonable value of the services provided.

The Trustee has paid Counsel $1,271.51 through the Chapter 13 Plan to date, which is in addition to $1,726.00 retainer he received. Trustee has not disbursed the additional $502.49, which otherwise remains to be paid to Counsel for services through the entry of the discharge in this case according to the order confirming. Thus, Trustee asks the court to reconsider paying Counsel the additional fees owed, as he is no longer practicing law and he cannot provide the legal services to Debtor.

DISCUSSION

Trustee asserts that the court should reconsider paying Counsel the balance of the Fixed Fee, as "he is no longer practicing law and has not proved that he has earned these remaining fees." Trustee's Motion to Reconsider, Dckt. No. 36 at 2. Though Trustee makes the arguments under Federal Rule of Civil Procedure 60(b), this is properly reviewed under 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1.

Standard for Attorney Compensation

Here, Counsel executed a Rights and Responsibilities on December 28, 2009, which stated that the initial fees charged in this case would be $3,500 for all preconfirmation services, and acknowledged that of this amount, $1,726.00 was paid by Debtors before the filing of the petition. Dckt. No. 7. Debtors and Counsel acknowledged that where substantial and unanticipated post-confirmation work would be necessary, the attorney may request the court to approve additional fees. Dckt. No. 7 at 5.

A bankruptcy court can, consistent with provision of Bankruptcy Code governing officer compensation, issue and rely upon presumptive guideline fees for routine services in Chapter 13 cases. 11 U.S.C. § 330. *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The docket reflects that Counsel did not apply for additional compensation.

The Chapter 13 Plan was confirmed in this case on April 2, 2010. Order, Dckt. 23. The term of the Plan is 60 months. Plan, Dckt. 5. The case having been filed on December 28, 2009, the Debtors are closing in on completing the Chapter 13 Plan.

The Fixed Fees includes the amounts for counsel to review the Trustee's Final Report, advise counsel that the monies have been properly accounted for, make sure the post-petition education and any other documents necessary for the discharge are filed, and to confirm that the Debtors' discharge is entered. Counsel cannot provide those legal services to the Debtors. The court finds that of the remaining balance of $502.49, the sum of $400.00 relates to further services in the case (including having the Debtors file their certificate of post-petition debtor financial educations) and $102.49 relates to the services getting the Plan confirmed and getting the case to closing.

The Motion is granted, the court does not allow the $400.00 in fees to be paid to Counsel, and the Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan (including payment to other counsel who may substitute in to represent Debtors).

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 Reconsider filed by the Trustee having been presented to the court, the Motion stating grounds for a review of counsel for Debtors' fees pursuant to 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1(c)(5), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and attorneys' fees in the amount of $400.00, which remain to be paid through the Chapter 13 Plan as confirmed, are disallowed Debtors' former counsel Piotr Reysner. The Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan, which may include counsel who may substitute in to represent Debtors in this case.
>
> **IT IS FURTHER ORDERED** that fees in the amount of $102.49 remain owing to said Counsel, which the Trustee shall pay as provided in the Chapter 13 Plan.

7. 09-32179-E-13 SCOTT/JENNIFER ALLEN — MOTION TO RECONSIDER
NLE-2 Piotr G. Reysner — 1-13-14 [58]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Reconsider was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 grant the Motion and determine the reasonable amount of the Fixed Fees to be paid counsel for the Debtor pursuant to Local Bankruptcy Rule 2016-1. 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:

David Cusick, Chapter 13 Trustee, requests that the court reconsider its Order approving $3,000.00 of attorney fees to Debtors' attorney, Piotr G. Reysner ("Counsel"). Dckt. No. 41. Counsel is no longer eligible to practice law, and is still showing to be the attorney of record in this bankruptcy case. As shown by a review of the California State Bar website and as addressed by the court in other cases, Counsel has wrestled with issues which impaired his ability to practice law and has stipulated to disbarment, which was effective June 16, 2012. Counsel status with the State Bar was Note Eligible to Practice Law effective from September 18, 2011 through the June 16, 2012 date. http://members.calbar.ca.gov/fal/Member/Detail/210937.

In this case, Debtors paid Counsel $1,000.00 prior to the filing of the bankruptcy. On September 22, 2009, the Honorable Judge Bardwil approved an order confirming Debtors' Chapter 13 Plan. Dckt. No. 41. The Plan was confirmed, and further ordered that:

> [T]he attorney's fees for the debtor's attorney in the full amount of $3,000 are approved, $1,000.00 of which was paid prior to the filing of the petition. The balance of

> $2,000.00, provided that the attorney and debtor have executed and filed a Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall be paid by the trustee from plan payments at the rate specified.

Order Confirming First Amended Chapter 13 Plan Filed July 30, 2009. Dckt. No. 41. The fees of $3,000.00 were awarded under Local Bankruptcy Rule 2016-1, which provides in pertinent part,

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).
>
> (4) If an attorney elects to be compensated pursuant to Subpart (c) but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.
>
> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

At the times relevant to this Motion the Local Bankruptcy Rule provided for a maximum of $3,500.00 in fixed fees in non-business Chapter 13 cases. The amount was increased to $4,000.00 in 2012.

The Fixed Fee compensation covers the activities of counsel through the debtor obtaining the discharge in the case. The Local Rules provide for additional fees for substantial and unanticipated additional services which may be required. Completing Chapter 13 Plan as confirmed, reviewing the Trustee's proposed final accounting and making sure that the debtor's discharge entered are included in the Fixed Fee.

In addition to Local Bankruptcy Rule 2016-1, 11 U.S.C. § 329 provides that the court may review all transactions between a debtor and counsel during the one-year period prior to the commencement of the case and during the case, and cancel any agreement for fees or order the return of fees that exceed the reasonable value of the services provided.

The Trustee has paid Counsel $1,633.17 through the Chapter 13 Plan to date, which is in addition to $1,000.00 retainer he received. Trustee has not disbursed the additional $366.83, which otherwise remains to be paid to Counsel for services through the entry of the discharge in this case according to the order confirming. Thus, Trustee asks the court to reconsider paying Counsel the additional fees owed, as he is no longer practicing law and he cannot provide the legal services to Debtor.

DISCUSSION

Trustee asserts that the court should reconsider paying Counsel the balance of the Fixed Fee, as "he is no longer practicing law and has not proved that he has earned these remaining fees." Trustee's Motion to Reconsider, Dckt. No. 58 at 2. Though Trustee makes the arguments under Federal Rule of Civil Procedure 60(b), this is properly reviewed under 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1.

Standard for Attorney Compensation

Here, Counsel executed a Rights and Responsibilities on July 22, 2009, which stated that the initial fees charged in this case would be $3,000 for all preconfirmation services, and acknowledged that of this amount, $1,000.00 was paid by Debtors before the filing of the petition. Dckt. No. 22. Debtors and Counsel acknowledged that where substantial and unanticipated post-confirmation work would be necessary, the attorney may request the court to approve additional fees. Dckt. No. 22 at 5.

A bankruptcy court can, consistent with provision of Bankruptcy Code governing officer compensation, issue and rely upon presumptive guideline fees for routine services in Chapter 13 cases. 11 U.S.C. § 330. *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The docket reflects that Counsel did not apply for additional compensation.

The Chapter 13 Plan was confirmed in this case on September 22, 2009. Order, Dckt. 41. The term of the Plan is 60 months. Plan, Dckt. 30. The case having been filed on June 5, 2009, the Debtors are closing in on completing the Chapter 13 Plan.

The Fixed Fees includes the amounts for counsel to review the Trustee's Final Report, advise counsel that the monies have been properly accounted for, make sure the post-petition education and any other documents necessary for the discharge are filed, and to confirm that the Debtors'

discharge is entered. Counsel cannot provide those legal services to the Debtors. The court finds that the remaining balance of $366.83 relates to these additional services and that payment of such monies should not be to counsel.

The Motion is granted, the court does not allow the $366.83 in fees to be paid to Counsel, and the Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan (including payment to other counsel who may substitute in to represent Debtors).

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 Reconsider filed by the Trustee having been presented to the court, the Motion stating grounds for a review of counsel for Debtors' fees pursuant to 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1(c)(5), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and attorneys' fees in the amount of $366.83, which remain to be paid through the Chapter 13 Plan as confirmed, are disallowed Debtors' former counsel Piotr Reysner. The Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan, which may include counsel who may substitute in to represent Debtors in this case.

8. 13-29907-E-13 SYAMPHAI LIEMTHONGSAMOUT MOTION TO CONFIRM PLAN
SS-2 Scott Shumaker 12-31-13 [40]

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, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 31, 2013. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

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 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 Amended 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. § 1323 permits a debtor to amend a plan any time before confirmation. The Trustee argues that the plan may not be proposed in good faith, 11 U.S.C. § 1325(a)(3). Debtor admits in her declaration in support of this motion, that at the time of filing she held a cashier's check for $15,842. Dckt. 42. The Debtor indicates that she did not consider this her money and that is why it was not originally listed. Debtor does not state what her intent was with the Cashier's Check, only that it was money she had set aside for her son. The Trustee is concerned that the Debtor will spend these funds and requests the money be turned over to the Trustee in a lump sum. The Trustee states that while section 6.04 of the plan calls for Debtor to repay those funds into the plan, it fails to propose a date in which the lump sum will be provided.

The Trustee also states that the Debtor proposes to pay secured creditor JPMorgan Chase Bank, N.A. a monthly dividend of $8.64 per month, in Class 2 of the plan. Monthly disbursement payments must normally be no less than $15.00 per month, under Federal Rule of Bankruptcy Procedure 3010(b).

Lastly, the Trustee argues that the Debtor's Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. §1325(a)(4). The Debtor's non-exempt equity totals $13,245.00 and the Debtor is proposing a 7% dividend to unsecured creditors, which will pay only $7,448.06 to unsecured claims. In order to satisfy liquidation, the plan must propose to pay no less than 13%. While the proposed amended plan does have sufficient proceeds to pay the unsecured claims the 13% required, this may change based on filed and allowed claims.

DEBTOR'S RESPONSE

Debtor does not object to increasing the payment to JPMorgan Chase Bank, N.A. to $15.00, which can be reflected in the Order Confirming. The Debtor also agrees that the plan must provide unsecured claims with approximately 13% and ask that this change also be reflected in the Order Confirming.

However, the Debtor argues that the plan has been filed in good faith and that Debtor is not required to surrender to the Trustee the non-exempt funds presently in her possession, as the plan repays all non-exempt funds to the estate.

Trustee asserts that Debtor must surrender to the trustee the sum of $15,842.00 for distribution to Debtor's creditors but Debtor argues that the Debtor's plan provides for repayment in full of the non-exempt amount of these funds ($13,245.00) through the plan. Debtor states that Chapter 13 Plans allow the repayment of certain debts and Estate assets monthly, not in one lump sum.

Debtor also argues that the failure to list the subject funds in her original petition and schedules was not intentional and that she saved the money for her son and did not believe it belonged to her. When the matter came to light, Debtor asserts she disclosed the assets and proposed a plan which repaid the non-exempt funds in full.

DISCUSSION

Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren,* 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389-1390 (9th Cir. 1982)). Factors to consider include:

1) The amount of the proposed payments and the amounts of the debtor's surplus;

2) The debtor's employment history, ability to earn, and likelihood of future increases in income;

3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

5) The extent of preferential treatment between classes of creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

11) The burden which the plan's administration would place upon the trustee.

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))).

Here, the court is asked to consider factors (1) The amount of the proposed payments and the amounts of the debtor's surplus and (4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court. The plan does not make clear how the subject funds will be "repaid to the bankruptcy estate through the Amended Plan." Plan, Dckt. 43.

Debtor discusses various provisions of the Bankruptcy Code regarding future earnings and other future income and that it does not require a lump sum payment. However, the subject funds do not appear to be "future earnings or other future income" as described in 11 U.S.C. § 1325(a)(1). These funds were in Debtor's possession on the date of filing the petition. Debtor has not made clear in the pleadings or in the filed Chapter 13 plan how the subject funds will be repaid through the Amended Plan. No discussion or explanation has been provided how these funds will be distributed (either through plan payments, lump sum, or otherwise). While Debtor appears to dispute that the payment does not need to be made in one lump sum, she does not address how the payment will be made at all.

The Debtor has $15,842.00 of cash that is being held in a cashier's check. The existence of these moneys was not originally disclosed. In responding to the Opposition the Debtor fails to provide any testimony under penalty of perjury, instead relying sole on arguments made by counsel.

When stating assets under penalty of perjury on Schedule B, Debtor did not disclose the existence of the $15,842.00 cashier's check. Schedule B, Dckt.1 at 10-13. In her declaration in support of confirmation the Debtor admits that she has the money, it is money that she "set aside for her son" and it is for his future. Therefore, she did not consider it her money. Declaration, Dckt. 42. She state that she did not inform her attorney of this money.

Debtor then states that when the existence of the cashier's check "came to light," she seeks to exempt part of it and recognizes that part of it is not exempt. She has filed amended Schedules B and C, and also I and J to provide for income of her partner (whom she recognizes as her husband, but they are not married).

Debtor's lack of candor and hiding information from her attorney, trustee, creditors and the court raises further red flags concerning her credibility and good faith. Apparently, it is more important for her to

keep the non-exempt funds in this case safe from creditors than it is to fund her plan. The court does not find credible her argument of "trust me to fund the plan to pay an amount equal to the monies that I hid from my attorney, creditors, the trustee and court, and I'll keep the money for now and use it for whatever, whenever I want." If the Debtor were acting in good faith, the plan would provide for that money to be used for a specific purpose. As it now sits, the Debtor can abscond with the non-exempt cash asset and then default in her plan. This Debtor is not proposing the plan in good faith and is not prosecuting this case in good faith.

Therefore, the amended 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.

9.	**13-31109-E-13 NLE-1**	**RONALD DICKERSON AND MARY SANER Gerald Glazer**	**CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-3-13 [16]**

CONT. FROM 1-28-14, 12-17-13, 10-29-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on October 3, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan was not filed in good faith under 11 U.S.C. § 1325(a)(7). Trustee states that Debtors propose a 36 month plan paying $75.00 per month with a guaranteed dividend of no less than 0% to general unsecured claims.

Trustee argues that it does not appear the Debtors are attempting to restructure their debts in good faith and that other than proposing to pay Debtors' counsel fees of $2,100.00, Debtors do nothing to restructure their finances. Trustee argues that this Chapter 13 case is nothing more than a disguised Chapter 7 which appears to be in violation of the Supreme Court's ruling in *In re Dewsnup*, 502 U.S. 410 (1992).

Additionally, the Trustee argues the Debtors' plan may fail the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). The Debtors list on Schedule B a potential lawsuit, listed at an unknown value. The asset is exempted on Schedule C also in an unknown amount. The Trustee argues the non-exempt equity, if any, upon the claim being realized should be contributed to the plan.

The Trustee argues that the proposed plan is not the Debtors' best efforts under 11 U.S.C. § 1325(b). Debtors are below median income proposing a 36 month plan paying $75.00 per month with a guaranteed dividend of no less than 0% to general unsecured claims. Trustee argues that Debtors are not proposing all their disposable income into the plan. Debtors list their residential real property in Class 3 of the plan to surrender the property. Trustee states that Debtors testified at the 341 meeting that they have not yet received a notice of default or any foreclosure action by the lender on the property but that they have missed five (5) mortgage payments. Debtors list an expense of $1,100.00 per month for mortgage or rent. Trustee states that Debtors also testified at the 341 meeting that the expense for rent or mortgage was an anticipated expense that will begin upon the foreclosure of their residence.

Trustee argues that Debtors should be required to commit their projected disposable income into the plan and until the time they are moving, rent is not a necessary expense. Trustee argues the plan payment should be increased by $1,100.00 per month.

Lastly, the Trustee argues the Debtor may not be able to make the payments called for under the plan. Debtor has only $270.00 in their bank accounts and no cash. Where the Debtor has not paid rent for 5 months and the Debtor has no cash and nothing in their checking and savings, the Trustee argues that the Debtor's income is less or the expenses are more than scheduled.

CONTINUANCE

The court continued the hearing to allow Debtor to file opposition.

OPPOSITION

The Debtor filed an opposition, stating that the Debtor's plan was filed in good faith and that they are willing to contribute any non-exempt interest in their lawsuit to the Chapter 13 plan. Debtors state they are using their best efforts and gave their best estimate of their income and expenses on the bankruptcy forms. Mr. Dickerson has found a job and filed updated schedules to reflect the change. Debtors also state they are helping Mr. Dickerson's daughter, who is a single mother of three, with $350.00 a month to pay for daily living expenses. Debtors also state they live with Mr. Dickerson's mother, who is unable to meet her expenses and they contribute $60.00 per month for personal necessities.

Debtors anticipate moving in five months from December 12, 2013, and will no longer be able to help debtors' family at that time as they will need to use the money for rent.

TRUSTEE'S RESPONSE

Trustee responded, again stating that Debtors have done nothing to attempt to reorganize their debts, but instead are merely filing a disguised Chapter 7. The plan proposes to pay nothing to secured claims or unsecured claims. The only party to receive payment in the plan is Debtors' counsel. Plan, Dckt. 5.

While the Debtors propose to contribute any non-exempt equity in their lawsuit to the Chapter 13 plan, Trustee states this does resolve the Trustee's concerns with liquidation. Debtors have not provided the Trustee with pertinent information relating to the lawsuit such as; which Court the matter is filed in, the case number of the lawsuit or information relating to the attorney representing the Debtor in this case. Debtors also have not filed a Motion to Employ Counsel with the Bankruptcy Court. Debtor did indicate at the 341 held on September 26, 2013, that the law firm handling the lawsuit is Dreyer, Babich, Buccola et al. Trustee states the lack of information relating to the potential lawsuit causes concern whether the order confirming can provide sufficient information so that the Debtors shall make the payments of the lawsuit funds as proposed.

The Trustee objected to the plan based on whether the 8 Debtors contribution of $75 was Debtor’s best effort in light of the fact that the $1,100 per month rent expense was a projected expense, not currently being paid by the Debtors. In response to this portion of the objection, the Debtors filed Amended Schedule I and J. The new expense report list significant changes to the Debtors' original household budget and include several new expenses, such as $500 assisted living for Debtors, $60 to assist mother, $350 to assist daughter/grandchildren, $250 per month for tools for new job and $431.69 savings for moving expenses. The Debtors indicate in the declaration in support of the Debtors' opposition to the Trustee's objection, that once the Debtors' move, they will no longer be able to assist their family members, and are not certain how the parties will then meet their expenses.

Trustee states that Debtors offer no information or evidence as to what the current sources of income and household income for both parties. Debtors do not indicate how long they have been contributing to each member. Debtors also fail to show bank statements to support their claim that they are saving $431.69 per month for the move. Nor do the Debtors supply any evidence in the form of receipts to support the claimed expense of $250 per month for tools. It appears the Debtors are creating expenses to avoid paying toward the plan, as they clearly indicate that the expenses are not going to continue, but are temporary expenses due to their current ability to pay them.

Trustee argues that despite the fact that debtors admitted at the 341 held on September 26, 2013, that they had not paid their mortgage payments on the residence at 5632 Sapunor Way, Carmichael, California in approximately 5 months. The concern is that if they had not paid mortgage in 5 months and had no excess funds in their accounts or in their pocket, how will Debtors be able to maintain their plan payment, their household expenses and the rents once they move. In addition now, the Debtors have indicated that they have several family members who are also not able to support themselves and have placed an additional burden on the Debtors' financial shoulders.

The Trustee requests the Debtors be required to provide bank statements for accounts for the 90 days prior to filing and for the time that has elapse since filing and also that the Debtors provide receipts for purchases of tools since filing. The Trustee also requests the Debtors supply information relating to sources of income for those the Debtors claim to be assisting with support.

DEBTOR'S REPLY

Debtors reply, stating they have given the Trustee the information regarding the personal injury lawsuit, located in the Statement of Financial Affairs, Item number 4. Debtors also state they have supplied all the information requested by the Trustee in this matter.

DEBTORS' FEBRUARY 6, 2014 SUPPLEMENTAL RESPONSE

On February 6, 2014, the Debtors filed Supplemental Pleadings to address the Trustee's objections and the Court's concerns, including the lack of candor and disclosure concerning what appears to be the only real asset, and ability to make payments under a Chapter 13 Plan – the State Court lawsuit. To address these concerns, Debtors' counsel first provides a Response, Dckt. 41, which states,

A. A copy of the contract for legal services with the Dreyer Law Firm to prosecute the State Court litigation for the claims of the Estate is provided as Exhibit A.

B. The terms of that contract include,

1. The Dreyer Law Firm makes no guaranty as to what will be recovered. (Debtors' counsel paraphrases this as the Dreyer Law Firm having made no projections, professional opinion, or estimation as to the value of this asset of the estate.)

2. The contractual provision cited by Debtors' Counsel does state that when the Dreyer Firm comments as to the value of this asset of the estate it is the opinion of such State Court counsel.

C. Exhibit B are statements showing the Debtors' bank account balances.

D. Exhibit C is a receipt for monies which were wired to the Debtors' daughter.

Debtor May Saner provides her testimony under penalty of perjury in the Declaration filed with the Supplemental Response. Dckt. 42. First, Ms. Saner states under penalty of perjury that "The Dreyer law firm has made no opinion of value of my personal injury claim." The court finds such testimony to be "incredible" (not credible). It is highly unlikely that a well respected, highly experienced plaintiffs law firm such as the Dreyer Law Firm would not review the claims, meeting and confer with the client, provide the client with realistic advice as to the value of the claim, and educate the client so that the client would have realistic expectations as to the possible outcome. Further, in filing such litigation, it is common for an amount to be demanded. Ms. Saner and her Bankruptcy Counsel carefully avoid (1) providing the court with a copy of the State Court Complaint or (2) stating how much is asserted as damages – Is it $2,000.00, $20,000.00, or $2,000,000.00. Further, Ms. Saner and Bankruptcy Counsel carefully fail to provide any information concerning the defendant and

possible insurance for the injury – is the statutory minimum or a $20,000,000.00 policy.

Exhibit B which are identified in the Response as bank statements and Ms. Saner's declaration under penalty of perjury as receipts showing the balance in the Debtors checking and savings accounts as of January 31, 2014, are merely ATM receipts for showing a one-day snapshot. Hidden from the court are the transactions which have led to those low, end of month balances.

DISCUSSION

The court agrees with the concerns of the Trustee.

First, it appears to the court that Debtors have filed a thinly disguised Chapter 7 liquidation, with on good faith attempt to reorganize their debts. The plan proposes to pay nothing to secured claims or unsecured claims and the only party to receive payment in the plan is Debtors' counsel. Plan, Dckt. 5. Debtors have offered no argument or evidence to the contrary.

Second, the Debtors have not offered sufficient information or evidence as to what the current sources of income, household income for the parties, and expenses. The court agrees that Debtors have not offered evidence to show they are saving $431.69 per month for the future move or support the claimed expense of $250 per month for tools. The court is concerned that the Debtors are altering their expenses to avoid paying more to unsecured creditors. Debtors have not offered argument or evidence to the contrary. Mere statements that the plan is in "good faith" and that they are using their "best efforts" are legal conclusions without any basis for the court to so conclude.

Third, the Debtors appear to have hired the Dryer law firm as special counsel to prosecute claims which are property of the bankruptcy estate. The Chapter 13 Debtors appear to be exercising the powers of a bankruptcy trustee to prosecute this asset of the estate. On its face, 11 U.S.C. § 1303 provides that a Chapter 13 debtor may exercise the rights and powers of a trustee under § 363 of the Bankruptcy Code. To the extent that it is contended that the hiring of special counsel and prosecuting this litigation is that which would be done by a trustee, the trustee would have to obtain court authorization to employ such counsel. 11 U.S.C. § 327.

While there is a recognition that § 1303 doesn't work to limit the exercise of other necessary powers as the fiduciary of the bankruptcy estate, a Chapter 13 is not a situation where the debtor is free to do whatever he or she wants with whatever professional, secret from the court, Chapter 13 Trustee, and parties in interest. FN.1.

FN.1. See discussion in COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 1303.04; *Houston v. Eiler (In re Cohen)*, 305 B.R. 886 (B.A.P. 9th Cir. 2004).

Even if not subject to prior court authorization to employ is required, 11 U.S.C. § 329 requires that any attorney who provides services

for a debtor must provide disclosures to the court and parties in interest. This section states,

> § 329. Debtor's transactions with attorneys
>
> (a) **Any attorney representing a debtor in a case under this title, or in connection with such a case**, whether or not such attorney applies for compensation under this title, **shall file with the court a statement of the compensation paid or agreed to be paid**, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
>
> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to–
>
> (1) the estate, if the property transferred--
>
> (A) would have been property of the estate; or
>
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
>
> (2) the entity that made such payment.

11 U.S.C. § 329 [emphasis added]. As the Dreyer Firm is actively representing the Chapter 13 Debtors in prosecuting these claims which are property of the bankruptcy estate, these fees are to be paid after one year before the case was filed. No such statement by the Dreyer firm has been filed with the court.

While the court would be surprised if the Dreyer Firm employment terms was not the standard for this type of claim, the court is concerned with the Debtors lack of "knowledge" concerning this claim and its value. On Schedule B the Debtors state under penalty of perjury that the value of this "potential claim" is "unknown." Dckt. 1 at 14. However, on the Statement of Financial Affairs the Debtors state that they have already filed suit on this claim. (California Superior Court, County of Sacramento, Case No. 34-2012-00137505). Dckt. 1 at 34. From the case number, the state court action was filed in 2012, now almost two years ago. It is not a "potential claim," but an actual claim being litigated.

Even more significant is the feigned ignorance as to the value of the claim the Debtors are asserting. The Dreyer Firm is well known in the region for successfully prosecuting plaintiff's injury claims. When they prosecute a case it is highly likely that the claim will be successfully prosecuted and that there will be a significant recovery. If nothing else, the Debtors could have truthfully and honestly stated under penalty of perjury that the complaint had been filed seeking damages. Instead, the Debtors state under penalty of perjury that they have no knowledge of what they are seeking to recover.

In the Supplemental Pleadings the Debtors have continued in their efforts to hide and obfuscate. The "incredible" testimony that the Dreyer Law Firm has expressed no opinion as to value is not credible. The hiding of the State Court Complaint and refusing to state what is sought as damages, at least as stated in the Complaint, causes the court to believe that it is a huge number which the Debtors are intentionally hiding from the court in breach of their fiduciary duties to the Estate.

This inaccurate disclosure under penalty of perjury puts into question the Debtors' good faith in prosecuting a plan in this case (11 U.S.C. § 1325(a)(3)), as well as their ability to serve as the fiduciary of this bankruptcy estate. It is as if these Debtors are surreptitiously pleading with the court to convert their case to one under Chapter 7.

As discussed above, this Chapter 13 "Plan" makes no provision for payment of any claims to creditors. Rather, it is a thinly veiled Chapter 7 case in which the Debtors hide a personal injury claim being litigated by the Dreyer Law Firm. While a properly drafted Plan which provides for the claims of the Estate to be litigated and paid to creditors (after Debtors properly claim exemptions) could be presented to the court, such has not been done. The Debtors' lack of candor and truthful, clear testimony belies any statements that of "oh yeah, now that you point that out, we could, at some future date, come up with some terms that might provide for the payment of some money, possibly, from what the Dreyer Law Firm gets for us."

The Objection to Confirmation is sustained. Counsel and the Debtors can go back to the drawing board and come up with a Plan that they, in good faith and subject to the duties and obligations under Federal Rule of Bankruptcy Procedure 9011, propose a well thought out Plan that complies with the Bankruptcy Code. They can provide evidence in support of a motion to confirm such plan. While the court does not expect the Debtors and Dreyer Law Firm to disclose information which would be detrimental to the prosecution of the claim, clear testimony to give the magnitude of such asset of the estate, risks, and projections of recovery can be provided. Given the lack of candor of the Debtors in the testimony provided and Responses, it will be necessary to have counsel from the Dreyer Law Firm not only provide his or her declaration, but also be in attendance at the hearing on the motion to confirm the amended plan. The court does not have the confidence that declarations prepare for such counsel would be sufficient and having such attorney present may allow the Chapter 13 Trustee, creditors, U.S. Trustee, other parties in interest, and the court to have questions addressed rather than the court having to deny such motion.

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.

10. 11-27611-E-13 WW-2 | **CHRISTOPHER/SHAWN GEORGIOU** Mark Wolff | **MOTION TO MODIFY PLAN** 12-18-13 [60]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 18, 2013. By the court's calculation, 55 days' notice was provided. 35 days' notice is required.

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.

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 18, 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.

11. 13-35413-E-13 ROBERT JEFFREY — **MOTION TO VALUE COLLATERAL OF ETRADE BANK**
Pro Se — **12-26-13 [18]**

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on December 26 2013. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

Tentative 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).

The court's tentative decision is to deny the Motion to Value Collateral without prejudice. Oral argument may be presented by the parties at 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 seeks to value the collateral of E-TRADE Bank. However, the service of process is not proper.

Service of Process Issues

Federal Rule of Bankruptcy Procedure 7004(h) provides that, service of process on an insured depository institution shall be made by certified mail addressed to an officer of the institution.

The respondent creditor in this case, E-TRADE Bank, is insured by the Federal Deposit Insurance Corporation. Thus, the service requirements of regarding federally insured financial institutions apply. The certificate of service for this motion does not state that the Motion was sent to the respondent creditor by certified mail, or that the mail was addressed to one of its officers.

Additionally, according to the certificate of service for this motion, Dckt. No. 21, Debtor served E-TRADE Bank at the following address:

501 Plaza 2, 34 Exchange Place, Jersey City, NJ 07311. Debtor provides no basis that E-TRADE Bank accepts or has an agent for service of process at this address. The court notes the address specified for this entity on the FDIC website is 671 North Glebe Road, 16th Floor, Arlington, VA 22203. The link to the FDIC website for federally insured financial institutions may be found under the additional links tab at the court's website.

Moreover, the other address of Creditor ETRADE BANK to which the Motion was sent was to a Post Office Box. Service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously."). FN.1.

FN.1. The court requires attorneys and *pro se* parties to comply with the service rules to insure that orders of the court cannot be collaterally attacked. This court does not want to have to address the situation where a debtor has faithfully and fully performed a plan for 60 months, making every payment on time. Then, when that debtor makes demand on the creditor to reconvey the deed of trust (in what is commonly, though inaccurately described as with a "lien strip") only to find that the creditor was never properly served and the court's orders from five years earlier are of no legal force or effect. For a discussion of this court's view of how a debtor forces the reconveyance of deeds of trusts which secure claims for which there is no value in the collateral, see *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case) and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013); both of which are posted under the Opinions for this judge on the court's website.

The court also notes that the Debtor's Declaration, Dckt. 20, may be problematic on value. This appears to be a "fill-in form" used by the *pro se* Debtor. There is nothing inherently improper about using such forms, and for the pro se debtor, such form may be of great assistance in assembling the allegations and testimony. However, in some cases such forms may create the illusion that the federal judicial process is merely one in which a series of boxes are checked, and like the DMV, some governmental office just processes the paperwork.

In his declaration the Debtor states that it is his opinion that the Property has a value of $308,000.00. Owners of property may provide their personal opinion as to value, but it must be the owner's opinion. It appears from the Declaration that the Debtor may merely be repeating the information which he obtained from eappraissial.com. If so, then such statement would merely be hearsay (repeating of the out of court statements by eappraissial.com) which the court does not find credible and would not be admissible. Fed. R. Evid. 801, 802. If may be that the Debtor is providing his opinion and makes reference to eappraissial.com to show the court that

he has made an effort to corroborate his opinion. The court is confident that the Debtor will make this clear when he refiles the motion and declaration, properly serving them on the creditor.

Based on the lack of property service, the motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value 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 Motion is denied without prejudice.

12. 10-52114-E-13 NLE-1 — JOHN BOORINAKIS AND LEONA AZAR-BOORINAKIS — Richard Steffan — CONTINUED MOTION TO MODIFY PLAN 12-20-13 [32]

CONT. FROM 1-28-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 20, 2013. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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 Debtors having filed a response/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 Motion to Confirm the First Amended Plan is denied. 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 Chapter 13 Trustee moves to modify Debtor's Chapter 13 plan based on the fact that the Debtor has received an "inheritance," which appears sufficient to pay all claims 100%.

DEBTOR'S RESPONSE

Debtors oppose the motion, stating that the issue is whether or not a chapter 13 estate includes an inheritance received after the 180 day period. Debtor became entitled to distributions from his parent's trust in July 2013, upon the death of his father, which was more than 6 months after filing the case. Debtors have scheduled an amended Schedule B.

Debtors argue that the chapter 13 estate should not include an inheritance received after 180 days based on nonbinding law and statutory interpretation analysis.

DISCUSSION

The court recognizes a unique relationship between section 541 and section 1306 of the Bankruptcy Code. The Filing of a bankruptcy petition creates a bankruptcy estate containing all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a)(1). Furthermore, section 541(a)(5)(A) states that property of the estate includes,

> (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date —
>
> (A) by bequest, devise, or inheritance . . . .

11 U.S.C. § 541(a)(5)(A). This provision "applies to interests acquired postpetition where the measuring death occurs between the filing of the bankruptcy petition and the termination of the one hundred and eighty (180) day period." *Chappel v. Proctor (In re Chappel)*, 189 B.R. 489, 494 (9th Cir. B.A.P. 1995).

In a Chapter 13 case, section 541(a) is supplemented by section 1306(a), which expands the scope of the bankruptcy estate. The section provides,

> (a) Property of the estate includes, **in addition** to the property specified in section 541 --
>
> (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case **but before the case is closed, dismissed, or converted** to a case under chapter 7, 11, or 12 of [the Code], whichever occurs first...

11 U.S.C. § 1306(a) (emphasis added). The Ninth Circuit has not determined the issue of whether an inheritance which postdates the bankruptcy petition by more than 180 days is property of the bankruptcy estate.

However, the Fourth Circuit recently discussed the relationship between section 541(a) and section 1306(a) and held that 1306(a) plainly extends the time line for including the kind of property specified in section 541 in Chapter 13 bankruptcy estates and affirmed the bankruptcy court's inclusion of the inheritance in the chapter 13 bankruptcy estate. *Carroll v. Logan*, 735 F.3d 147, 149 (4th Cir. 2013). As the court explained,

> Congress has harmonized these two statutes for us. With Section 541, Congress established a general definition for bankruptcy estates. With Section 1306, it then expanded on that definition specifically for purposes of Chapter 13 cases. Thus, "Section 1306 broadens the definition of property of the estate for chapter 13 purposes to include all property acquired and all earnings from services performed by the debtor after the commencement of the case." S. Rep. No. 95-989, at 140-41 (1978).
>
> The statutes' plain language manifests Congress's intent to expand the estate for Chapter 13 purposes by capturing the types, or "kind," of property described in Section 541 (such as bequests, devises, and inheritances), but not the 180-day temporal restriction. 11 U.S.C. § 1306(a). This is because "[t]he kind of property is a distinct concept from the time at which the debtor's interest in the property was acquired." *In re Tinney*, 07-42020-JJR13, 2012 Bankr. LEXIS 3092, 2012 WL 2742457, at *2 (Bankr. N.D. Ala. July 9, 2012). And on its face, Section 1306(a) incorporates only the kind of property described in Section 541 into its expanded temporal framework.

Id. at 150. The court further explained,

> Section 1306's extension of a Chapter 13 bankruptcy estate's reach until the Chapter 13 case is closed, dismissed, or converted constitutes "a rational response to the relevant situation." *Salomon Forex*, 8 F.3d at 975. Chapter 13 proceedings provide debtors with significant benefits: For example, debtors may retain encumbered assets and have their defaults cured, while secured creditors have long-term payment plans imposed upon them and unsecured creditors may receive payment on only a fraction of their claims. See 11 U.S.C. §§ 1322, 1325...
>
> In exchange for those benefits, a Chapter 13 debtor makes a multi-year commitment to repay obligations under a court-confirmed plan. Id. The repayment plan remains subject to modification for reasons including a debtor's decreased ability to pay according to plan, as well as the debtor's increased ability to pay. See 11 U.S.C. § 1329. As we have stated before, "[w]hen a [Chapter 13] debtor's financial

> fortunes improve, the creditors should share some of the wealth." In re Arnold, 869 F.2d 240, 243 (4th Cir. 1989)...

Id. at 151. This court finds the Carroll statutory analysis and policy considerations very persuasive. This court recognizes there are other courts that have held that property inherited more than 180 days post-petition is not property of the estate, but finds these cases are not persuasive and not binding on this court. FN.1.

FN.1. *See In re Key*, 465 B.R. 709, 712 (Bankr. S.D. Ga. 2012); *In re Walsh*, 07-60774, 2011 Bankr. LEXIS 2602, 2011 WL 2621018, at *2 (Bankr. S.D. Ga. June 15, 2011); and *In re Schlottman*, 319 B.R. 23, 24-25 (Bankr. M.D. Fla. 2004).

DISTRIBUTION ON TRUST INTEREST

However, based on the opposition filed by the Debtors, it is asserted that this asset was distributed from a trust, not by testate or intestate succession. Dckt. 42. Debtor’s interest as a beneficiary of a trust was not originally listed on the schedules. The court notes that the Debtor has since amended his Schedule B to include the interest. Dckt. 40. Thus, it appears that the beneficial interest in the Trust is property of the estate. Therefore, it further appears that any distribution on that interest is property of the bankruptcy estate. As the parties have not addressed this trust issue, the court affords them the opportunity to provide supplemental briefs.

TRUSTEE’S SUPPLEMENTAL BRIEF

On February 4, 2014, the Trustee filed a supplemental brief to it’s Motion to Modify. The Trustee argues that this is a distribution of the Debtor’s interest in a trust and therefore property of the estate. The Trustee states that the value of Debtor's interest in the trust appears to have appreciated, becoming fixed and final, upon the death of the settlor. Trustee argues that appreciation in property has been discussed in various case decisions, discussing it in the context of a Chapter 13 converting to a Chapter 7. Trustee states that 11 U.S.C. §348(f) holds that the estate in a conversion is as of the date of the petition unless the case was converted in bad faith.

ADDITIONAL PLEADINGS FILED BY DEBTOR

On February 6, 2014, the Debtor filed the following pleadings: (1) Second Amended Plan, Dckt. 44; Motion to Confirm Second Amended Plan, Dckt. 41; and Declaration in Support of Motion to Confirm Second Amended Plan, Dckt. 43. The Second Amended Plan provides for payment of all claims, including a 100% dividend to creditors holding general unsecured claims. This Second Amended Plan renders the present Objection Moot, the filing of the Second Amended Plan constituting a *de facto* dismissal of the prior plan.

In reviewing the Motion to Confirm the Second Amended Plan and Declaration have some shortcomings, which may have occurred in the Debtor and Counsel diligently working to create the Second Amended Plan. The first

is that the Motion does not comply with Federal Rule of Bankruptcy Procedure 9013 which requires the Motion to state with particularity the grounds upon which the relief is requested. Here, the Motion must set forth the compliance with the requirements of 11 U.S.C. §§ 1322 and 1325. The Motion merely states that Debtor requests that the court confirm the Second Amended Plan. Such a demand does not provide sufficient grounds stated with particularity upon which the court may grant the relief requested.

The Debtor's declaration must provide testimony as to facts for which the Debtor has personal knowledge, Fed. R. Evid. 601, 602, or under very limited circumstances non-expert opinion testimony, Fed. R. Evid. 701. In his Declaration the Debtor for the most part merely states his personal findings of fact and conclusions of law. No testimony is provided as to how the court can find and conclude that the case has been filed and the plan proposed in good faith. No testimony is provided for the court to find and conclude that the Chapter 7 liquidation test has been satisfied. No testimony is provided for the court to find and conclude that the plan is feasible.

The Debtor's original plan provided that he was only able to squeeze out $1,426.00 a month in projected disposable income to fund a plan. Original Plan, Dckt. 5. The Original Plan provided for a 50% dividend to creditors. Under penalty of perjury in Original Schedule I the Debtor states that the combined monthly net income of the Debtor and his spouse is $12,040.00. (The deductions include a $368.00 a month for the Spouses voluntary Federal Thrift Savings Plan, which is in addition to her federal defined benefit pension plan. Schedule I states that the spouse has been employed by the United States Postal Service for 27 years.) Dckt. 1 at 19.

On Schedule J the Debtor states under penalty of perjury that he and his spouse have necessary monthly expenses of $10,614.00 (including a $1,575.00 mortgage payment), yielding the $1,426.00 monthly net income (which is then used as the projected monthly disposable income for the plan payment). *Id.* at 20.

On February 6, 2014, the Debtor filed amended Schedules I and J. Without explanation in his Declaration, Debtor has reduced his combined monthly income, as of the commencement of the case, to $11,083.00. No reason is given why the Original Schedule I was incorrect or why the income, as of the commencement of the case, needs to be corrected. The court notes that the Debtor's Spouse has increased the voluntary Federal Thrift Saving Plan contribution to $695.00 (an 89% increase). No explanation is provided in the Declaration as to why and how the TSP contribution, and the 89% increase, is reasonable, necessary, and in good faith.

More disturbing is that the Debtor now states under penalty of perjury that the joint expenses are only $6,413.00. No explanation is give as to how the expenses, a 60.4% reduction, has occurred or why the original $10,614.00 was in error. Rather, it appears that the expenses have been artificially constructed in both cases to produce the Debtor's desired result for what he though the Chapter 13 Trustee and court could be led (or deluded) to believe as the Debtor's projected disposable income.

To the extend that the "amended" Schedules I and J are intended to reflect post-petition changes, such amendments are improper. Schedules I

and J state the income and expenses as of the commencement of the case. If the post-petition events occur or changes are made by the Debtor, then the Debtor can so testify under penalty of perjury in a declaration or in open court at an evidentiary hearing.

Counsel and the Debtor can review what has been filed in this case, the Motion to Confirm the Second Amended Plan and supporting pleadings to determine if they have a likelihood of having the motion granted. If not, then they may decide to start over or request the court to reset the hearing, and establish a schedule for the Debtor to file supplemental pleadings and opposition. FN.2.

FN.2. The court does not purport to provide an "advisory opinion" as to the Motion to Confirm the Second Amended Plan, but little utility exists in not identifying what appear to be substantial pleading and evidentiary defects. As stated above, it may be that Counsel and the Debtor in hurrying to get the Second Amended Plan and Motion filed prior to this hearing made the errors. Given this court's consistent and uniform applicable of the pleading and evidentiary rules, the court is inclined to believe that it is an error and not an intentional failure to comply and hope it sneaks by the Chapter 13 Trustee and court. Additionally, the Debtor and counsel may want to review the Thrift Savings Plan issue and voluntary contributions to retirement plans.

ANALYSIS

All legal and equitable interests of the Debtor are part of the bankruptcy estate. 11 U.S.C. § 541(a)(1). This includes any interest in property that would have been property of the estate if such interest had been an interest of the Debtor on the date of the filing of the petition, and that the Debtor acquires or becomes entitled to acquire within 180 days after such date by bequest, devise, or inheritance or as a beneficiary of a life insurance policy or of a death benefit plan. 11 U.S.C. § 541(a)(5).

The Supreme Court has held that the term "property," as used in the Bankruptcy Code, must be "construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Segal v. Rochelle*, 382 U.S. 375, 379 (1966). "Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541." *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993).

Moreover, to the extent a debtor holds a beneficial interest in a trust, that beneficial interest becomes property of the estate, unless it is protected by a valid spendthrift provision. 11 U.S.C. § 541(a)(1) and (c)(2); *Cutter v. Seror (In re Cutter)*, 398 B.R. 6, 19 (B.A.P. 9th Cir. 2008). A beneficial interest in a trust is an equitable interest under § 541(a)(1) despite the fact that at the time of filing a bankruptcy petition the debtor's interest is unvested and contingent. *In re Neuton*, 922 F.2d 1379, 1382-1383 (9th Cir. 1990). *See also In re Bialac*, 712 F.2d 426, 431 (9th Cir. 1983) ("The courts have consistently said that options or contingent interests are property of the bankruptcy estate under section 541").

As for the argument for or against 11 U.S.C. § 541(a)(5)(A) being applicable, an intervivos (or living) trust is unaffected by § 541(a)(5)(A). *See In re Neuton*, 922 F.2d 1379, 1384 n.6 (9th Cir. 1990); *Newman v. Magill*, 99 Bankr. 881, 884-85 (C.D. 1989) (holding that "income distributions derived from an intervivos trust do not fit within" the definition of 11 U.S.C. § 541(a)(5)(A) and therefore escape "the pale of the 180 day dragnet").

Here, the court does not have Trust documents before it to determine whether the Debtor's interest is protected by a valid spendthrift provision. The court notes that the Ninth Circuit has held that the bankruptcy estate possess an income interest in one-forth of trust distribution payments due to Debtor from a spendthrift trust. *In re Neuton*, 922 F.2d 1379, 1383 (9th Cir. 1990) (citing California Probate Code § 15306.5 which provides that despite such restraints a creditor may obtain an "order directing the trustee to satisfy all or part of the judgment out of the payment to which the beneficiary is entitled under the trust instrument," so long as the payment does not "exceed 25% of the payment that otherwise would be made to . . . the beneficiary.") The *Neuton* court found that the spendthrift restriction fully protects only 75% of the interest in the trust and that because the trustee enjoys the power of a hypothetical judgment creditor pursuant to 11 U.S.C. § 544(a)(1), the remaining one-fourth is not excluded from the estate pursuant to 11 U.S.C. § 541(c)(2). *Id.*

At the time of his petition, Debtor had a contingent interest in his father's trust. Therefore, this interest is property of the estate. While the interest has become fixed and final upon the death of the settlor, it does not change the characterization of the interest being property of the bankruptcy estate. It follows that any proceeds or product of or from property of the estate, the distribution under the trust (or partial distribution under a valid spendthrift trust), is also part of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(6).

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 denied without prejudice.

13. 13-35016-E-13 NAMATH KANDAHARI
Timothy Walsh

AMENDED MOTION TO VALUE COLLATERAL OF BANK OF AMERICA N.A., BANK OF AMERICA HOME LOANS
1-14-14 [24]

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 14, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

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 motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 991 Zephyr Lane, Vacaville, California. The Debtor seeks to value the property at a fair market value of $470,000.00 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 $755,343.00. Bank of America, N.A.'s second deed of trust secures a loan with a balance of approximately $130,000.00. 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 991 Zephyr Lane, Vacaville, 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 $470,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

14. 11-21422-E-13 SHMAVON MNATSAKANYAN AND YERMONIYA ARTUSHYAN
PGM-5 Peter Macaluso
CONTINUED MOTION TO APPROVE LOAN MODIFICATION
12-3-13 [113]

CONT. FROM 1-14-14

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 3, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to set the Motion for further hearings. 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

Green Tree Servicing, LLC, files the present Motion, stating that the plan provides for its claim in Class 4. (As discussed below, the Claim identified in the Plan and the Proof of Claim filed is for Bank of American, N.A., not Green Tree Servicing, LLC.) Green Tree Servicing, LLC has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment to $400.70. A review of the Loan Modification (attached as Exhibit A) shows that Green Tree Servicing, LLC is named as the "Lender" on the loan to be modified. The confirmed plan lists Bank of America as the only creditor with a secured claim on the residence. Proof of Claim No. 17, filed by BAC Home Loans Servicing, LP. A Substitute of Trustee and Assignment of Deed of Trust filed with Proof of Claim No. 17, shows BAC Home Loans Servicing, LP was transferred the interest in the deed of trust on August 13, 2010. FN.1 No assignment or transfer of claim appears on the docket transferring any interest to Green Tree Servicing, LLC.

FN.1. In connection with other proceedings, the court has been provided with a Certificate of Merger filed with the Texas Secretary of State stating that BAC Home Loans Servicing, LP was merged into Bank of America, National Association. This Certificate is dated June 28, 2011, and is stated to be

effective July 1, 2011. The California Secretary of State reports that BAC Home Loans Servicing, LP registration with California was cancelled. See, http://kepler.sos.ca.gov/cbs.aspx.

The court is not certain how Green Tree Servicing, LLC, can name itself as "Lender" in a Loan Modification for an obligation that appears to be owed to Bank of America, N.A. The court will not approve an loan modification that will not be effective against the actual owner of the obligation, which here appears to be Bank of America, N.A., successor in interest to BAC Home Loans Servicing, LP.

The court issued an order to Debtors and Green Tree Servicing, LLC to file on or before January 21, 2014, any and all properly authenticated documents identifying that Green Tree Servicing, LLC is the actual creditor, as defined in 11 U.S.C. § 101(10). The court continues the hearing to January 28, 2014, to allow the parties to file the appropriate documentation. FN.2.

FN.2. This court has previously addressed with Green Tree Servicing, LLC the requirement that it accurately identify its status in a bankruptcy case – whether creditor, loan servicer for the creditor, agent of the creditor, or holder of a power of attorney authorized to act for the creditor in legal proceedings or in executing documents in the name of the creditor. In the *Edwin L. and Cynthia Crane* bankruptcy case, Bankr. E.D. Cal. 11-27005, Dckt. 124, the court entered an order requiring Green Tree Servicing, LLC to correctly identify the creditor in cases, and for Green Tree Servicing, LLC not to identify itself as the creditor,

> "unless it is the holder of all legal rights to enforce the claim in its own name, as the assignee for collection, or as the holder of a power of attorney for another and is the agent for service of process for all purposes for any other person who holds any legal rights to enforce the claim. Any proofs of claim shall have attached to them documentation of the assignment, power of attorney, and general agent for service of process for any claims for which Green Tree Servicing, LLC asserts it is a creditor."

See Civil Minutes of the November 8, 2011 hearing in the *Crane* case in which the court addressed and rejected the contention that a mere agent or loan servicer may present itself as the actual creditor with a claim. *Id.*, Dckt. 111.

Other cases in which the court has issued orders to show cause and Green Tree Servicing, LLC has filed responses and represented that its practices have been modified to correctly identify the creditor include: *John and Susan Jones*, Bankr. E.D. Cal. 11-31713; and *Matthew and Kristi Separovich*, Bankr. E.D. Cal. 11-42848.

The court acknowledges that Green Tree Servicing, LLC has, and most likely will, in connection with this matter be responsive and address the court's concerns – as well as educating the court to the current practical business issues, and challenges, of maintaining a nationwide business

providing these types of services. However, it appears that the impact of these changes is limited or fleeting.

Further, if Green Tree Servicing, LLC has expanded its business to purchase notes, how it will provide that information to the federal courts.

GREEN TREE SERVICING LLC'S RESPONSE

Green Tree Servicing, LLC responds stating that it is the servicer of the loan, with Fannie Mae being the owner of loan. Green Tree Servicing, LLC confirms that it is not the creditor in this case. *See* 11 U.S.C. § 101(10) for definition of creditor.

Green Tree Servicing, LLC states that it was granted the authority to enter into the loan modification agreement pursuant to a duly noticed power of attorney from Bank of America, N.A. (the prior loan servicer), which is attached as Exhibit A. Green Tree Servicing, LLC states this document grants Green Tree Servicing, LLC the right to execute loan modifications that were initiated when Bank of America, N.A. was servicing the loan. Green Tree Servicing, LLC states that the Power of Attorney provides that it may execute the loan modification agreement in the stead of Bank of America, N.A. and in its own name, which would bind Fannie Mae.

At this point, the court needs to carefully review with Green Tree Servicing, LLC what it is asserting, the legal basis for it, and how Green Tree Servicing, LLC is asserting such rights (and quite possibly misleading the consumer debtors). Breaking down the arguments and legal authorities into outline form is of assistance to the court, rather than a long narrative.

I. **Supplemental Brief.** As the basis for Green Tree Loan Servicing, LLC, individually in its name, to enter into a contract with a consumer to modify the contract of the third-party creditor, the court has been presented with the following arguments:

A. Green Tree Loan Servicing, LLC is only the loan servicer.

B. Fannie Mae is the actual creditor and Green Tree Servicing, LLC is the current servicer of that loan (having purchased the servicing rights from Bank of America, N.A.).

C. Legal Points and Authorities

1. Green Tree Servicing, LLC does not deny that it is only the servicer of the loan being modified which it the claim in this case.

2. The Power of Attorney provides that "Green Tree [Servicing, LLC] may execute the loan modification agreement in the stead of [Bank of America, N.A.]

3. *Roth v. Schaaf*, 148 Cal. App. 2d 662, 666 (1957), holds that "the purpose and effect of a power of attorney of this kind [the points and authorities do not indicate what

"kind" of power of attorney is referenced in the District Court of Appeal ruling] are to vest in the attorney full authority to transact any and all kinds of business for the principal."

4. Green Tree Servicing, LLC has never asserted that it is a creditor in this case, as that term is defined by 11 U.S.C. § 101(10). Green Tree Servicing, LLC has no documents or basis for asserting that it is a creditor in this bankruptcy case.

5. The Loan Modification Agreement makes no representation that is it the owner of the Note or creditor in this case. Though it creates a defined term by which Green Tree Servicing, LLC is identified as "Lender," this choice of definition is not a "representation" of Green Tree Servicing, LLC (to the least sophisticated consumer, the court borrowing that debt collection concept from the Federal Fair Debt Collection Practices Act, or the least sophisticated consumer's bankruptcy counsel).

6. Green Tree Servicing, LLC is the attorney in fact for Fannie Mae.

7. The court should accept Green Tree Servicing, LLC as the party authorized and entitled to execute this Loan Modification with the Debtor so that "Debtors may retain their home and unnecessary litigation may be avoided."

II. Documentary Evidence. As the sole document upon which Green Tree Servicing, LLC bases its authority to act in its name to enter into the loan modification with the Debtor, it has provided the court with a Limited Power of Attorney executed by Bank of America, N.A. The Power of Attorney is provided as Exhibit. A. The Power of Attorney states:

1. The Power of Attorney is granted by Bank of America, N.A., as successor to BAC Home Loans Servicing.

2. Bank of America, N.A. appoints Green Tree Servicing, LLC as the Attorney in Fact for Bank of America, N.A.

3. Green Tree Servicing, LLC is given "full power and authority to act **in the name of** and **on behalf of** [**Bank of America, N.A.**] solely to do the following:" [emphasis added],

a. For all **loan modifications in process** at the **time servicing** of loans **is transferred** to Green Tree Servicing, LLC.

b. For judicial foreclosures, Green Tree Servicing, LLC is authorized to bid in the **name of Bank of America, N.A.**, but authorization is

excluded if any additional documents are required for the entry of a judgment for foreclosure.

4. The Power of Attorney is given by Bank of America, N.A. to Green Tree Servicing, LLC solely for the servicing rights which were sold to Green Tree Servicing, LLC.

5. The Power of Attorney remains in full force and effect until revoked by Bank of America, N.A. or termination of Bank of America, N.A.'s participation in the HAMP or 2MP Programs.

Exhibit A, Dckt. 125.

III. Testimony Presented by Green Tree Servicing, LLC. Wanda Lamb-Lindow provides her declaration in response to the court's order. Dckt. 124. In this declaration Lamb-Lindow testifies under penalty of perjury to the following:

A. She is an Assistant Vice-President for Green Tree Servicing, LLC.

B. She is a custodian of records for Green Tree Servicing, LLC and has personal knowledge of the documents which are being presented to the court. Further, except as expressly stated in the Declaration, her testimony is based on her personal knowledge or her personal review of the books and records of Green Tree Servicing, LLC.

C. Green Tree Servicing, LLC is currently the loan servicer for the loan which is secured by (the Debtor's) property commonly known as 3417 Portsmouth Drive, Rancho Cordova, California.

D. The current owner of the loan (upon which the claim in this case is based) is Fannie Mae (which the court interprets to mean the Federal National Mortgage Association).

E. This loan was previously serviced by Bank of America, N.A.

F. On January 31, 2013, Green Tree Servicing, LLC **purchased the servicing rights** from Bank of America, N.A., and on May 31, 2013 the transfer of the servicing rights was effectuated.

G. Exhibit A is a true and accurate copy of the Limited Power of Attorney issued by Bank of America, N.A. in connection with the transfer of the servicing rights.

The court accepts Ms. Lamb-Lindow's testimony as to the transferring of the servicing rights and that the Limited Power of Attorney is the only document upon which Green Tree Servicing, LLC purports to have the right to enter into the loan modification with the Debtor in this case.

DISCUSSION

The court begins it review with the evidence which has been presented. Green Tree Servicing, LLC does not have any interest in the note, no interest (other than acting as a loan servicer) in the claim, and is not a creditor, as that term is defined in 11 U.S.C. § 101(10). The only power of attorney provided is that from Bank of America, N.A., the prior loan servicer on the note. It carefully states that Green Tree Servicing, LLC may act in the **name of and on behalf of Bank of America, N.A.** within the circumscribed scope specified in the Limited Power of Attorney.

Green Tree Servicing, LLC provides little authority for how it interprets the Limited Power of Attorney as the basis for entering into Loan Modifications, in its own name, with consumers. Therefore, the court provides the following applicable statements of law.

I. California law concerning principals and agents is found in the Civil Code. A summary of the California Civil Code provides the following.

A. An agent represents another person, the principal, in dealing with third parties. Cal. Civ. Code § 2295.

B. A person having the capacity to contract may appoint an agent. Cal. Civ. Code § 2296.

C. An agent for a particular act is a "special agent," with all other agents being "general agents. Cal. Civ. Code § 2297.

D. An agent may be authorized to do any acts which the principal may do, except those which the principal is bound to give its personal attention. Cal. Civ. Code § 2304.

E. An agent has the authority which the principal, actually or ostensibly, confers on the agent. Cal. Civ. Code § 2315.

F. The specific grant of authority controls over the general. Cal. Civ. Code § 2321.

G. Authority expressed in general terms does not allow the agent to act in its own name, unless it is the usual court of business to so do. Cal. Civ. Code § 2322. FN.3.

FN.3. In *Bank of America National Trust and Savings Association v. Cryer*, 6 Cal. 2d 485, 488 (1936), the California Supreme Court held that when a contract is executed by an agent in the agent's name, the principal may be held liable if the principal has been disclosed.

H. Powers of Attorney are governed by California Probate Code § 2400. Cal. Civ. Code § 2400.

I. An agent may delegate its powers to another person if,

1. The act done is purely mechanical;

2. When it is such that the agent cannot perform the act;
3. When it is the usage of the place to delegate such powers; or
4. Where such delegation is specifically authorized by the principal.

Cal. Civ. Code § 2349.

II. 3 WITKIN SUMMARY OF CALIFORNIA LAW, AGENCY, CHAPTER IV, discusses powers of attorney provides that except where California Power of Attorney law (Cal. Prob. Code §§ 4000 et seq.) provides a specific rule, California General Agency Law applies (including Cal. Civ. Code §§ 2295 et seq.). *Id.* § 207(4).

III. A survey of WITKIN SUMMARY OF CALIFORNIA LAW, WILLS AND PROBATE, POWER OF ATTORNEY, CHAPTER XXI, reveals the following.

A. A power of attorney is a written instrument giving authority to an agent. *Id.* § 835.

B. Powers of attorney are strictly construed, with the specific controlling over the general. Citation to California Civil Code § 2321, *Quay v. Presidio & Ferries R. Co*, 81 C. 1 (1889); *White v. Moriarty*, 15 Cal. App. 4th 1290 (1993) (principal ratifies acts taken by agent which are within the scope of the power of attorney). *Id.* § 836.

C. California law governing powers of attorney is set forth in California Probate Code §§ 4000 et. seq. *Id.* § 839.

D. A principal is a "natural person" as defined by California Probate Code § 4026.

ANALYSIS

In trying to sort through what has been presented by Green Tree Servicing, LLC, it appears that what has occurred is that Bank of America, N.A. has engaged the services of a sub-agent to exercise some powers which Bank of America, N.A. has been granted by Fannie Mae. The court has no information as what power, if any, have been granted by Fannie Mae to Bank of America, N.A. FN.4.

FN.4. At this juncture Green Tree Servicing, LLC and its attorneys may be thinking, "really judge, do you think that a mortgage debt buyer, bank, and loan servicer would do anything other than what was proper." One only has to look to the home mortgage meltdown after 2007 in which mortgage brokers generated liar loans, mortgage debt buyers purchased debt without regard to loan documentation, real property title place holders (with no interest in or right to exercise any ownership rights in the note) purported to be owners of the notes, and banks engaged the services of robo-signers to process foreclosures and provide false declarations to understand why being truthful and accurate is necessary not only in the federal courts, but as part of ordinary commercially reasonable practices.

Taken on its face, the clear, plain language states that Green Tree Servicing, LLC may, under the Limited Power of Attorney, act in the **name of Bank of America, N.A.** for the carefully circumscribed circumstances set forth in the Limited Power of Attorney. Green Tree Servicing, LLC has not acted in the name of Bank of America, N.A., but purports to act in its own name. The court does not find credible Green Tree Servicing, LLC's argument that its internal shorthand by naming itself lender is proper and somehow results in the words "Green Tree Servicing, LLC" to mean Fannie Mae.

The court also does not know what powers have been given to Bank of America, N.A. by Fannie Mae which Green Tree Servicing, LLC may exercise in the name of Bank of America, N.A. It may well be that Bank of America, N.A. may only exercise these powers if they receive a loan by loan approval. It may be that Bank of America, N.A. is authorized to exercise powers in the name of Fannie Mae. Because Green Tree Servicing, LLC has withheld the document showing what authority Bank of America, N.A. has to act as the agent of Fannie Mae (assuming, *arguendo*, that it has been granted some authority beyond that of merely a collection agency to receive payments) the court has no idea of whether Green Tree Servicing, LLC may, in the name of Bank of America, N.A., execute the Loan Modification Agreement, or whether it has to do so in the name of Bank of America, N.A. doing it in the name of Fannie Mae.

Given the express language of the Limited Power of Attorney, no authority has been given Green Tree Servicing, LLC to contract with borrowers like the Debtor in its own name to modify the loans (contracts) the borrowers have with Fannie Mae. The express language of the Limited Power of Attorney states, "Nothing in these presents shall be deemed to empower the Attorneys in Fact [Green Tree Servicing, LLC] to perform any act outside of the scope of the authority granted herein or which is unlawful."

The court also sees no bona fide, good faith commercial reason for Green Tree Servicing, LLC purporting to execute the Loan Modification Agreement in its own name and hide the existence of the purported sub-agency upon which it asserts the right to execute this Loan Modification which alter the rights of Fannie Mae.

In the discussion of parties in CALIFORNIA JURISPRUDENCE, THIRD EDITION, IDENTIFICATION OF PARTIES, § 242, the following is what should be obvious statement,

> § 242 Identification of parties
>
> Although parol evidence may, under certain circumstances, be admissible to identify the parties to an agreement, **when parties put a contract in writing there is no more reason or excuse for omitting the name of a known party than there is for omitting its most important stipulation.** If such a name is omitted, sound policy requires the enforcement of the general rule that a writing cannot be varied by parol, and the name cannot be shown by extrinsic evidence. However, when the contract declares that it is between two particular

> parties, a parol explanation of the fact that a third party signed it as agent and not as a real party in interest is proper.

Little excuse exists to put consumers or commercial parties to the burden of having after the fact determine whether Green Tree Servicing, LLC was acting in an undisclosed (as set forth within the for corners of the written contract) agency capacity, reconstruct the basis for the agency, figure out who the sub-principal and principal were, determine whether the undisclosed agency was authorized, and then decide if they actually have an enforceable contract.

The court is also uncertain if the Limited Power of Attorney authorizes Green Tree Servicing, LLC to execute the Loan Modification in the name of Bank of America, N.A. The Limited Power of Attorney only applies to "mortgage modifications in process at the time services of the related mortgage loans are transferred from [Bank of America, N.A.] to [Green Tree Servicing, LLC]..." Limited Power of Attorney, ¶ 1), Exhibit A, Dckt. 125.

Ms. Lamb-Lindow testifies that on January 31, 2013, Green Tree Servicing, LLC purchased the servicing rights from Bank of America, N.A. It may be that the purchase date is the date mortgages subject to the Limited Power of Attorney being "modifications in process" is determined. Alternatively, Ms. Lamb-Lindow testifies that on May 31, 2013, "the transfer of the servicing was effectuated from [Bank of America, N.A.] to [Green Tree Servicing, LLC]." Possibly this the outside date by which all of the loans for which "mortgage modifications [were] in process at the time services of the mortgage loans [were] transferred...to [Green Tree Servicing, LLC]."

The Loan Modification presented to the court is dated November 2, 2013. That is five months after the latest date for transfer, May 31, 2013, and nine months from the date on which Green Tree Servicing, LLC purchased the servicing rights. Quite possibly the "mortgage modification" process began after one or both of these dates.

It is also unclear whether Bank of America, N.A. has merely delegated its existing authority to act for a principal, or whether Bank of America, N.A. has unilaterally terminated the principal-agent relationship and is attempting to force a replacement agent on the principal by "selling" the servicing rights. It is clear that an agent negotiating and entering into Loan Modification in the name of the principal is not a "purely mechanical act," nor has there been a showing that Bank of America, N.A. cannot fulfill whatever undisclosed authority it has from Fannie Mae it purports to delegate to Green Tree Servicing, LLC. Cal. Civ. Code 2349(1), (2). There has been no evidence that Fannie Mae has authorized Bank of America, N.A. to delegate whatever unidentified authority has been given to Green Tree Servicing, LLC. Cal. Civ. Code § 2349(4).

No evidence has been presented to the court that the delegation of authority to negotiate home mortgage modifications is a practice in "common usage" in California, the Western United States, or the United States. Rather, given the problems which have come from the mortgage melt down, the financial institution failures, the required TARP bailouts, and the robo-signing perjury, it appears that the routine transfer of such authorizations to whatever sub-agent the agent may want (and for whatever profit the agent

can make by selling the rights), without the authorization of the owner of the loan secured by a residence is not "in the norm."

Words are a lawyer's stock in trade, they have a meaning, and the choice of words in contracts and pleadings have significance. Green Tree Servicing, LLC appears to be presenting a cavalier attitude over entering into Loan Modify Agreements in its own name, and hiding its agency capacity. Green Tree Servicing, LLC also appears to take lightly omitting the identity of the actual creditor whose rights are purportedly be modified. Further, Green Tree Services, LLC places little significance in stating that it is the "Lender" who is now contracting with the "Borrower" Debtor.

The Merriam-Webster Dictionary defines the verb "lend" to be,

> : to give (something) to (someone) to be used for a period of time and then returned
>
> : to give (money) to someone who agrees to pay it back in the future
>
> : to make (something) available to (someone or something)

THE MERRIAM-WEBSTER DICTIONARY AND THESAURUS available at http://www.merriam-webster.com. It continues to define the transitive verb "lending" as,

> 1a (1) : to give for temporary use on condition that the same or its equivalent be returned <lend me your pen> (2) : to put at another's temporary disposal <lent us their services>
>
> b : to let out (money) for temporary use on condition of repayment with interest

Id. The word "lender" is a noun, identifying the person who engaged in the act of lending. *Id.* There is nothing presented by Green Tree Servicing, LLC showing that it was or is the "Lender." Given that Green Tree Servicing, LLC was careful to correctly identify the Debtor as "Borrower" (defined by Merriam-Webster to be the person who received the money from the "Lender"). The court cannot identify any bona fide reason for correctly identifying the Debtor but misidentifying Green Tree Servicing, LLC.

FURTHER PROCEEDINGS

Green Tree Servicing, LLC, having appeared before this court on several prior occasions and well aware of the judicial need to have parties and their capacities correctly identified, has now provided the court with a minimal effort to address the court's concerns. It is now appropriate for the court to act further to get the basic, minimal information necessary to determine what Green Tree Servicing, LLC may properly do; whether what it does actually is authorized by the ultimate principal, Fannie Mae; and what power and authority Bank of America, N.A. had which it could sell to Green Tree Servicing, LLC.

Moving forward, the court will require Bank of America, N.A. to appear and provide the court with an explanation as to how Green Tree Servicing, LLC is before the court purporting to enter into a Loan Modification with the Debtor. Further, what rights and powers it received from Fannie Mae which it purports to have transferred to Green Tree Servicing, LLC.

Additionally, Fannie Mae's participation will be required to confirm what powers it granted to Bank of America, N.A., whether Bank of America, N.A. could have transferred those powers, whether Fannie Mae confirms that it is bound by all Loan Modifications which have and will be signed by Green Tree Servicing, LLC, and if Fannie Mae acknowledges that Green Tree Servicing, LLC is its agent.

Given the nationwide loan servicing by Green Tree Servicing, LLC and its conduct taking place in most likely every federal jurisdiction, the court will also extend the opportunity to the U.S. Trustee, the Federal Trade Commission, the Consumer Financial Protection Bureau, the U.S. Attorney, and such other federal agencies and departments which have appropriate jurisdiction to participate in this process. FN.5.

FN.5. The court directs Green Tree Servicing, LLC and its counsel to Proof of Claim No. 8 filed by Green Tree Servicing, LLC in the Neil Freeman Bankruptcy Case, Bankr. E.D. Cal. 13-20541. That Proof of Claim states under penalty of perjury and subject to the provisions of 18 U.S.C. §§ that Green Tree Servicing, LLC is the creditor. This is contrary to not only the express representations previously made to this court by Green Tree Servicing, LLC that their procedures, practices, and policies had been corrected so proofs of claim which incorrectly and falsely identifies Green Tree Servicing, LLC as the creditor, but also violates the court's prior order prohibiting Green Tree Servicing, LLC from filing such proofs of claim. There are no documents attached to the Proof of Claim which demonstrate the Green Tree Servicing, LLC has transformed from the servicer as testified to under penalty of perjury in this case to a creditor in the Neil case.

In an evidentiary hearing conducted on February 10, 2014, the court discovered another Proof of Claim in which Green Tree Servicing, LLC has stated it is the creditor having a secured claim. In re Raymond and Rhonda Wilson, Bankr. E.D. Cal. 13-34303, Proof of Claim No. 5. The Note attached to the Proof of Claim names GMAC Mortgage, LLC as the payee. A corporate assignment of the deed of trust, executed by Green Tree Servicing, LLC as the attorney in fact for GMAC Mortgage, LLC, purports to assign the deed of trust to itself, Green Tree Servicing, LLC.

Counsel for Green Tree Servicing, LLC can advise the court if his or her law firm are likely to be counsel for Green Tree Servicing, LLC in connection with any proceeding in this court or the United States District Court concerning the violation of the order prohibiting the filing of Proofs of Claim which falsely identified Green Tree Servicing, LLC as the creditor. If so, the court will have counsel added to the service list to receive courtesy copies of any orders to show cause.

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15. 09-32596-E-13 ALEJO/MARIA GUTIERREZ
WW-1

STATUS CONFERENCE RE: MOTION TO APPROVE LOAN MODIFICATION
11-25-13 [49]

Debtors' Atty: Mark A. Wolff

Notes:

Set by order filed 1/23/14 [Dckt 68]. Status conference to be conducted in conjunction with Green Tree Servicing, LLC's appearance at the hearing in the *Shmavon Nmatsakanyan and Yermoniya Artushyan* bankruptcy case.

16. 10-26265-E-13 PABLO/ROBIN PADILLA — MOTION TO APPROVE LOAN MODIFICATION
WSS-2 W. Steven Shumway
1-7-14 [30]

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 January 6, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The hearing on the Motion to Approve the Loan Modification is continued to 3:00 p.m. on xxxxxxxxxx, 2014, and the court will order IndyMac Mortgage Services, if it can be identified sufficiently for service, to appear and address the issues concerning its standing in this case, its capacity to contract in its name for the Loan Modification, and the identify of any undisclosed principal, if any. 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 Debtors have filed the present Motion to approve a Loan Modification Agreement. In the Agreement IndyMac Mortgage Services agrees to a loan modification which will reduce the Debtor's monthly mortgage payment which includes principal, interest, taxes and insurance payment from the current $2,471.82 to $2,051.13 per month. The IndyMac Mortgage Services will capitalize the delinquency, and add it to the existing principal balance of the loan. Lender will fix the interest rate on the loan at 2.00% for the next 5 years, then 3.00% for year six, 4.00% for year seven and 4.25% for the remaining term of the loan.

This modification will allow Debtors to propose a plan that will pay a dividend to unsecured creditors. Debtors will also file Amended Schedules I and J in connection with the motion, in order to amend Debtors' plan after this modification is approved.

UNIDENTIFIABLE PARTY TO THE CONTRACT

Though the Debtors want to enter into a Loan Modification Agreement with some entity named IndyMac Mortgage Services, the court cannot identify this entity as a creditor, (11 U.S.C. § 101(10), having a claim to modify in

this case. In reviewing the Loan Modification Agreement, IndyMac Mortgage Services, is stated,

A. The "Lender" or "Servicer," and then given the defined term title of "Lender."

B. Various powers and authorities are given to "Lender." It appears that these power and authorities are given only to "Lender" personally and not to the actual, undisclosed creditor.

C. IndyMac Mortgage Services executes this Agreement in its personal, individual capacity, with no disclosure of any agency capacity or authority.

Loan Modification Agreement, Dckt. 33.

The Official Registry of Claims in this case lists only one secured claim, that filed by OneWest Bank, FSB. Proof of Claim No. 3. That proof of claim is in the amount of $64,932.98, however, on the Proof of Claim form does not identify the property which secures the claim. (Required information for Question 4. The court acknowledges that salted through the attachment are references to an address in Roseville, California which may indicate the property OneWest Bank, FSB believes secures the claim.) Attached to the Proof of Claim is a Note in which INDYMAC BANK, FSB is identified as the "Lender," the person to whom the borrower promises to pay the obligation thereunder. The Note states that it is secured by a Deed of Trust.

A Deed of Trust (Secondary Lien) is also attached to the Proof of Claim. INDYMAC BANK, FSB is identified as the "Lender." The Deed of Trust cross references the Note identified above. Though long and dense, the court has attempted to read the document to see if there is an IndyMac Mortgage Services referenced therein. None has been identified.

The court reviewed the California Secretary's of State website and could not identify any entity named IndyMac Mortgage Services registered to do business in California. http://kepler.sos.ca.gov/.

The court is troubled by having a services company appearing to be the party contracting with this consumer debtor to modify the loan. If OneWest Bank, FSB is the creditor, then it should clearly state so in its Modification Agreement. If IndyMac Mortgage Services is an authorized agent, then OneWest Bank, FSB should be clearly shown as the party in the contract and IndyMac Mortgage Services execute the contract for OneWest Bank, FSB. A least sophisticated consumer debtor should not be presented with a "pick a name, any name" situation in which a name other than his or her creditor is placed on a purported loan modification.

If IndyMac Mortgage Services is merely a fictitious name by which OneWest Bank, FSB is doing business, the court cannot see the reason for having that fictitious name placed in the Loan Modification Agreement. One would question whether it is being done for an improper purpose, such as to confuse least sophisticated consumers into later being duped into believing that they did not have an effective modification with the BANK. FN.1.

FN.1. If a fictitious name is being used by the actual creditor, implications arise under the Federal Fair Debt Collection Practices Act. See 15 U.S.C. § 1692a, "Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph [exclusion for the original creditor], the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts."

The parties will have to accurately and correctly identify the "Creditor" who is entering into this Loan Modification Agreement, have the Agreement properly identify the creditor, and if the Agreement is being executed by an agent, that the agent be correctly identified and proof of its authority provided to the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Approve the Loan Modification is continued to 3:00 p.m. on xxxxxxxxxxxxx, 2014.

17. 10-48887-E-13 BARBARA OLSON
RAC-4 Richard A. Chan

MOTION TO APPROVE LOAN MODIFICATION
1-13-14 [77]

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, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The Motion to Approve the Loan Modification is denied without Prejudice. 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 seeks court approval for permission to modify her existing home loan with Wells Fargo Home Mortgage ("Wells Fargo"). Debtor states that Wells Fargo Home, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment. The loan is secured by Well's Fargo security interest in Debtor's real property, commonly known as 1717 Fontenay Way, Roseville, California.

Debtor's Motion describes the agreement as compromised of the following terms; the interest bearing principal will be in the amount of $316,594.89. The interest rate of the modified loan will be 4.00% and the modified payment of principal and interest will be $1,323.17. The estimated modified payment amount including taxes and insurance will be $1,708.53 for the duration of the loan. ¶ 4, Motion to Approve Loan Modification, Dckt. No. 77.

Thus, the motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 4001(c)(1)(B). Debtor does not attach a copy of their post-petition credit agreement to the motion. Federal Rule of Bankruptcy Procedure 4001(c) requires that a motion for authority to obtain credit shall summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P.

4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

Debtor instead offers what is labeled as a "Exhibit 'A' - Copy of Loan Modification Terms," on their Exhibit Cover Sheet. Dckt. No. 80. This document appears to be the first page of a letter, addressed to Debtor, from Wells Fargo. It is unclear who drafted the letter, as only the first page is provided. The author acknowledges receiving consent from Debtor's Attorney's office to discuss workout options with the Debtor, and extends an offer to Debtor for a proposed modification, with a chart that outlines the current and proposed modified terms of Debtor's home loan. Exhibit A, Copy of Loan Modification Terms, Dckt. No. 80.

The offer appears to be a proposal for a loan modification with Wells Fargo. The court is uncertain whether this constitutes a trial loan modification, in which Debtor would make trial payments to obtain a permanent modification. Debtor's Declaration merely rehashes the terms outlined in Wells Fargo's Letter. Declaration of Debtor in Support of Motion for Permission to Modify Home Loan, Dckt. No. 79.

According to the "Copy of Loan Modification Terms," the modification proposed by Wells Fargo would modify the current unpaid principal balance, from $294,383.02 to $316,594.89. The interest rate would be modified to 4.00%, and the post modification principal and interest payment would be in the amount of $1,323.17. The estimated modified payment amount would be $1,706.53. Exhibit A, Copy of Loan Modification Terms, Dckt. No. 80 at 2.

The "Copy of Loan Modification Terms" instructs Debtor's Attorney to review the proposal with Debtor and to then file a petition with this court to obtain approval to modify the first mortgage. This copy of Wells Fargo's letter, charting out the current and proposed modified terms of Debtor's loan, does not qualify as a credit agreement that meets the requirements of Federal Rule of Bankruptcy Procedure 4001(c)(1)(B). Debtor only characterizes the agreement as a proposed loan modification, and does not explain whether the proposed agreement is only for a trial loan modification in which the borrower Debtor must submit all trial payments and remain eligible for loan modification, before Debtor can actually receive a permanent loan modification.

UNIDENTIFIABLE CREDITOR TO LOAN MODIFICATION

The Motion seeks to have the court approve an undisclosed contract with an entity identified as "Wells Fargo Home Mortgage." The California Secretary of State reports that an entity named "Wells Fargo Home Mortgage, Inc." was merged out and is no longer registered to do business in California. http://kepler.sos.ca.gov/. It further discloses that an entity named as "Wells Fargo Home Mortgage of Hawaii, LLC" cancelled its registration in California. A limited liability company named Wells Fargo Home Mortgage, LLC is listed as having a current registration in California.

The Motion does not identify which, if any, of these entities is the one with whom the Debtor wants to enter into a Loan Modification. In

providing the court with only an excerpt of the November 15, 2013 Loan Modification Proposal, Exhibit A, the court cannot tell if a subsequent page identifies the creditor with whom the Debtor wants to contract. The Certificate of Service for this Motion lists Wells Fargo Bank, N.A. being provided service, however, no entity named Wells Fargo Home Mortgage is served. Dckt. 81.

The court notes that while the banner in the upper right hand corner consists of two boxes, one of which includes the words "Wells Fargo" and the other "Home Mortgage." While the scanned image is of rough quality, it appears that the two boxes are of different color. It does not appear that these words form one name consisting of "Wells Fargo Home Mortgage."

From similar documents presented to the court in other cases, the second or last page of this letter usually contains a footer saying that the letter is from Wells Fargo Bank, N.A., and that "Wells Fargo Home Mortgage" is a division within Wells Fargo Bank, N.A.

No Proof of Claim has been filed by "Wells Fargo Home Mortgage." Proof of Claim No. 12 has been filed by Wells Fargo Bank, N.A., for a secured claim in the amount of $293,385.53. The name "Wells Fargo Home Mortgage" is not part of Proof of Claim No. 12. It may well be that this is the debt which the Debtor seeks to modify and Wells Fargo Bank, N.A. is the creditor with whom the Debtor will contract. Presumably the actual Loan Modification Agreement identifies the creditor who has the claim for which the rights will be modified.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by 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 Approve the Loan Modification is denied without prejudice.

18. 07-27123-E-13 DOREEN GASTELUM **CONTINUED MOTION FOR CONTEMPT**
PGM-4 Peter Macaluso **10-21-13 [123]**

CONT. FROM 1-28-14, 11-19-13

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, Chapter 13 Trustee, respondent creditors, all creditors and Office of the United States Trustee on October 21, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to set a Discovery Schedule and Pre-Evidentiary Hearing Conference for the Motion for Contempt. 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

Debtor Doreen M. Gastelum ("Debtor") moves for an order to show cause concerning the violation of discharge under 11 U.S.C. § 1328 against the City of Chicago, A Municipal Department, City of Chicago Office of the Mayor Rahm Emanuel, Markoff Kransy LLC, Law Offices of Talan & Ktsanes, City of Chicago Department of Buildings, City of Chicago Department of Police, City of Chicago Department of Streets and Sanitation, and the City of Chicago Department of Revenue ("City"). Debtor seeks (1) injunctive relief by the court to determine whether Debtor should be liable for the pre-petition liability arising from the complaints relating to the real properties located at 1517 W. 61st Street, Chicago, Illinois and 356 West 45th Street Chicago, Illinois; and (2) a determination of whether the City is in violation of 11 U.S.C. § 1328 by seeking a claim that runs with the land prior to the filing of the Chapter 13 bankruptcy.

Debtor alleges that the City began enforcement of both pre-petition and post-petition claims after the Chapter 13 case was filed, confirmed and discharged. Debtor asserts the claims in this case start pre-petition and have grown to staggering amounts. Debtor has filed a new Chapter 13 bankruptcy, Case NO. 13-311441-E-13C on August 30, 2013 to remedy any post-petition claims.

EVIDENCE

Debtor alleges the following pre-petition activity by the City:

1. On or about January 13, 2007, the City filed and noticed an Administrative Complaint regarding the 45 Street Property. (Exhibit 1, Dckt. 128);

2. On or about February 23, 2007, the City conducted a hearing of the Administrative Complaint regarding the 45 Street Property. (Exhibit 2, Dckt. 128);

3. On or about March 6, 2007, a Findings, Decisions & Order was entered concerning the 45 Street Property. (Exhibit 3, Dckt. 128);

4. On or about March 21, 2007, the City mailed a "Collection Notice" regarding the Administrative Judgment against the 45 Street Property. (Exhibit 4, Dckt. 128);

5. On or about May 25, 2007, the law firm of Wexler & Wexler, LLC, acting as Counsel on behalf of the City of Chicago, A Municipal Corporation, sent a collection letter advising Debtor that an Administrative Judgment had been entered, in the amount of $532.25, which Debtor paid on June 4, 2007, with check #1004. (Exhibits 5 and 6, Dckt. 128);

6. On or about June 5, 2007, the law firm of Wexler & Wexler, LLC sent a collection letter advising Debtor that an Administrative Judgment had been entered. (Exhibit 7, Dckt. 128).

CITY'S OPPOSITION

The City argues that Debtor points to no pre-petition conduct to support the allegation that the discharge injunction was violated. The City alleges that the Debtor is without any evidence from which the court can conclude the City violated the discharge injunction. The City argues that it has pursued nothing other than post-petition, post-discharge fines imposed upon the Debtor in its exercise of police powers.

The City argues that Debtor has recognized in a variety of pleadings (from the related Adversary Proceeding) that the City's actions were post-petition.

As to the allegations of the City's pre-petition activity, the City argues that the pre-petition collection effort for the removal of an obstruction and repair to a defective house drain pipe was adjudicated and the judgment paid three months before the debtor sought Chapter 13 bankruptcy protection on September 4, 2007. The city states the debtor does not explain the relevance of these allegations to her claim that the City violated the discharge injunction for post-petition, post-discharge debts she incurred later.

The City also states that the violative property conditions, and the fines did not exist at either the filing of Debtor's petition, or at the time of the Debtor's discharge. The City claims it is not in dispute that

the City did not begin conducting its investigation, or enforcing the various municipal code violations until after the debtor received her discharge on February 3, 2011. The City argues that its actions to ameliorate the debtor's illegal conduct occurring on her properties, post-petition and after discharge does not threaten the letter nor the spirit of the bankruptcy laws.

The City alleges that regardless, its collection efforts are exempt from discharge as fines due to government entities. The City cites 11 U.S.C. § 362(b)(4), the police power exemption, that excepts from the automatic stay the commencement or continuation of an action or proceeding by a governmental unity to enforce such governmental unit's police and regulatory power. The city argues that there is no dispute that the City's pursuit of municipal code violations at the debtor's properties was, and is, for the protection of its residents, and to protect public health and safety. The City further alleges that even if the fines had been entered pre-petition or for pre-petition violations, any pre-petition debt composed of fines or penalties payable to a governmental unit would have been excepted from the debtor's discharge under § 523(a)(7).

DEBTOR'S REPLY

Debtor responds to the City's opposition, stating that the pre-petition letters presented evidence actions taken by the City and that the amount claimed by the City could have in fact included these pre-petition claims. Debtor requests that this Motion should be continued to allow discovery as to the material disputed issues.

STATUS CONFERENCE STATEMENT

Debtor filed a status conference statement stating that Debtor has received her Chapter 13 discharge in her Chapter 13 case no. 07-27123-E-13L, Dckt. No. 114. Debtor filed this new Chapter 13 Plan in an attempt to remedy any future claims. Debtor states there is a pending objection to the claims of Fifth Third Bank.

Debtor's counsel states he has called the only party interested in the property in the City of Chicago and has made a cash sale offer to sell, and is awaiting a reply to date. Debtor's counsel has also discussed with the City of Chicago's counsel regarding the pending tax lien on the second property, how to accelerate the tax lien sale process to resolve title transfer in this property, and the willingness to transfer the first property as the claim with the collection process for this property would ultimately result in the tax lien sale.

Debtor states that as the Court continued this matter to afford the parties time to address these issues and work to structure a sale of the propertied at issue, no discovery has been initiated by either party. Debtor asserts that the discovery process should start within (90) days, if nothing further develops to resolve the transfer of title.

Debtor's counsel also suggests that the Bankruptcy Dispute Resolution Program could be initiated to meaningfully resolve these unique issues before the Court allows discovery to begin. Debtor's counsel believes

this matter can be resolved through the B.D.R.P. while minimizing future litigation and preserving the Judicial Economy.

No Status Report has been filed by the City of Chicago (and none was ordered by the court). In light of the Status Report filed by Debtor, a Report from the City stating its view of the current status and whether there will be a prompt resolution will be of assistance to the court.

CITY OF CHICAGO STATUS REPORT

The City has filed a succinct Status Report, which is at odds with that of the Debtor. The City states that the Debtor refuses to take any responsibility for the properties at issue, refuses to pay anything, and failed to cooperate when a potential purchaser of the 356 West 45th Street Property in late November 2013. The City believes that the Debtor will not be able to sustain a claim for violation of the Discharge Injunction.

SETTING OF DISCOVERY SCHEDULE

The court has insured that the parties have had sufficient time to address the contentions, consider their respective rights, and determine if there was a practical solution. The matter has not been resolved. In such situations these matters proceed to trial, with the court doing its job and making a ruling based on the evidence and the law. Rarely does such a decision making process result in a compromise result where each party protects some portion of the position. Judgements and orders generally result in a winner and a loser.

The court shall issue an order setting the following Discovery Schedule and a Pre-Evidentiary Hearing Conference (which the court conducts in the same manner as a pre-trial conference).

The court shall issue a Pre-Evidentiary Scheduling Order setting the following dates and deadlines:

a. Jurisdiction exists for this Contested Matter pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding arising under 11 U.S.C. § 524 and pursuant to 28 U.S.C. § 157(b)(2), including subparagraphs (I) and (O).

b. Expert Witnesses shall be disclosed on or before ----------, 2014, and Expert Witness Reports, if any, shall be exchanged on or before ----------, 2014.

c. Discovery closes, including the hearing of all discovery motions, on ----------, 2014.

d. The Pre-Evidentiary Hearing Conference in this Contested Matter shall be conducted at ------- p.m. on ----------, 2014.

19. 12-26623-E-13 NAVRAJ/INDU JASUJA
NLE-2 Peter Macaluso

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
1-8-14 [133]

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 and Debtor's Attorney on January 8, 2014. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's tentative decision is to sustain the objection to claimed exemptions. 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 objects to the Debtor's exemptions. The Debtor filed amended Schedules B and C on December 10,2013, Dckt. 121. The Debtor changed the value of the following assets: Restaurant; Goodwill, Tools, Furniture, Fixtures, Inventory, Computer and Printer from $12,000.00 to $11,265.00. The Debtor also changed the exemptions on Schedule C for this asset from $2,200.00 under Cal. C.C.P. § 703.140(b)(6) and $9,800.00 under Cal. C.C.P. § 703.140(b)(5) to $7,175.00 under Cal. C.C.P. § 703.140(b)(6) and $9,800.00 under Cal. C.C.P. § 703.140(b)(5).

The Trustee states that it appears that the Debtor decreased the value of the Restaurant equipment on amended Schedule B and increased the exemption on Schedule C by $4,975.00. Trustee also states that it appears that the Debtor has sold some or all of the assets being exempted without Court permission and has only exempted them after the Trustee filed a motion to convert this matter to a Chapter 7. The Trustee argues that these amendments should be disallowed as the Debtor acts in bad faith and creditors are unfairly prejudiced where the Debtor appears to have spent non-exempt funds.

DEBTOR'S RESPONSE

Debtors have filed a "Limited Opposition" to the Objection to Exemption. (As discussed below, the limited opposition appears to be in recognition of the prior misconduct of the Debtors and an attempt to salvage a plan in this case rather than having it possibly dismissed with prejudice.)

Debtors assert that their "punishment" (see discussion below for improper sale of assets) should be the surcharge of the exempted funds from the sale as this is a benefit to the creditors. Debtors state that these funds are a windfall to the estate, and a conversion or dismissal would not directly benefit those creditors who have participated in this Chapter 13.

The Debtors state the only change between the 9/10/12 exemption is the amount of the exemption from $2,200.00 to $7,175.00, an increase of $4,975.00. The debtor has no opposition to the "increase" in the claim of exemption being disallowed, and surcharged to the benefit of the unsecured creditors. The debtors do not oppose an increase of $4,975.00 be deemed as non-exempt, be ordered to be paid for the benefit of the creditors in this case.

By the court's calculation, the Debtors' improper conduct in selling assets of the Estate generated $20,000.00 cash for them. (This doesn't take into previously undisclosed account eve of bankruptcy transfers.)

DISCUSSION

Background

The Court addressed the Debtor's actions in this case in the Trustee's Motion to Dismiss, DCN: NLE-1, Dckt. 137. The court summarized the prior proceedings in the civil minutes.

> In denying the first motion to sell the court addressed the motion that incorrectly identified the asset being sold. Civil Minutes, DCN: PGM-2, Dckt. 59. The first motion proposed to sell the real property (which the Debtors do not own) at which the restaurant was located. In denying the Motion, the court stated,
>
> > "This Motion is fatally defective as it does not identify the property to be sold. The Notice of Hearing is fatally defective because it misidentifies the property being sold. If the Debtors wish to sell their business and the personal property of the business then they may file a motion to sell those personal property assets, with that motion actually identifying what is to be sold (and not merely generically describing the assets as business and inventory."
>
> *Id.*
>
> In denying the second motion to sell, the court's findings of fact and conclusions of law reviews the incomplete and inaccurate statements made by the Debtors under penalty of perjury. Civil Minutes, DCN: PGM-4, Dckt. 75. Only when pressed, these Debtors began disclosing bank accounts and other assets. In discussing the Debtors' lack of credibility, the court stated (emphasis added),

"**The undisclosed assets, the multiple amended Schedules, and the failure to disclose payment of property taxes on the eve of bankruptcy significantly impair the Debtors' credibility.** The Debtors state under penalty of perjury in the Schedules that the business only has a liquidation value of $12,000.00 and no goodwill value. For the current sale, the value has risen sufficient to sell it for $20,000.00, with the buyer paying $3,000.00 for goodwill. **Not coincidently, the additional values are just enough to pay what the Debtors identify as sale expenses so that they can claim a new exemption in the remaining net proceeds of just less than $12,000.00** (the amount of the exemption claimed in the business, including the tools of the trade exemption).

The testimony and Purchase Agreement provided to the court is devoid on any information as to the purported $5,735.00 costs of sale and the $3,000.00 in purported taxes. **Fortunately, from the Debtors' perspective, this works out to be exactly the number of expenses and taxes so that the remaining net proceeds can be within the re-reamended exemption** amounts previously stated by the Debtors. The court does not find the Debtors' testimony as to the expenses and taxes to be credible.

The court will not approve a sale which purports to authorize the payment of unidentified expenses and taxes. Further, the court will not approve a sale that may purport to authorize the Debtors to claim the proceeds as exempt. The **Debtors have filed a blizzard of amended schedules, including amended exemptions. Further, the amended schedules have disclosed cash accounts for which no plausible explanation has been provided for the failure to disclose when the case was filed or earlier in these proceedings.**

Finally, **the court has no idea what assets are being sold**. The motion sees to sell generically described assets consisting of "business inventory, equipment and goodwill located in the property commonly known as 7467-69 Village Parkway, Dublin, California." Dckt. 62. The court has no idea if the inventory consists of two boxes of salt, three chickens, and a bottle of pepper, or a freezer

> full of food to prepare a banquet for 200 persons. Additionally, the equipment could consist of a one burner stove, hot plate, to pans, and a spatula, or may be a 14 burner Wolf stove, six oven, three walk in freezers, three stainless steel work tables with built in sinks and disposals.
>
> **The Business Purchase Agreement states that a list of the equipment being sold is attached, but that disclosure has been omitted from the Exhibit A filed with the court.** Dckt. 65. Further, though not disclosed in the Motion, the Business Purchase Agreement allocates $2,000.00 for the Debtors and estate not to compete within 5 miles of the Dublin, California location of the business being sold.
>
> **The court cannot issue an order which effectively states that the Debtors may sell the "Stuff" used in the business.** That is what has been requested by the Debtors. The court also will not approve a sale and blindly parrot purported expenses merely because the Debtors say that such expenses exist."

Id. From the above Ruling, it was abundantly clear to the Debtors that truthfulness, honesty, and forthright communications are required of the Debtors.

The Debtors, being unsuccessful at getting an order from the court to sell property of the estate due to their lack of disclosure and candor, chose to dispense with complying with the Bankruptcy Code. Being represented by knowledgeable counsel, there is little argument that the Debtors did not know that court approval was required and that absent court approval these fiduciaries of the bankruptcy estate could not sell or transfer these assets. That did not deter them from violating the Bankruptcy Code and getting what they wanted – cash from the unauthorized sale of property of the estate.

Local Bankruptcy Rule 3015-1 requires that the "debtor shall not transfer, encumber, sell or otherwise dispose of any personal or real property with a value of $1,000.00 or more other than in the ordinary course of business without prior Court authorization."

The Chapter 13 Debtor is vested under 11 U.S.C. § 1303 with identical rights and powers as those of a trustee by virtue of 11 U.S.C. § 363(h) and may therefore sell property under 11 U.S.C. § 363(b) and (f). Where a

> sale of property of the estate of a debtor is not in the ordinary course of debtor's business, court approval of the sale is required. 11 U.S.C. §§ 363(b)(1) and 1303. It is universally accepted that the terms of a proposed sale not in the ordinary course must be disclosed to the court and to all creditors and parties in interest.

Courts have held transfers in violation of 11 U.S.C. § 363(b) are void ab initio and must be set aside. *See In re Koneta*, 357 B.R. 540, 543 (Bankr. D. Ariz. 2006)(Where Chapter 13 debtor and tenants of certain commercial property modified post-petition option agreement giving tenants option to purchase property, modification, which reduced purchase price and altered payment terms, was void because it was outside ordinary course of business and was not approved by court under 11 U.S.C. § 363(b)); *Medical Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379 (2d Cir. N.Y. 1997) *affd.* 114 F.3d 379 (2nd Cir. 1997)(Chapter 11 Debtor-in-possession's attempt to cancel an insurance policy which constituted property of the estate, without notice to interested parties was null and void); *In re First International Services Corp.*, 25 B.R. 66, 70 (Bankr. D. Conn. 1982)(The secret transfer of management and control of the debtor corporation runs counter to the spirit of the Bankruptcy Code and under such circumstances, the entire agreement must be deemed null and void).

> In a very similar unreported case, *In re Corum*, 2012 Bankr. LEXIS 5317 (Bankr. E.D. Va. 2012), Chapter 13 Debtors sold their home without first obtaining court approval as required by 11 U.S.C. § 363(b) and the court converted their case to one under Chapter 7 of the Bankruptcy Code on a finding of bad faith. The Debtor’s motion to sell the property had been denied, but Debtor closed the sale despite never obtaining a court order approving the sale. The court stated the Debtors “are charged with dealing with property of the estate in an open and honest manner, and with full disclosure to the Court, the creditors and other parties in interest (including the Chapter 13 Trustee). This they failed to do.” *Id.* at 20.

Civil Minutes, Dckt. 137.

The court also noted that neither party disputes that Debtor's post-petition sale of their business was outside the ordinary course of business and therefore required court approval after notice and a hearing. The court then found and still believes that Debtors still seek to cover up their misdeeds after knowingly selling the restaurant without court authorization because it was in their financial advantage.

Legal Standards

Section 522(l) of the Bankruptcy Code and Rule 4003(b) of the Federal Rules of Bankruptcy Procedure permit a party in interest to object to a debtor's claim of exemption. The Supreme Court has recognized the "broad authority granted to bankruptcy judges," pursuant to § 105(a) of the Bankruptcy Code, "to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor." *Marrama v. Citizens*

Bank of Massachusetts, 549 U.S. 365, 374-75 (2007); *see also Latman v. Burdette*, 366 F.3d 774, 784-86 (9th Cir. 2004)(recognizing inherent powers of bankruptcy courts to equitably surcharge a debtor's exemption to protect integrity of the bankruptcy process and to ensure debtor does not exempt amount greater than allowed under Bankruptcy Code despite lack of express Code provision for equitable surcharge of exemptions).

A party objecting to a debtor's claim of exemption must prove bad faith by a preponderance of the evidence and not by clear and convincing evidence. *Tyner v. Nicholson (In re Nicholson)*, 435 B.R. 622 (B.A.P. 9th Cir. 2010). Bad faith in claiming exemptions is determined by an examination of the "totality of the circumstances." *In re Rolland*, 317 B.R. 402, 414 (Bankr. C.D. Cal. 2004). Concealment of assets is the usual ground for a finding of "bad faith." *Id.* at 415. However, "a debtor's intentional and deliberate delay in amending an exemption for the purpose of gaining an economic or tactical advantage at the expense of creditors and the estate [also] constitutes 'bad faith.'" *Id.* at 416.

Intentional concealment can be inferred from the facts and circumstances of a case, including non-disclosure resulting from a debtor's reckless disregard for the truth of information furnished in the schedules and statements. *See Jordan v. Bren (In re Bren)*, 303 B.R. 610, 614 (8th Cir. BAP 2003) (stating that "multiple inaccuracies or falsehoods may rise to the level of reckless indifference to the truth, which is the functional equivalent of intent to deceive").

Furthermore, schedules and statements are signed under penalty of perjury. Fed. R. Bankr. P. 1008. Debtors are presumed to have read the schedules and statements before signing the documents, and are responsible for their contents. Debtors bear an independent responsibility for the accuracy of the information contained in their schedules and statements. *AT&T Universal Card Servs. Corp. v. Duplante (In re Duplante)*, 215 B.R. 444, 447 n.8 (9th Cir. BAP 1997) (noting that "schedules and statements of financial affairs are sworn statements, signed by debtors under penalty of perjury" and warning that "adopting a cavalier attitude toward the accuracy of the schedules and expecting the court and creditors to ferret out the truth is not acceptable conduct by debtors or their counsel").

Review of the Original and Amended Exemptions

The Debtors' travels through the exercise of their fiduciary duties as Chapter 13 Debtors, misuse of property of the Estate, and their statements under penalty of perjury concerning property of the estate and exemptions is summarized as follows.

Exemption and Asset (non-household)	Original Schedule C Filed 04/04/12, Dckt. 27	Value Stated on 04/10/12 Amended Schedule C	Non-Exempt Value for Estate
Cash	($60.00)	$60.00	$0.00

Bank Acct In India	Not Disclosed on Schedule B and Not Claimed Exempt		
Checking So Cal Postal	($400.00)	$400.00	$0.00
Credit Union Bank of America	($200.00)	$200.00	$0.00
Savings So. Cal Postal	($30.00)	$30.00	$0.00
Life Insurance, Whole Life	($9,353.47)	$9,353.47	$0.00
401K	($6,640.00)	$6,640.00	$0.00
TSP Voluntary Retirement	($57,000.00)	$57,000.00	$0.00
Restaurant Business	($12,000.00)	$12,000.00	$0.00
		Non-Exempt Value on Schedule C	$0.00

Exemption and Asset (non-household)	Amended Schedule C Filed 04/27/12, Dckt. 15	Value Stated on 04/27/12 Amended Schedule C	Non-Exempt Value for Estate
Cash	($60.00)	$60.00	$0.00
Bank Acct In India NEWLY DISCLOSED	($5,146.44)	$5,146.44	$0.00
Checking So Cal Postal	($400.00)	$400.00	$0.00
Credit Union Bank of America	($200.00)	$200.00	$0.00
Savings So. Cal Postal	($30.00)	$30.00	$0.00
Life Insurance, Whole Life	($9,353.47)	$9,353.47	$0.00
401K	($6,640.00)	$6,640.00	$0.00
TSP Voluntary Retirement	($57,000.00)	$57,000.00	$0.00
Restaurant Business	($12,000.00)	$12,000.00	$0.00

		Non-Exempt Value on Schedule C	$0.00

Exemption and Asset (non-household)	Amended Schedule C Filed 05/10/12, Dckt. 27	Value Stated on 09/10/12 Amended Schedule C	Non-Exempt Value for Estate
Cash	($60.00)	$60.00	$0.00
Bank Acct In India	($5,146.44)	$5,146.44	$0.00
Checking So. Cal. Postal $11,601.19 INCREASE	($6,588.56)	$12,001.91	$5,413.35
Credit Union Bank of America	($200.00)	$200.00	$0.00
Savings So. Cal Postal	($30.00)	$30.00	$0.00
Life Insurance, Whole Life	($9,353.47)	$9,353.47	$0.00
401K	($6,640.00)	$6,640.00	$0.00
TSP Voluntary Retirement	($57,000.00)	$57,000.00	$0.00
Restaurant Business	($12,000.00)	$12,000.00	$0.00
		Non-Exempt Value on Schedule C	$5,413.35

Exemption and Asset (non-household)	Amended Schedule C Filed 09/10/12, Dckt. 58	Value Stated on 09/10/12 Amended Schedule C	Non-Exempt Value for Estate
Cash	($60.00)	$60.00	$0.00
Bank Acct In India	($5,146.44)	$5,146.44	$0.00

Checking	($6,588.56)	$12,001.91	$5,413.35
Credit Union Bank of America	($200.00)	$200.00	$0.00
Savings So. Cal Postal	($30.00)	$30.00	$0.00
Life Insurance, Whole Life	($9,353.47)	$9,353.47	$0.00
401K	($6,640.00)	$6,640.00	$0.00
TSP Voluntary Retirement	($57,000.00)	$57,000.00	$0.00
Restaurant Business	$12,000.00	$0.00	$12,000.00
		Non-Exempt Value on Schedule C	$17,413.35

Exemption and Asset (non-household)	Amended Schedule C Filed 12/10/13, Dckt. 121	Value Stated on 12/10/13 Amended Schedule C	Non-Exempt Value for Estate
Cash	($60.00)	$60.00	$0.00
Bank Acct In India	($5,146.44)	$5,146.44	$0.00
Checking	($6,588.56)	$12,001.91	$5,413.35
Credit Union Bank of America	($200.00)	$200.00	$0.00
Savings So. Cal Postal	($30.00)	$30.00	$0.00
Life Insurance, Whole Life	($9,353.47)	$9,353.47	$0.00
401K	($6,640.00)	$6,640.00	$0.00
TSP Voluntary Retirement	($57,000.00)	$57,000.00	$0.00
Restaurant Business FN.1.	($16,975.00)	$11,265.00	($5,710.00)

		Non-Exempt Value on Schedule C	($296.65)

FN.1. Inexplicitly the Debtor contend that the Restaurant business has a value of $11,265.00, but somehow they can exempt $16,975.00 in "value." By Debtors' calculations on Schedule C, which is stated under penalty of perjury, creditors owe the Debtors $296.65.

Analysis

The court reads the Trustee's Objection is that the Debtors should not be allowed to benefit in any of the $20,000.00 which they obtained from breaching their fiduciary duty, selling property of the estate without court authorization and then hiding the money. The Trustee is correct. These Debtors have now demonstrated on multiple occasions that "truth" is a transitory term, and they will state whatever they want to get whatever they desire.

In opposition the Motion the Debtors offer no evidence, no testimony, no statements under penalty of perjury. Rather, they merely push their attorney out in front of them to argue, "Give the Debtors $15,025.00 in cash they got from selling property of the estate without court authorization, ignore their breach of their fiduciary duty, ignore that they had the proposes sale denied by the court but they chose to breach their fiduciary duty knowing that the court had denied the sale, and "punish" the Debtors by making they pay the grand total of $4,975.00 of their ill gotten gain to creditors."

The court is very surprised that, after hearing the court's comments at the prior hearing and reading the ruling, the Debtors have not come forward providing for the $20,000.00 of ill gotten gain to be paid into the plan. The breach of fiduciary duty is not a mere "technicality" or "faux truth" that can be ignored. Converting property of a bankruptcy estate by a fiduciary raise substantial civil and criminal law issues.

The Debtor clearly have the ability to place the $20,000.00 they improperly took and now claim as exempt back into the estate. But this appears to be the farthest thing from their mind, trying to nickel and dime the way out of their breach of fiduciary duty. This appear to be part of what may be a larger strategy to abuse the Bankruptcy Code, Estate, and creditors, hide assets, and steal as much as they can from the estate.

The court finds that Debtors have acted in bad faith and therefore, sustains the Trustee's objection. The Debtors' exemptions claimed in the Restaurant business and assets is denied.

Given the Debtors' conduct, the court also finds it necessary and property that the $20,000.00 in sales proceeds be immediately turned over to the Trustee. If the Debtors fail or refuse to turn over the proceeds, or an amount equal to the $20,000.00 proceeds if the Debtors have diverted or used such moneys so as to make them "unavailable" to pay to the Trustee, the Trustee, U.S. Trustee, creditors, or any party in interest may seek to have the court reallocate other exemptions claimed by the Debtor to the

$20,000.00 in moneys taken from the estate, and thereby free up or surcharge other assets so that the Debtors' breach of fiduciary duty is financially rectified.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is sustained and the claimed exemptions in the Restaurant assets and $20,000.00 in sale proceeds of the restaurant assets are disallowed in their entirety.

20. 13-34223-E-13 NAOMI LEBUS
NLE-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
1-13-14 [22]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on January 13, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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 Debtor appeared at the first meeting of creditors held on January 9, 2014, in Redding, California but indicated that she had counsel. Counsel was not present and the Trustee did not conduct the examination. The Trustee argues that he does not have sufficient information to determine if the plan is suitable for confirmation under 11 U.S.C. § 1325. The hearing is continued to February 13, 2014 at 10:30 a.m.

Also, the Trustee argues that the Debtor has failed to provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. §521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3).

The Trustee opposes confirmation offering evidence that the Debtor is $135.80.00 delinquent in plan payments. Debtor has not made any plan payments to date. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

Local Rule 3015-1(a) states that the mandatory form plan EDC 3-080 shall be utilized as the standard form, effective May 1, 2012. Debtor filed the amended plan using the pre-May 1, 2012 form on November 19, 2013, well

after the new form became mandatory. Not using court-approved form is cause to deny confirmation.

Trustee also states that Debtor cannot make the plan payments required as her Schedule J indicates negative net income of $2,170.00 per month.

Additionally, the Trustee argues that the Debtors plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtors Schedule B lists a 2008 Hyundai Elantra at a value of $11,000.00. Dckt. 11. Schedule C exempts $3,525.00 of this value. Dckt. 11. Schedule D does not list any secured debt against this vehicle. Dckt. 11. Trustee argues that Debtor's non-exempt assets may total at least $7,475.00 of equity in the vehicle while Debtor proposes to pay 0% to unsecured creditors. The Trustee adds that the total non-exempt equity may be higher if the Debtor maintains they do not owe mortgages on their real property. Section 3.09 of the plan maintains that the Debtor is "DISPUTING THESE MORTGAGES," but does not indicate the nature of the dispute and if the Debtor maintains the mortgages are not owed then the Debtor has additional non-exempt equity of $278,373.00 that must be paid to unsecured creditors (the value of the real property on Schedule A).

Lastly, Debtor's Schedule I indicates that Debtor is a self employed flower farmer. Trustee states that the Statement of Financial Affairs fails to disclose Debtor's business.

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.

21. 13-34624-E-13 DEBRA RANDELL
NLE-1 Mark Briden

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
1-13-14 [24]

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 13, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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 the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. §341. Attendance is mandatory. 11 U.S.C. §343.

The Trustee further alleges that the Debtors have failed to provide copes of the 60 days of employer payment advices as required under 11 U.S.C. §521(a)(1)(B)(iv).

The Trustee opposes confirmation offering evidence that the Debtor is $2,000.00 delinquent in plan payments and has not made any plan payments to date. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Trustee also argues that Section 6 of Debtors plan indicates that Debtor is currently in the loan modification process with the mortgage lender. The plan does not contain any language for the treatment of the creditor if a loan modification is denied. The Trustee has not received any documentation of the Debtor applying for a loan modification to date.

Additionally, the Trustee states that Debtor's plan fails to provide for the secured debt of Shasta County Tax Collector. Schedule D lists a debt of $2,200.00 for property taxes, which is not listed in the plan. While

treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment may indicate that Debtor either cannot afford the plan payments because of additional debts, or that the Debtor wishes to conceal the proposed treatment of a creditor.

The Trustee also argues that the plan fails to provide for all priority debts as required by 11 U.S.C. § 1322(a)(2). County of Shasta Superior Court has filed a priority Proof of Claim (court claim #3) for $2,300.00, which is not listed in the plan.

Lastly, the Trustee argues that the Debtor may not be able to make the plan payments required under 11 U.S. C. § 1325(a)(6). Debtors plan proposes payments of $2,000.00 for sixty months. Debtor filed an amended Schedule I on January 7, 2014, which changes the combined average monthly income from $10,875.00 to $9,400.00. This is $1,475.00 less than originally listed. The Trustee is not aware of any amendment to Schedule J to date. Trustee states that this is the third of a series of Chapter 13 cases: 10-53182, 12-38694, and now the present case 13-34624, and the Debtor has not explained why this case will work when the last two cases were dismissed.

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.

22. 09-27025-E-13 BLG-10 NILTON/MELISSA SAAVEDRA Chad Johnson

MOTION FOR COMPENSATION FOR CHAD M. JOHNSON, DEBTOR'S ATTORNEY(S), FEES: $1,995.50, EXPENSES: $95.95
1-14-14 [177]

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, creditors, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Compensation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 for Compensation is granted. No appearance required.

Bankruptcy Law Group, PC, Counsel for Debtor, seeks additional attorney fees in the amount of $1,995.50 and expenses in the amount of $95.95. Counsel argues that these additional fees are actual, reasonable, necessary and unanticipated as post-confirmation work required.

Description of Services for Which Fees Are Requested

1. Communication with Clients: Counsel communicated with debtor's regarding status of case and follow-ups (no charge).

2. Case Administration: Counsel communicated with Trustee's office regarding vehicle payments and declaration prepped and filed (no charge).

3. Motion for Loan Modification: Counsel prepared a loan modification application (1 hour).

4. Motion to Incur Debt: Counsel prepared a Motion to Incur Debt and amended petition (3.1 hours).

5. Motion to Incur Debt: Counsel prepared a Motion to Incur Debt for brother's vehicle to show purchase. (1 hour).

6. Motion to Modify: Counsel prepared motion to modify chapter 13 plan and the motion was granted (3.3 hours).

Counsel argues that the additional fees sought were beyond the typical fees in a chapter 13 case and the work performed was necessary and provided a benefit to the Debtor.

The hourly rates for the fees billed in this case are $300.00/hour for counsel, $135.00/hour for paralegal, $85.00/hour for administrative staff for a total of 6.4 billable hours of unanticipated and substantial work. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $1,995.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

Counsel also seeks the allowance and recovery of costs and expenses in the amount of $95.95 for postage. The total costs in the amount of $95.95 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Compensation filed by Counsel for Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Bankruptcy Law Group, PC, Counsel for Debtor, is allowed the following fees and expenses as a professional of the Estate:
>
> Bankruptcy Law Group, PC, Counsel for Debtor
> Applicant's Fees Allowed in the amount of $1,995.50
> Applicants Expenses Allowed in the amount of $95.95.

23. 13-20541-E-13 NEIL FREEMAN **MOTION TO MODIFY PLAN**
DEF-4 David Foyil **12-31-13 [54]**

Final Ruling: The Debtor having filed a “Withdrawal of Motion” for the pending Motion to Modify, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Modify, and good cause appearing, **the court dismisses without prejudice the Motion to Modify 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.
>
> A Motion to Modify Plan having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Modify Plan is dismissed without prejudice.

24. 13-20541-E-13 NEIL FREEMAN **MOTION TO APPROVE LOAN**
DEF-5 David Foyil **MODIFICATION**
12-31-13 [60]

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 31, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny the Motion to Approve the Loan Modification. 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:

Green Tree Servicing, LLC, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment to $740.85, with an interest rate at 4%. There will be one additional payment in the amount of $737.64 due after the earlier payments are made. Debtor will also make payments of $287.18 to the Lender in escrow payments. The total ongoing monthly payment to Green Tree Servicing, LLC will be one thousand thirty dollars $1,030.

Green Tree Servicing, LLC has confirmed in connection with another case that is not a creditor in bankruptcy cases, but merely the servicer, or sub-servicer, for the actual creditor. See Civil Minutes for February 11, 2014 hearing on Motion to Approve Loan Modification, DCN: PGM-5, in the Shmavon Mnatsakanyan and Yermoniya Artushyan case, Bankr. E.D. Cal. 11-21422.

Debtor will be filing a First Modified Chapter 13 Plan as a result of this loan modification. The Debtor's First Modified Chapter 13 Plan will change the classification of Green Tree Servicing, LLC from a Class 1 Creditor to a Class 4 Creditor. Debtor's current plan currently has a plan payment of two thousand seven hundred four dollars ($2, 704) for a period of 60 months. The First Modified Chapter 13 Plan payment will be $2, 704 for months 1 through 10 and $1,689 for the period thereafter. The length of Debtor's First Modified Chapter 13 Plan will be reduced to 38 months.

Based on the confirmation from Green Tree Servicing, LLC that it is not a creditor and has some authority as a loan servicer, the court cannot in good conscious approve a contract in which it knows that Green Tree Servicing, LLC is not the creditor and that some secret, unnamed, undisclosed creditor is hiding behind Green Tree Servicing, LLC. The court does not believe that creating the possibility, or likelihood of future litigation over who is the undisclosed principal; does the undisclosed principal know that Green Tree Servicing, LLC is purporting to be its agent; what power and authority, if any, and did the principal give to Green Tree Servicing, LLC to modify its contractual rights is a prudent use of judicial resources or good business-consumer public policy. Further, as in the Mnatsakanyan/Artuschyan case, the Limited Power of Attorney upon which Green Tree Servicing, LLC purported to be authorized was limited to acting in the name of the former servicer; only for loan modifications which were in process when Green Tree Servicing, LLC was transferred the servicing rights; and Green Tree Servicing, LLC failed to provide the court with evidence of what rights the former servicer had that could be transferred to Green Tree Servicing, LLC. FN.1.

FN.1. The court also notes that on April 9, 2013, Green Tree Servicing, LLC filed Proof of Claim No. 8 in which it stated under penalty of perjury that it personally was the creditor holding a $175,814.50 claim. This is contrary to Green Tree Servicing, LLC statements and the testimony under penalty of perjury by one of its Assistant Vice Presidents that it is merely a servicer, and not a creditor in bankruptcy cases.

The court having been told by Green Tree Servicing, LLC that it is not a creditor in bankruptcy cases, the court will not approve a Loan Modification with someone who is not the creditor. If Green Tree Servicing, LLC is acting as the agent for the actual creditor, the Loan Modification documents can be easily corrected to identify the creditor and identify Green Tree Servicing, LLC executing the Agreement in the name of the creditor as it authorized agent.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Neil Freeman, 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 denied without prejudice.

25. 13-35342-E-13 WW-1 JOSEPH/PEGGY ORLANDO Mark Wolff

MOTION TO VALUE COLLATERAL OF ADDISON AVENUE FEDERAL CREDIT UNION
1-14-14 [31]

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's Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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 Debtors' declaration. The Debtors are the owners of the subject real property commonly known as 1506 Antrim Court, Roseville, California. The Debtors seek to value the property at a fair market value of $298,000.00 as of the petition filing date. As the owners, the Debtors' 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 $337,234.00. Creditor Addison Avenue Federal Credit Union's second deed of trust secures a loan with a balance of approximately $11,772.00. 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 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Addison Avenue Federal Credit Union secured by a second deed of trust recorded against the real property commonly known as 1506 Antrim Court, Roseville, 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 $298,000.00 and is encumbered by a senior lien securing claims which exceed the value of the Property.

26. 13-35342-E-13 JOSEPH/PEGGY ORLANDO
NLE-1 Mark A. Wolff

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
1-7-14 [21]

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. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 decision is to sustain the Objection to Confirmation. 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 the proposed plan is not the debtors' best efforts. Debtors are above median income and propose a 60 month plan paying $841 per month with no less than 10% to unsecured claims. Debtors list on Schedule I, that Peggy Orlando has a deduction of $186 per month for repayment of a retirement loan. Debtors fail to propose a plan increase upon payoff of the loan. Debtors supplied the Trustee with documentation which reveals the loan balance as of October 30, 2013 was $4,425.58. It appears the loan will payoff in approximately 24 months, or approximately October, 2015. Trustee argues that the plan should be increased by $186 to $1,027.00 in November, 2015.

Additionally, the Trustee states the Debtor cannot afford to make the payments or comply with the plan, 11 U.S.C. §1325(a)(6). Debtors' plan relies on the Motion to Value Collateral of Addison Avenue Federal Credit Union, but Debtor has not filed the motion to value collateral. Debtors plan does not have sufficient monies to pay the claim in full and therefore should also be denied confirmation.

The court notes that the Debtors filed a Motion to Value set for hearing February 11, 2014. The Motion to Value appears to state with particularity the grounds upon which the requested relief is based. Motion,

Dckt. 31. The Debtor provides his testimony under penalty of perjury as to the relevant facts and owner opinion as to the value of the property which secures the claim. Declaration, Dckt. 33.

In light of the pending Motion to Value, the court continued the hearing on the Objection to Confirmation.

CONTINUANCE

The court having granted the Motion to Value Collateral, the Trustee's objection is overruled on those grounds. However, the Debtors have not responded to the objection based on the Debtors failing to provide for the known reduction of expenses in November 2015.

The Trustee's Objection to Confirmation is sustained. Confirmation of the Plan is denied.

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

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

27. 13-33049-E-13 JEANNE CHRISTENSON
JT-2 John Tosney

CONTINUED MOTION TO CONFIRM PLAN
11-11-13 [24]

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, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 11, 2013. By the court's calculation, 64 days' notice was provided. 35 days' notice is required.

No 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). 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 xxxxx the Motion to Confirm 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. The Debtors have filed evidence in support of confirmation.

Creditor Central Mortgage Company filed opposition to confirmation of the plan on December 31, 2013. Unfortunately, counsel for the Debtor passed away shortly before the January 14, 2014 hearing on the Motion to Confirm. The court continued the hearing to allow new counsel to be substituted in for the Debtor and address the objection. Civil Minutes, January 14, 2014, Dckt. No. 51.

On January 23, 2014, the court signed an Order on Substitution of Attorney, approving the substitution of Aaron C. Koenig as attorney of record, in place of Debtor's deceased attorney John A. Tosney. Dckt. No. 53. The court will proceed to consider the merits of Creditor's Opposition.

Creditor's Opposition to Confirmation of Plan

Creditor, Central Mortgage, was assigned a Deed of Trust encumbering Debtor's real property, located at 8129 Quartz Lane, Smartville, California. On November 7, 2013, Creditor filed its Proof of Claim, designated as Claim No. 2-1 on the claims registry. The face of the Proof of Claim form shows the pre-petition arrearages as currently due and owing in the amount of $1,764.21. The pre-petition arrearages are calculated as follows:

a. One monthly mortgage payment, missed at $1,771.60
b. Credit to the borrower of $7.39

Debtor will have to increase the payments by approximately $49.01 through the Amended Plan to cure the pre-petition arrearages owed to Central Mortgage within the 36 months of the proposed plan.

Debtor's Amended Plan incorrectly identifies Creditor as a Class 4 Creditor, because Debtor is not current in her payments to Central Mortgage. Debtor does not appear to account for all of the pre-petition arrearages owed to Central Mortgage. Additionally, Debtors will need to increase monthly plan payments to satisfy the pre-petition arrearages over a period of 36 months, as proposed pursuant to 11 U.S.C. § 1322(d). Thus, the Plan does not comply with the requirements of 11 U.S.C. § 1325(a)(5)(B) and 11 U.S.C. § 1322, and the proposed plan is not confirmed.

On January 23, 2014, a substitution of attorney was filed by the Debtor. Dckt. 52. It seeks to substitute Aaron C. Koenig in as counsel for the Debtor. Mr. Koenig has substituted in as counsel for client of the late Mr. Tosney.

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 xxxxxx.

28. 13-35472-E-13 NLE-1 RONALD/POLLY KLINEFELTER Catherine King

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 1-13-14 [16]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on January 13, 2014. By the court's calculation, 29 days' notice was provided. 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. Debtors' Plan lists four education debts in Class 4 as secured direct payments. The debts appear to be unsecured student loans, where Schedule J provides for payments of $635.00 per month.

   Where the Plan is a 100% Plan, Trustee would not be opposed to confirmation of the Plan if this matter is addressed in the order confirming, stating,

   > The Debtor shall pay directly the unsecured student loan claims listed in Class 4 of the plan, which have account numbers ending in 0002, 0001, 1874, and 1774. Claim #5 for the Department of Education shall be paid directly by the Debtor as representing the two claims of VSAC Federal Loans.

2. Debtors' Plan is not feasible; it proposes to pay 100% to unsecured creditors. Section 2.15 of the plan lists the total unsecured debts at $43,550.78. However, Schedule F lists total unsecured debt of $92,217.78. Four debts to KSA Servicing are listed as "unknown" amounts. The plan will take approximately 126 months to pay 100% of

$92,217.78 unless these “unknown” amounts are actually duplicates of the existing loans to be paid directly by the Debtors.

As it stands, 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.

29. 13-28480-E-13 CHARLES/TAMYRA HEARD MOTION TO MODIFY PLAN
PGM-2 Peter Macaluso 1-7-14 [62]

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, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 35 days' notice was provided. 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, David Cusick, objects to confirmation of the plan on the basis that the Plan runs longer than 60 months. The Plan provides for a priority tax claim of the Franchise Tax Board in the amount of $6,000, and does not disclose the tax year.

The Franchise Tax Board has filed several claims because it has not received 2012 taxes for both Debtors, 2010-2011 taxes for Co-Debtor (who did not file any returns), and 2010-2011 taxes for the primary Debtor, as no returns. Claim Nos. 15-17 on the official claims registry. The Plan will not pay all of these claims as proposed in 60 months. This exceeds the maximum amount of time for completion of a Chapter 13 Plan allowed under 11 U.S.C. § 1322(d).

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

30. 10-52482-E-13 SEAN/JENNIFER BAUERS
TBH-1 Thomas Hjerpe

MOTION FOR COMPENSATION BY THE LAW OFFICE OF LAW OFFICE OF THOMAS HJERPE FOR THOMAS B. HJERPE, DEBTOR'S ATTORNEY(S), FEES: $1,815.00, EXPENSES: $0.00
1-15-14 [192]

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 January 9, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required. That requirement was met.

Final Ruling: The Motion for Compensation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 for Compensation is granted. No appearance required.

FEES REQUESTED

Thomas B. Hjerpe, Counsel for the Debtors, makes a First Interim Motion for Compensation in this case. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested relief is based.

A. Counsel seeks a award of attorneys' fees in the amount of $1,815.00 and costs of $0.00.

B. Counsel requests that the court order the Chapter 13 Trustee to pay the fees as an administrative expense.

C. Counsel has provided the following services for which compensation is requested:

1. Draft and File Motion to Confirm Modified Plan;

2. Drat and File Modified Chapter 13 Plan;

3. Address Objection to Proposed Modified Chapter 13 Plan;

4. Attend Hearing on Motion to Confirm Modified Chapter 13 Plan.

Motion, Dckt. 192.

The period for which the fees are requested is for the period of February 16, 2012 through July 30, 2012. The order of the court approving employment of counsel was entered on January 27, 2012. FN.1.

FN.1. The court recently addressed with Counsel the requirements of Federal Rule of Bankruptcy Procedure 9013, 7007; Federal Rule of Civil Procedure 7; and Local Bankruptcy Rules and Guidelines for Pleadings which are enforced in this court. Counsel has motions in the "pipeline" for which the court will not deny or continue for supplemental pleadings when appropriate, such as in the present case. The court is confident that motions and other pleadings filed going forward with comply with the Rules and Guidelines.

Description of Services for Which Fees Are Requested

The attorney who initially represented Debtors, Fredrick C. Clement had entered into a fee sharing agreement with current counsel, Thomas B. Hjerpe, which provided that Hjerpe (the Movant in this matter) 40% of the fees that remained unpaid at the time of substitution, and Fredrick E. Clement would receive the remaining 60%. On January 20, 2012, the court approved of the agreement and issued an Order on Stipulation for Transfer of Chapter 13 Attorney Fees. Dckt. No. 161.

On December 31, 2011 the court approved the First and Final Motion for Compensation for Fredrick E. Clement in the amount of $8,240.48.00 in fees and $759.52 in costs. The remaining balance to be paid throughout the Chapter 13 Plan, subsequent to the substitution of counsel, was $7,000.00. To date $5986.11 was distributed through the Chapter 13 Plan. Hjerpe distributed 60% of these fees to Fredrick E. Clement, and the remaining 40%, or $2,394.44, was paid to Hjerpe. An additional $1,012.89 remains to be distributed through the Chapter 13 plan. Hjerpe will distribute 60% of those funds to Fredrick E. Clement and the remaining 40%, or $405.56, will be paid to Thomas B. Hjerpe.

The basis for this application is services that Hjerpe performed, related to post-confirmation issues in Debtors' case. Counsel reviewed the Debtors' application to modify the Chapter 13 plan; modified the Chapter 13 plan and Objection to Modification filed by the Trustee; and attended the hearing on Motion to Modify the Plan. Counsel discussed claims and plan requirements with Debtors, and communicated with creditors and the Trustee regarding distributions under the modified plan. Counsel Hjerpe has spent 8.70 hours on the matters described herein.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

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

Id. at 959.

A review of the application shows that Counsel's services produced the tangible benefit of confirming a Modified Plan. The court also finds that the requested fees of $1,815 to be reasonable, given Counsel's work in working collectively with Debtors and the Trustee to draft a confirmable plan, and filing a modified Chapter 13 Plan that was eventually confirmed on March 5, 2012.

The court also notes that the Chapter 13 Trustee has filed a statement of non-opposition to Counsel's Motion for Compensation.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for counsel and $175.00/hour for an associate attorney for a total of 8.7 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $1,815.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

Attorneys' Fees	$1,815.00
Costs and Expenses	$ 0.00

For a total interim allowance of $1,815.00 in Attorneys' Fees and Costs in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Thomas Hjerpe is allowed the following fees and expenses as a professional of the Estate:

Thomas Hjerpe, Counsel for the Estate
Applicant's Fees Allowed in the amount of $1,815.00
Applicants Expenses Allowed in the amount of $0.00,

IT IS FURTHER ORDERED that this is an interim award of fees pursuant to 11 U.S.C. § 331, which are subject to final review and allowance pursuant to 11 U.S.C. § 330. and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

31. 13-33583-E-13 NLE-1 | **SUE MARIANO** / **Charnel Jamse** | **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** **1-8-14 [35]**

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 and Debtor's Attorney on January 8, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The court's tentative decision is to sustain the Objection to Debtor's Claim of Exemptions. 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 objects to Debtor's claimed exemptions under California Code of Civil Procedure § 703.140(b). Debtor appears to be separated, according to her Schedule I. Debtor indicates that she is "separated" in the marital status section of her Schedule I. Dckt. No. 25.

Debtor has exempted a number of items of property on her Schedule C, including household furniture, a checking and savings account, clothing, a life insurance policy, three vehicles, and 403B Retirement Accounts under various subsections of California Code of Civil Procedure § 703.140(b). Dckt. No. 32.

Debtor's spouse, however, has not joined the petition. California Code of Civil Procedure § 703.140(a)(2) requires that a debtor to file a Spousal Waiver, which must be signed by the debtor and debtor's spouse. California Code of Civil Procedure § 703.140(a)(2) provides that,

> If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

Trustee states that after reviewing the record, he has not found any such waiver filed with the court. Thus, the objection is sustained and Debtor cannot claim exemptions under California Code of Civil Procedure § 703.140(b).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Debtor's Claim of Exemptions filed by Trustee having been presented to the court, Debtor having filed an Amended Schedule C which replaced the Original Scheduled C filed in this case, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained and Debtor is denied the exemptions, in their entirety, stated on Amended Schedule C, Dckt. 32, filed in this case.

32. 10-42485-E-13 JT-3 PAUL/YOLANDA CRUZ John Tosney

MOTION TO VALUE COLLATERAL OF RIVER CITY BANK 1-10-14 [45]

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's Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on January 10, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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 real estate appraiser James Chaussee's declaration. Mr. Chaussee values the property at a fair market value of $304,000.00. Given the absence of contrary evidence, Mr. Chaussee's opinion of value is conclusive.

The first deed of trust secures a loan with a balance of approximately $319,198.91. The second deed of trust secures a loan with a balance of $110,220.35. Creditor River City Bank's third deed of trust secures a loan with a balance of approximately $127,906.00. 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 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of River City Bank secured by a third deed of trust recorded against the real property commonly known as 9110 Quail Brook Circle, Elk Grove, 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 $304,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

33. 13-26988-E-13 JON SNELLSTROM — MOTION TO INCUR DEBT
RAC-2 Richard Chan — 1-23-14 [28]

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, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on March 26, 2012. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Incur Debt. Oral argument may be presented by the parties at the schedules 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 seeks the approval of this court to incur post-petition debt to finance the purchase of a new vehicle, a 2013 Hyundai Elantra. Debtor states that his lease with American Honda Finance, for a 2011 Honda Civic has expired and Debtor must turn in this vehicle. Debtor was previously paying $203.85 per month on the lease. Debtor's payments on the new vehicle will be $293.43 per month.

Debtor states that he has made preliminary arrangements with Paul Blanco's Good Car Company, to finance the purchase of a 2013 Hyundai Elantra ("Hyundai"), subject to the approval of this court. If this motion is granted, Debtor intends to complete the purchase of the Hyundai, and thereby

become indebted to Paul Blanco's Good Car Company. The purchase price of the Hyundai is $14,954.61, with interest paid at the rate of 11.95%. The monthly payment amount will be $293.43 per month for 72 months. Exhibit A, Sales Contract, Dckt. No. 31.

In his declaration, Debtor states that he would like to complete this purchase as soon as possible. While Debtor has not filed updated schedules, Debtor states that a decrease in expenses will allow him to make contractual payments to Paul Blanco's Good Car Company of $293.43 per month, without jeopardizing his ability to maintain the payments to the Chapter 13 Trustee under the terms of the confirmed Plan. The chart below shows the specific changes proposed to Debtor's expenses to fund the slightly higher car payments. Debtor states that this will be the information contained in his updated Schedule J.

Expenses	**Old**	**New**
Car Payment	203.85	293.43
Home Maintenance	106.93	50.35
Car Insurance	105.00	90.00 (Decreased because of the added safety features on the newer vehicle)
Recreation	50.00	40.00
Clothing	50.00	42.00

DISCUSSION

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

Debtor does not address the reasonableness of incurring debt to lease a new, 2013 brand vehicle while seeking the extraordinary relief under Chapter 13 to discharge debts. Debtor had previously leased a 2011 Honda Civic, but now proposes to lease a 2013 Hyundai Elantra. The loan with Paul Blanco's Good Car Company calls for a substantial interest charge–-11.95%. Debtor will be making new payments of $293.43 under his new vehicle sales contract. This results in a significant increase of $89.58, in case where Debtor under his confirmed plan is paying holders of unsecured claims nothing, and making monthly payments of only $284.00 per month.

A debtor driven to seek the extraordinary relief available under the Bankruptcy Code is hard pressed to provide a good faith explanation as to how a "reward" for filing bankruptcy is to purchase a 2013 car at a 11.95% interest rate. Moreover, the depreciation rate on a 2013 model year car will be high, and this car will have lost a substantial chunk of its value once Debtor acquires this fairly recent model year vehicle.

Debtor does not provide information as to alternatives to buying a 2013 model year vehicle. It is commonly know that during the first three years a car suffers the greatest depreciation. If the Debtor were to purchase a 2011 vehicle, instead fo a new or almost new 2013, it is likely that the payments would be significantly less.

Here, the Debtor has sought the extraordinary relief under Chapter 13, filing a petition on May 22, 2013. Now, eight months later, the Debtor "needs" to purchase a new car. In obtaining this relief, the Debtor has confirmed a Plan which is funded with $284.00 a month for 60 months. Plan, Dckt. 5. The dividend for the Class 7 general unsecured claims is 0%. Other than Debtor's counsel, the Chapter 13 administrative expenses, and a $120.01 a month plan distribution to SMUD for home improvements, no creditors are paid through the Plan.

Additionally, Debtor's Declaration, Dckt. No. 30, does not provide much insight into the supposed decrease in Debtor's expenses. Here, the transaction is not best interests of the Debtor. Debtor merely includes the table, comparing Debtor's old and new expenses, in his declaration. Debtor makes no attempt to explain the reduction in his home maintenance, recreation, and clothing expenses, with the exception of noting that his car insurance payments will be down because of the "added safety features on the newer vehicle." Declaration of Jon David Snellstrom, Dckt. No. 30 at 3.

The court lacks sufficient evidence of decreased expenses to show that Debtor will be able to afford the increased payments on an apparent loan to purchase a 2013 Hyundai Elantra. Furthermore, the court is not sure that this transaction, given the high interest rate at which Debtor is being charged to finance a 2013 model year vehicle, is in Debtor's best interests. The motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

34. 10-27399-E-13 DAN GOODLOW **CONTINUED MOTION TO MODIFY PLAN**
PGM-2 Peter Macaluso **4-11-12 [37]**

CONT. FROM 12/4/13

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

Proper 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 April 11, 2012. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

No Tentative Ruling:

DECEMBER 4, 2013 STATUS CONFERENCE

On November 5, 2013, counsel for Dorice Goodlow filed a motion to withdraw as her counsel in an adversary proceeding which must be resolved as part of a plan in this case.

PRIOR HEARINGS

The Status Conference Statement filed by Dorice Goodlow in Adversary Proceeding 12-2195 advises the court that the parties are proceeding with the Eastern District Bankruptcy Dispute Resolution Program (mediation), with the BDRP Conference set for June 14, 2013, with Russell Cunningham serving as the mediator.

On January 9, 2013 the court continued the hearing to the date of the status conference in adversary proceeding number 12-2195.

On October 17, 2012 the court continued the hearing to allow the court to conduct a status conference. The Debtor is prosecuting an adversary proceeding which must be resolved or made part of the Chapter 13 Plan.

On April 25, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

On June 26, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

History of Hearings

On September 5, 2012 the court continued the hearing to allow Debtor to file and serve evidence in support of the court's tentative ruling from the September 5, 2012 hearing.

On May 22, 2012 the court continued the hearing on Motion to Confirm and ordered Debtor to file and serve evidence as set forth in the tentative

ruling. A review of the docket indicates that Debtor has not filed any additional information.

Adversary Proceeding

The Debtor filed adversary proceeding number 12-02195 to determine the estate's interest in the Bald Creek Road Property and that of asserted co-owners. The proposed plan modification does not take that litigation into account and the consequences of a determination that the Debtor does not have any interest in the property. The court cannot identify what is asserted to be the "unknown transfers of title to [the Debtor's] property."

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor seeks to modify the plan because of a restraining order was entered against him, title to his property was allegedly transferred to others without his knowledge, and he has retained an attorney to defend him in an unidentified action. Debtor does not explain how these issues changed his ability to make plan payments; no expense related to any of these matters is listed on Schedules I or J. However, Schedule I states that Debtor is not residing in his home and is "in a fight over the home." Debtor does not budget for rent, but is proposing to maintain mortgage payments on the home he does not live in.

The Trustee challenges the feasibility of the proposed plan payment in light of the unknown costs associated with the attorney the Debtor has hired – who may be a professional of the estate – and the unknown costs associated with the Debtor's living arrangements outside of his home. These unknown costs impair the feasibility of the proposed plan payment and are cause to deny confirmation. 11 U.S.C. § 1325(a)(6).

Additionally, the Trustee suggests that payment on the claim secured by the loan may work unfair discrimination to holders of general unsecured claims. However, the court declines to reach this issue in light of the pending adversary proceeding the Debtor has commenced to determine his interest in the property and the independent cause to deny confirmation.

The court is further concerned that the proposed modification to the plan does not comport with the reality of this case. The Motion requesting the modification does not state with particularity the grounds relating to a restraining order or possession on the residence being changed by an order of a non-bankruptcy court. The confirmed plan in this case provides that the property of the estate has not revested in the Debtor. (Dckt. 5). The Motion merely instructs the court to read the Debtor's declaration and choose whatever statements made therein the court thinks the Debtor should allege as the grounds for this Motion.

The declaration makes a reference to there being a domestic violence restraining order, an unknown transfer of title to the property (which is property of the bankruptcy estate), and that the Debtor now has to hire an attorney to represent him (presumably with respect to the restraining order and title issue). The Debtor testifies that he is $2,500.00 in arrears in the confirmed plan, and that he owes $6,552.67 on the obligation secured by his home (which is the subject of an unidentified title transfer). He further states that this claim, which is held by Acqua Loan Servicing, will be paid off during the term of the plan.

In support of the Motion the Debtor has provided current financial information using the Schedule I and J forms filed as Exhibits 1 and 2. Dckt. 40. These exhibits are not authenticated by the Debtor and he does not attest that the information provided therein is true and correct under penalty of perjury. The information provided therein raises significant questions.

First, the Debtor states that the total income for he and his wife is $1,084.00, consisting solely of his social security income. No income is shown for his wife, who is listed as retired. Though not stated by the Debtor, presumably there has been a separation and her income of $1,400 a month (as stated on Original Schedule I, Dckt. 1) is no longer available to the Debtor. The expense information, Exhibit 2, lists only $409 a month in expenses, which does not include any utilities, insurance, medical expenses, taxes or other amounts. It provides for a food expense of $150.00.

Second, the information concerning the Debtor's interest in real property is conflicting. On Schedule A the Debtor lists one property identified as 1148 Bald Rock Road, Berry Creek, California. Dckt. 1. It states that the Debtor's interest in the property is $184,500, and the property is subject to a secured claim in the amount of $129,000. Further on Schedule A the Debtor states that he has a 1/4 interest in this property and that 1/4 interest is worth $87,500.00.

Schedule D states that EMC Mortgage Corporation has a 1st Deed of Trust against an unidentified property in the amount of $42,600, with the collateral having a value of $148,000.00. (This appears to be a typographical error given that on Schedule A the Debtor states that the only real property he owns has a value of $184,000.) A second secured claim is listed in the amount of $20,000.00 secured by a judgment lien, with the Debtor stating that he asserts this obligation has been paid in full and is listed only as a precaution.

On Schedule C the Debtor states that he asserts a $150,000.00 homestead exemption. The Bald Creek Road Property is listed as the Debtor's address on his petition.

In the present Motion the Debtor asserts that the creditor having a deed of trust on the Bald Creek Road Property has a claim of only $6,552.67, not the $42,600 as listed on Schedule D.

Debtor's Supplemental Declaration

The court first addressed these issues at the initial hearing on May 22, 2012 and has continued the hearing three times to allow the Debtor to file supplemental information.

On October 2, 2012 Debtor filed a supplemental declaration that is identical to the original declaration filed in support of the motion to modify. Debtor has not provided any additional evidence that would resolve Trustee's concerns regarding attorneys' fees for the adversary proceedings or the unknown costs associated with the Debtor's living arrangements outside of his home. Debtor still has not explained how these issues affect his ability to make plan payments.

Analysis

In addition to unresolved issues raised by the Chapter 13 Trustee, the Status Conference Statement filed on October 10, 2012 indicates that issues surrounding the ownership of the real property have not been resolved. (Adv. Proc. No. 12-02195, Dckt. 33).

The court's review of the docket in Adversary Proceeding Number 12-02195 indicates that the following has occurred since the court continued the hearing in bankruptcy case number 10-27399. The court entered an order allowing Wargo & French LLP to withdraw as counsel of record for EMC Mortgage Corp. and permitting McCarthy & Holthus LLP to substitute in as counsel of record. On October 17, 2012 the court continued the status conference in the adversary proceeding in order to allow the parties to negotiate the terms of a potential settlement since all parties are now represented by counsel. (Dckt. 39). There is no indication that the parties have reached a settlement.

Debtor has not addressed the Trustee's or the court's concerns with regard to feasibility of the proposed plan. Further, Debtor's potential ownership interest in the Bald Creek Road Property has not been resolved and it appears that settlement negotiations in the adversary proceeding are ongoing.

PRIOR STATUS CONFERENCE STATEMENT

The court's review of the docket in adversary proceeding number 12-2195 indicates that on July 22, 2013 the parties filed a status conference statement. The statement indicates that the parties made great progress towards resolving the dispute after the BDR conference. Plaintiffs counsel submitted a written proposal to Defendant and hopes for fair and equitable resolution of the matter. Defendant asserts that she has been in the hospital with pneumonia and has not conferred fully with counsel and is hopeful when she is released from the hospital the matter will be concluded shortly.

The most recent Status Conference Statement in the Adversary Proceeding reports that one of the Defendants continues to be receiving medical treatment which impairs the ability of the parties to consummate a settlement in that Proceeding which would then allow for the confirmation of a plan.

35. 10-27399-E-13 DAN GOODLOW **CONTINUED STATUS CONFERENCE RE:**
12-2195 **COMPLAINT**
GOODLOW V. MARTIN ET AL **4-27-12 [1]**

Plaintiff's Atty: Peter G. Macaluso
Defendants' Atty:
Kelly M. Raftery [EMC Mortgage Corp.]
Pro Se [Dorice Goodlow; Antoinette Johnson; Robert Martin]
unknown [Acqura Loan Services; Calvin Hutson]

Adv. Filed: 4/27/12
Answer:
5/29/12 [Johnson, Goodlow, Martin, Wellington]
7/30/12 [EMC, LLC]

Notice of Dismissal:

Gloria Washington aka Gloria Wellington dated 7/18/12 [Dckt 21]; Order dismissing filed 7/19/12 [Dckt 23]

Kathryn Mangiameli aka Kathryn Danielson dated 7/18/12 [Dckt 22]; Order dismissing filed 7/19/12 [Dckt 25]

Nature of Action:
Declaratory judgment

Notes:

Continued from 12/4/13 to be heard in conjunction with the Motion to Modify Plan.

Motion of Douglas B. Jacobs to Withdraw as Counsel for Defendant, Dorice Goodlow filed 11/51/13 [Dckt 65]; Order granting filed 12/10/13 [Dckt 74]

36. 14-20464-E-13 EJS-2 | **MICHAEL/PHYLLIS ENOS** | **Eric Schwab** | **MOTION TO EXTEND AUTOMATIC STAY O.S.T. 1-31-14 [19]**

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors, Chapter 13 Trustee, and Office of the United States Trustee on January 31, 2014. By the court's calculation, 11 days' notice was provided.

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

Debtors seek to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. Debtor filed a previous Chapter 13 bankruptcy case in 2012, which was pending in the past twelve months. The Debtors' prior bankruptcy case (No. 12-36138-E13C) was dismissed on April 23, 2013, after Debtors defaulted on their plan payments. *See* Order, Bankr. E.D. Cal. No. 12-36138-E13C, Dckt. 40, April 23, 2013. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Debtors testify that during their previous case, they faced some unanticipated family issues, including a death in the family where no funds for a funeral were available. While assisting their family, they were unable to make the required payments to the Chapter 13 Trustee and their case failed. ¶ 5, Declaration of Debtors, Dckt. No. 21. Debtors state that since the dismissal of their previous case, they have adjusted their budget to account for a proper IRS withholding, and have filed all of the required schedules and statements, and have filed a motion to value their vehicle. They state that "all signs indicate that their family situation has stabilized," and they are prepared to prosecute this case to the best of their ability. They believe that they now have the ability to make the payments in their plan. *Id.* at ¶ 5.

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

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors — including those used to determine good faith under §§ 1307(c) and 1325(a) — but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?

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

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

Debtors have sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. Debtors state that they experienced a number of substantial and unanticipated family events during the course of their prior case, which dissipated the funds the Debtors would have otherwise used to make their Chapter 13 Plan payments.

As supported by Debtor's Declaration, Debtors state they have made adjustments to Joint Debtor Michael Enos's pension withholding and do not foresee any substantial changes in their family situation. Debtors filed all missing case documents on January 31, 2014, as well as a Motion to Value Collateral of Santander Consumer USA, Inc. Debtors attach a document described in their Exhibit Cover Sheet as “Proposed Chapter 13 Plan and Filed Budget Documents” as Exhibit “A” in support of this Motion. Dckt. No. 22. The Exhibit is comprised of Debtors’ proposed Chapter 13 Plan, and their Schedules I and J. Debtors state that they intend to prosecute this case and successfully reorganize their debts. Debtors therefore request an order extending or reinstating the automatic stay as to all creditors in the case pursuant to 11 U.S.C. § 362(c)(3)(B) and LBR 9014-1(f)(2).

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by 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 the Motion is granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

37. 12-37003-E-13 DOROTHY BROOKINS **ORDER TO SHOW CAUSE**
PGM-6 Peter Macaluso **1-31-14 [214]**

No Tentative: The Order to Show Cause was issued due to an omission in the court's ruling on approving attorneys' fees and costs for Peter G. Macaluso, counsel of record for Chapter 13 Debtor Dorothy Brookins-Smith. October 23, 2013. Dckt No. 204. The order approving attorneys' fees provides:

> **IT IS ORDERED** that the Motion is granted, and Law Offices of Peter G. Macaluso, Counsel for Debtor, is allowed the following fees and expenses as a professional of the Estate:
>
> Law Offices of Peter G. Macaluso, Counsel for Debtor Applicants Fees Allowed in the amount of $3,500.00 and additional expenses in the amount of $500.00.

The Motion requesting fees, Dckt. No. 195, however sought not only the approval of attorneys' fees, but also the authorization of the Clerk of Court to disburse $3,500 in funds deposited with the Clerk by Stephen Ruehmann puruant to the January 10, 2013 Order of this court. January 10, 2013 Order, Dckt. No. 60 ("Deposit Order"). The court's order allowing the fees did not provide for this disbursement, and did not address the additional relief requested.

Upon review of the Motion for Compensation filed by Counsel, the Deposit Order, and the files in this case, the court issued this Order to Show Cause as to why the court should not issue a supplemental order in connection with the Fee Motion authorizing the $3,500.00, plus any statutory interest thereon, to be released to the Chapter 13 Trustee, and order that the Chapter 13 Trustee first pay said monies to Peter Macaluso for the attorneys' fees and expenses allowed in the Fee Order, to the extent that such fees have not been theretofore paid through the Chapter 13 Plan.

The court further ordered that the hearing on this Order to Show Cause be scheduled for this date, and provided that opposition and responses may be presented orally at the hearing. If the presentation of evidence or briefing of issues are necessary, the court shall issue a scheduling order at this hearing.

At the hearing xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

The court's tentative decision is to XXXX the Order to Show Cause and XXXXX.

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 Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is XXXXX and XXXXX.