UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

March 25, 2014 at 3:00 p.m.

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1. 14-21002-E-13 DEAN/JAMIELYNNE HARRISON — MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, N.A.
MET-1 Mary Ellen Terranella — 2-16-14 [15]

Final Ruling: No appearance at the March 25, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 16, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and creditor's secured claim is determined to be $0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 6212 Vanden Road, Vacaville, California. The Debtor seeks to value the property at a fair market value of $329,000 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 $381,771.00. Creditor JP Morgan Chase Bank NA's second deed of trust secures a loan with a balance of approximately $0.00, the balance having been previously forgiven, though not yet reconveyed. 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 JP Morgan Chase Bank NA secured by a second deed of trust recorded against the real property commonly known as 6212 Vanden Road, 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 $329,000 and is encumbered by senior liens securing claims which exceed the value of the Property.

2. 13-35604-E-13 RENE/MARIA RESTUA — MOTION TO AVOID LIEN OF MIDLAND FUNDING, LLC
SLH-2 Seth L. Hanson — 2-20-14 [26]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid a Judicial Lien is denied without prejudice.

The Debtors seek an order avoiding the judicial lien of Midland Funding LLC. A judgment was entered against the Debtor in favor of Midland Funding LLC for the sum of $8,418.55. The abstract of judgment was recorded with Solano County on October 11, 2012. That lien attached to the Debtor's residential real property commonly known as 2418 Shawnee Court, Fairfield, California.

SERVICE OF PROCESS ISSUES

Service has not been effected as required by Fed. R. Bankr. P. 7004(b)(3). Federal Rule of Bankruptcy Procedure 7004(b)(3) and 9014 require that corporations, partnerships, and other fictitious entities need to be served on officers, partners, managing members, and other designated agents for service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R.

Civ. P. 4(h).

The respondent creditor in this case, Midland Funding LLC is an unincorporated association. Thus, the service requirements of Federal Rule of Bankruptcy Procedure 7004(b)(3) apply. The certificate of service for this motion, Dckt. No. 30, does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process."

The California Secretary of State lists one of the addresses used by the Debtor and also Corporate Service Company, dba CSC-Lawyers Incorpotation Services as the agent for service of process for Midland Funding LLC. The agent for service of process was not served.

The court will not speculate whether the a member of the LLC sufficient to receive service or merely to a part-time mail room employee.

On this basis and for the reasons detailed above, the Motion to Avoid the Judicial Lien of Midland Funding LLC, 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 Avoid a Judicial Lien 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 to Avoid a Judicial Lien is denied without prejudice.

3. 13-35604-E-13 RENE/MARIA RESTUA — MOTION TO AVOID LIEN OF TARGET NATIONAL BANK
SLH-3 Seth L. Hanson — 2-20-14 [31]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid a Judicial Lien is denied without prejudice.

The Debtors seek an order avoiding the judicial lien of Target National Bank. A judgment was entered against the Debtor in favor of Target National Bank for the sum of $5,522.55. The abstract of judgment was recorded with Solano County on August 5, 2010. That lien attached to the Debtor's residential real property commonly known as 2418 Shawnee Court, Fairfield, California.

SERVICE OF PROCESS ISSUES

Service has not been effected as required by Fed. R. Bankr. P. 7004(h). Federal Rule of Bankruptcy Procedure 7004(h) and 9014 require that service be made on federally insured financial institutions by certified mail. Even if certified mail is not required, corporations, partnerships, and other fictitious entities need to be served on officers, partners,

managing members, and other designated agents for service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

The respondent creditor in this case, Target National Bank is insured by the Federal Deposit Insurance Corporation. Thus, the service requirements of Federal Rule of Bankruptcy Procedure 7004(h) regarding federally insured financial institutions apply. The certificate of service for this motion, Dckt. No. 35, does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process." Additionally, the proof of service does not state that the Motion was sent to Creditor by certified mail.

On this basis and for the reasons detailed above, the Motion to Avoid the Judicial Lien of Target National Bank, 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 Avoid a Judicial Lien 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 to Avoid a Judicial Lien is denied without prejudice.

4. 13-35604-E-13 RENE/MARIA RESTUA — MOTION TO AVOID LIEN OF HSBC BANK NEVADA, N.A.
SLH-4 Seth L. Hanson — 2-20-14 [36]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid a Judicial Lien is denied without prejudice.

The Debtors seek an order avoiding the judicial lien of HSBC Bank Nevada NA. A judgment was entered against the Debtor in favor of HSBC Bank Nevada NA for the sum of $4,199.07. The abstract of judgment was recorded with Solano County on June 14, 2011. That lien attached to the Debtor's residential real property commonly known as 2418 Shawnee Court, Fairfield, California.

SERVICE OF PROCESS ISSUES

Service has not been effected as required by Fed. R. Bankr. P. 7004(h). Federal Rule of Bankruptcy Procedure 7004(h) and 9014 require that service be made on federally insured financial institutions by certified mail. Even if certified mail is not required, corporations, partnerships, and other fictitious entities need to be served on officers, partners,

managing members, and other designated agents for service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

The respondent creditor in this case, HSBC Bank Nevada NA is insured by the Federal Deposit Insurance Corporation. Thus, the service requirements of Federal Rule of Bankruptcy Procedure 7004(h) regarding federally insured financial institutions apply. The certificate of service for this motion, Dckt. No. 35, does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process." Additionally, the proof of service does not state that the Motion was sent to Creditor by certified mail.

On this basis and for the reasons detailed above, the Motion to Avoid the Judicial Lien of HSBC Bank Nevada NA, 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 Avoid a Judicial Lien 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 to Avoid a Judicial Lien is denied without prejudice.

5. 13-35604-E-13 RENE/MARIA RESTUA — MOTION TO CONFIRM PLAN
SLH-1 Seth L. Hanson — 2-6-14 [21]

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 February 6, 2014. By the court's calculation, 47 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 Chapter 13 Trustee opposes the motion on the basis that the Debtor cannot afford to make the payments or comply with the plan, as Debtors' plan relies on pending motions to avoid liens. As the court is denying these motions, the plan cannot be confirmed.

The Trustee also opposes the motion on the basis that the Debtor has not filed a motion to value the secured claim of Portfolio Recovery Associates. This is also sufficient to deny confirmation.

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.

6. 13-36004-E-13 ALLEN/LORI DOSTY — **MOTION TO VALUE COLLATERAL OF**
DMA-4 David M. Alden — **OLD REPUBLIC INSURANCE COMPANY**
Thru #7 — **3-1-14 [69]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, parties requesting special notice, and Office of the United States Trustee on March 1, 2014. By the court's calculation, 24 days' notice was provided. 14 days' notice is required.

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

The Motion is granted and creditor's secured claim is determined to be $0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 8343 Triad Circle in Sacramento, California. The Debtor seeks to value the property at a fair market value of $198,000 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 $212,055.42. Creditor Old Republic Insurance Company's second deed of trust secures a loan with a balance of approximately $127,107.17. It is noted that the Debtors dispute the amount claimed by Old Republic Insurance Company, because the first deed of trust exceeds the value of the property, the determination of the exact amount of the claim by Old Republic Insurance Company is not necessary for the purposes of this motion. 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 Old Republic Insurance Company secured by a second deed of trust recorded against the real property commonly known as 8343 Triad Circle in Sacramento, 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 $198,000 and is encumbered by senior liens securing claims which exceed the value of the Property.

7. 13-36004-E-13 ALLEN/LORI DOSTY
NLE-1 David M. Alden

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
1-29-14 [41]

CONT. FROM 2-25-14

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 January 29, 2014. By the court's calculation, 27 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 overrule 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 relies on pending Motions to Value Collateral. The court has denied a Motion to Value a claim of Republic Equity Credit Services, that entity appearing to be merely a servicing company and not the creditor who filed a claim in this case. Proof of Claim No. 6.

Additionally, the court has determined that the secured claim of Mercedes Benz Financial Services, LLC is in the amount of $25,750.00. The Chapter 13 Plan provides for payment of only a $23,203.00 secured claim for this creditor.

CONTINUANCE

The Debtors set a new motion to value for hearing. The court having granted the motion, the court will overrule the Trustee's objection.

The Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on December 23, 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.

8. 13-34907-E-13 VICTORIA VALENTE — MOTION TO CONFIRM PLAN
LBG-1 Lucas B. Garcia — 1-28-14 [22]

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 January 28, 2014. By the court's calculation, 56 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 Chapter 13 Trustee opposes the motion on the basis that the plan will complete in 69 motions opposed to 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). The Trustee states the cause of the over extension appears to be the plan proposes to pay a total of approximately $248,000 in ongoing mortgage

payments and arrears, attorney and trustee fees, but pays only $238,380.

The Trustee also argues that the plan does not provide all of the Debtor's projected disposable income for the applicable commitment period. On Schedule I (Court docket #1, page 20), Debtor reports her average net income of $8,346.09 per month. Trustee states that if the Debtors contributed her tax refund into her household income at 1/12 per month, she would have an estimated additional $1,266.00 per month ($15,192/12=$1,266). The Trustee states he received Debtor's 2012 Tax Return via email and that they show that Debtor received tax refunds of $8,555 from the IRS in 2013 representing federal tax refund for tax year 2012 and the Debtor received $6,637 from Franchise Tax Board for a state tax refund.

Debtor responds that she does not oppose the turnover of any tax refunds she may receive while her Chapter 13 plan is pending. The Trustee request the Court allow, if acceptable, the Debtor to amend the plan in the orders confirming to allow turn over any future tax refunds to the Trustee for contribution toward her plan for the duration of the plan. The Trustee would also like to point out that if the Debtor did turn over tax refunds, this may resolve the plan overextension.

The Trustee objects to the additional provisions of the plan. It appears the Debtor is requesting that the Court approve a retainer agreement that is not on file with the Court and has not been provided to the Trustee. The plan proposes to allow counsel to be paid attorney fees outside the plan, by debtor and the trustee. The provision indicates that the Trustee shall distribute attorney fees in accordance with Section 2.07 which calls for $75.00 per month be paid, up to $3,500.00. The plan further states, that Debtor shall pay any fees and costs in excess of the retainer held in trust directly outside the plan. However, Debtor's Schedule J (Court docket #20, page 4) shows Debtor's net disposable income being $3,974.07. Debtor's plan payments are $3,973.00, therefore it appears the Debtor has insufficient proceeds to pay counsel direct.

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. 10-24808-E-13 AMY HUYNH — MOTION TO MODIFY PLAN
SJS-1 Scott J. Sagaria — 2-6-14 [65]

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 February 6, 2014. By the court's calculation, 47 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 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. The Chapter 13 Trustee opposes the motion on the basis that the Debtors' are proposing to complete their Chapter 13 plan earlier than the 60 months confirmed. The Trustee states the Debtor made a lump sum payment of $10,000 in month 38 (July 2013) to shorten plan term to 48 months. The Debtor apparently withdrew the money from her 401(k) retirement account and submitted to Trustee's office for payment on her own discretion. Trustee states that Debtor fails to mention the Debtors' reason(s) for not being able to complete the plan in the allotted term of 60 months, and no current Schedule I & J have been filed.

The Trustee also objects that the Debtor has used the wrong plan form. 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 July 24, 2012, well after the new form became mandatory. Not using court-approved form is cause to deny confirmation.

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

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

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

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

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

10.	**09-22809-E-13**	**JON/TERRI HAJEK**	**MOTION TO APPROVE LOAN**
	MBB-1	**Scott A. CoBen**	**MODIFICATION**
			2-21-14 [53]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 21, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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 defaults of the respondent and other parties in interest are entered.

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

Movant failed to file a declaration authenticating the exhibits on

which the motion is based, without such evidence the court has no proper basis to consider the motion. Though the motion provides much of the information, it is not in the form of testimony under penalty of perjury. The moving party is well served to ensure that future filings comply with the Federal Rules of Bankruptcy Procedure. FN.1.

FN.1. The present Motion was filed by the U.S. Bank, N.A., an entity which regularly appears in this court and other federal courts. The Bank is well aware of the requirement that requests for relief must be supported by sufficient, properly authenticated evidence for the court to grant relief. Merely because the Bank concludes that evidence should not be require for "simple motions" is not a reason to suspend the basic legal requirements. This court does not leave attorneys and parties guessing when the rules, much less the very basic requirements for relief, will be ignored and orders merely handed out when requested. To do so would create a sense of uncertainty for attorneys and make it appear that certain parties are given preferential treatment by the federal courts.

Equally disturbing is that Debtor's counsel has been excluded from this Motion. Rather, it appears that U.S. Bank, N.A. and its counsel have taken on the legal and fiduciary role of filing motions for the Debtors.

While some courts have taken the position that creditors do not have standing to bring a motion for a debtor to obtain approval of a loan modification, this court's view has not been so narrow. Just as in approving a compromise with a trustee or debtor in possession where a creditor prepares the motion to approve the stipulation, the creditor may take the laboring oar in a motion to approve a loan modification.

However, in neither case may the attorney for the other party be non-existent in the motion. Counsel must either bring the motion jointly with the creditor, countersign the motion evidencing these Debtors, attorneys' concurrence and Debtors support, a declaration for the Debtors prepared by Debtors' counsel, or file a separate statement of support for the motion. Only then does the court know that the Debtors, who are represented by counsel, have with the knowledge and support of such fiduciary, entered into this agreement. Otherwise it appears that counsel representation has been circumvented or that counsel has failed to fulfill his or her duties to the Debtors.

Merely telling the court that counsel was "too busy" to countersign the motion or filing a two line statement of support is not credible. This court prepares its final and tentative rulings in advance of the hearings for the benefit of the attorneys, parties, and court. This motion was filed on February 21, 2014. The hearing on March 25, 2014, is 32 days later. The Creditor's Certificate of Service attests to serving Debtors' counsel. Dckt. 56. Even if his representation of the Debtors had been circumvented, Counsel was aware of the Motion and could have met with the Debtors and filed the proper responsive pleading.

The motion is denied without prejudice.

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

holding that:

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

11. 11-26009-E-13 ACK-1 | **RORY/MADELINE BRAMER** | **Aaron C. Koenig** | **MOTION TO VALUE COLLATERAL OF DEUTSCHE BANK NATIONAL TRUST COMPANY** | **2-27-14 [42]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Motion to Value Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not

required to file a written response or opposition to the motion. At the hearing **----------**. The defaults of the non-responding parties in interest are entered.

The Motion is granted and the creditor's secured claim is determined to be $0.00.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 2268 Oregon Way, Yuba City, California. The Debtor seeks to value the property at a fair market value of $198,000 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 $301,672.75. Creditor Deutsche Bank National Trust Company's second deed of trust secures a loan with a balance of approximately $77,839. 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 Deutsche Bank National Trust Company secured by a second deed of trust recorded against the real property commonly known as 2268 Oregon Way, Yuba City, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $198,000 and is encumbered by senior liens securing claims which exceed the value of the Property.

12. 11-49511-E-13 RANDALL DREES **MOTION TO SELL**
FF-4 Brian H. Turner **3-4-14 [68]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Chapter 13 Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the "Property" described as real property commonly known as 2211 O Street, Sacramento, California.

The proposed purchasers of the Property are David and Tracy Brezinski and the agreed upon purchase price is $435,000. There are liens encumbering the property which total $216,911.99. Debtors anticipate that they will be able to pay all allowed claims in full with the sale proceeds. The escrow fee shall be split evenly among the Debtor and the purchasers.

The Trustee filed a statement of non-opposition.

Creditor Bank of New York Mellon, one of the lien holders on the property also filed a conditional statement of non-opposition asserting that so long as their lien is paid in full, they have no opposition to the sale.

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Randall Edward Drees, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Randall Edward Drees, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to David and Tracy Brezinski or nominee ("Buyer"), the Property commonly known as 2211 O Street, Sacramento, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $435,000, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 71, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Chapter 13 Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The Chapter 13 Debtor be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale.
>
> 5. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen

(14) days of the close of escrow the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

13. 11-37113-E-13 NLE-1 — TEVIN/JESSICA TIANGTRONG — Peter G. Macaluso — OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS — 2-24-14 [57]

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

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney, on February 24, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Objection to Debtors' 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 overrule the Objection to Debtors' 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:

The Chapter 13 Trustee objects to the exemption of $100,000 on real property located at 304 Armida Court, Lincoln, California, which is claimed on Debtors' amended Schedule C, filed February 4, 2014. Dckt. 48. Trustee states that the Debtors claim an exemption in equity which may have been released by the creditor in error. The Trustee argues that 11 U.S.C. § 551 applies, which preserves the equity for the benefit of the estate.

DEBTOR'S RESPONSE

Debtors respond, stating that Debtors sought to sell the subject real property as a short-sale. The Debtors learned when they retained the assistance of real estate counsel that the second deed of trust on the real property securing the claim of USAA Federal Savings Bank had been released. The Debtors then amended their exemption which would "protect the proceeds of the sale." Dckt. 64. Debtors state they are entitled to the benefits of the Article 4 "automatic" exemption. *Id.* Debtors argue that no basis, such

as ownership dispute, bad faith or other grounds exist to not allow the exemption.

Lastly, Debtor argues that 11 U.S.C. § 551 is not applicable in this case. Debtors valued the second deed of trust at $0.00 and confirmed their plan, arguing that an exemption was not warranted. Debtor states that 11 U.S.C. § 551 relates only to avoidance actions, which was not the case here.

DISCUSSION

The Supreme Court has recently held that while a Bankruptcy Court has the authority to issue any order, process, or judgment necessary to carry out the provisions of the Bankruptcy Code, it may not contravene specific statutory provisions. *Law v. Siegel*, 2014 U.S. LEXIS 1784 (U.S. Mar. 4, 2014). The Supreme Court found that the Bankruptcy Court exceeded the limits of its authority by awarding Law's homestead exemption to Siegel, stating that although the statute does not require a debtor to establish a homestead exemption, once he has done so the Bankruptcy Court may not refuse to honor that exemption absent a valid statutory basis for doing so. *Id.* The court stated "The Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions." *Id. citing Hillman v. Maretta*, 569 U. S. ___, ___, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013) (slip op., at 12); *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001). The Court made clear that when a debtor claims a state-created exemption, the exemption's scope is determined by state law, which may provide that certain types of debtor misconduct warrant denial of the exemption, but that federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Code. *Id.*

Here, Debtor claimed a $100,000.00 exemption in the subject real property pursuant to California Code of Civil Procedure § 704.730(a)(2). Amended Schedule C, Dckt. 48. The Trustee does not appear to question the validity of the exemption, rather that equity from the sale of the subject real property may be preserved for the estate.

The provisions of 11 U.S.C. § 551 provides,

> "§ 551. Automatic preservation of avoided transfer
>
> Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate."

The Trustee asserts that it may be that the lien of USAA Federal Savings Bank is void under 11 U.S.C. § 506(d), which may then implicate the provisions of § 551. However, the lien has not been avoided under § 506(d), but merely the secured claim of USAA Federal Savings Bank has been determined by the court to have a value of $0.00. See discussion below concerning the motion to value, stipulation, and court's prior analysis in the *Frazier* and *Martin* of why and how *after completion of the bankruptcy plan* the creditor has the obligation to reconvey the deed of trust or

release the lien, or why, *after completion of the plan* 11 U.S.C. § 506(d) may apply.

The court not having avoided any lien, 11 U.S.C. § 551 is not applicable to the present lien of USAA Federal Savings Bank and the rights and obligations of the Debtors and USAA Federal Savings Bank under the confirmed Chapter 13 Plan, Stipulation between those parties, and upon completion of the confirmed Chapter 13 Plan.

Agreement Between the Debtors and Creditor

The undisputed facts are that Debtor filed this case on July 12, 2011, confirming the plan on October 13, 2011. Dckt. 39. Before confirming the plan, Debtors moved to value the secured claim of USAA Federal Savings Bank, who held a second deed of trust on the subject real property. To resolve the matter, the parties entered into a Stipulation, determining that the claim of the creditor, USAA Federal Savings Bank, would be deemed a general unsecured claim. It is also undisputed that Creditor USAA Federal Savings Bank reconveyed the Deed of Trust and filed it with the Placer County Recorder's Office on December 17, 2013, Document No. 2013-0114893. Exhibit C to Motion to Sell, Dckt. 53.

Consideration of this Objection is complicated by the Debtors and Creditor choosing to enter into a complex stipulation in connection with a relatively simple motion to value a secured claim pursuant to 11 U.S.C. § 506(a). On August 22, 2011, the Debtors filed a simple motion to value the secured claim of creditor USAA Federal Savings Bank. Motion, Dckt. 21. USAA Federal Savings Bank filed a statement that it did not dispute the contention that the property is encumbered by a senior lien which exceeds the value of the property, thereby leaving no value in the collateral for the USAA Federal Savings Bank unsecured. Response, Dckt. 26. Specifically, USAA Federal Savings Bank states,

A. "USAA contends that its lien may be deemed unsecured for the purposes of the Chapter 13 Plan..." FN.1.

B. "[T]hat upon completion of the Chapter 13 Plan and entry of a Chapter 13 Discharge, USAA's lien may be treated as void and no longer an encumbrance against the Property."

C. "<u>However</u>, USAA contends that its lien shall be retained in the full amount due under its loan in the event of either the dismissal or conversion to any other chapter under the United States Bankruptcy Code, or should the Property be sold or refinanced prior to the Debtors' completion of the Chapter 13 Plan and entry of the Chapter 13 Discharge." [Emphasis in original.]

FN.1. The use of legally imprecise legal language, such as stating that a "lien may be deemed unsecured" may well have led to the present situations. Lien secure obligations (claims in bankruptcy cases), not other liens.

This court has addressed the issues of 11 U.S.C. § 506(a) secured claim valuations and treatment of junior lien claims through bankruptcy plans (even "Chapter 20" plans). *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). The valuation under 11 U.S.C. § 506(a) merely values the secured claim and has no immediate impact on the lien. It is only through completion of the plan and operation of California law (and possibly 11 U.S.C. § 506(d) post-completion of the bankruptcy plan) that the lien becomes, at that future date, void and must be released or the deed of trust reconveyed.

The Debtors and USAA Federal Savings Bank then entered into a Stipulation by which they made representations and commitments to the other concerning the rights and interests of the Debtors and this Creditor in this case. The Stipulation signed by the Debtors mirrors the Stipulation language and affirmatively states that the USAA Federal Savings Bank deed of trust is avoided only upon completion of the Chapter 13 Plan and entry of the discharge in this case. Further, that,

> "Creditor's lien shall be retained in the amount due under its loan should the Property be sold or refinanced prior to the Debtors' completion of the Chapter 13 and entry of the Chapter 13 discharge.
>
> It is so stipulated:
>
> [Signed by Debtors]
>
> [Signed by USAA Federal Savings Bank]"

Stipulation, Dckt. 31.

The court issued an order granting the motion to value pursuant to the Stipulation. Order, Dckt. 36. From the appearance of the order form, it appears to have been one that the court had to substantially modify. In its original form, it likely incorporated all of the provisions of the Stipulation, including that the Creditor would retain its lien during the bankruptcy case, including the event of the Property being sold prior to completion of the Chapter 13 Plan and entry of the discharge. The court rejected, and continues to reject, such orders which include terms and provisions well beyond the scope of the motion before the court — which refusal may well be the Debtors' saving grace in this case.

However, there is a written agreement between the Debtors and USAA Federal Savings Bank which includes various contractual provisions. While not binding on the court and the parties not having the power and authority to countermand the confirmed Chapter 13 Plan (which provides for USAA Federal Savings Bank to be paid $0.00 on its Class 2 Secured Claim), the court approved modification of the contractual rights of the Debtors and USAA Federal Savings Bank, and order confirming that plan, it raises an issue as to what occurs if the Debtors fail to complete the Chapter 13 Plan and case is dismissed.

At this juncture, while grounds may not have been shown under applicable California exemption law or federal law to disallow the amended claim of exemption, serious questions exist as to such proceeds of sale and the lien, if any, that has been agreed to exist by the Debtors and USAA Federal Savings Bank. The court has been put in the position of having potential conflicting contractual obligations if the Debtors fail to perform the Chapter 13 Plan.

While the court has identified a possible significant contractual issue, it appears that the resolution of this dilemma may well rest in the Debtors' own four hands – completion of the Chapter 13 Plan as confirmed by the court.

CONCLUSION

The Chapter 13 Trustee not having presented the court with sufficient grounds under applicable California exemption law or federal law, the objection to claim of exemption in the proceeds from the sale of the real property commonly known as 304 Armida Court, Lincoln, California is overruled.

The court in its order approving the sale of the Armida Court Property required that any sales proceeds in excess of the amounts necessary to close the sale, pay expenses, and pay the senior lien be disbursed directly from escrow to the Chapter 13 Trustee. Order, Dckt. 66. This was required in light of the this pending Objection to Claim of Exemptions. At this point, while the Debtors have claimed an exemption and the Objection overruled, there appears to be a significant *potential issue* if the Debtors fail to complete the Chapter 13 Plan with respect to the Stipulation, non-Chapter 13 Plan, obligations. However, at this point it appears that the Debtors are in the "driver's seat" with respect to ultimately claiming the superior interest through the Chapter 13 Plan to the net sales proceeds.

Therefore, in recognition of the confirmed Chapter 13 Plan and anticipated future performance, the court also orders that the Chapter 13 Trustee transfer the net sales proceeds he received from the 304 Armida Court, Lincoln, California sale escrow to Peter Macaluso, counsel for the Debtors, to be deposited into said counsel's client trust account where it will be held and not disbursed except upon 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 Objection to Exemption filed by Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled.

IT IS FURTHER ORDERED that the Chapter 13 Trustee shall deliver to Peter Macaluso, counsel for Tevin and Jessica Tiangtrong, the Debtors; the net sales proceeds the Chapter 13 Trustee received from the 304 Armida Court, Lincoln, California sale escrow pursuant to the order of this court approving such sale (Order, Dckt. 66).

IT IS FURTHER ORDERED that Peter Macaluso shall deposit all monies received from the Chapter 13 Trustee into his client trust account, where such monies shall be held and not disbursed except upon further order of this court.

14. 13-35413-E-13 ROBERT JEFFREY **MOTION TO CONFIRM PLAN**
RJ-3 Pro Se **2-6-14 [41]**

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 (*pro se*), Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 47 days' notice was provided. 42 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)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted. No appearance required.

Subsequent to the filing of this Motion, the Debtor filed an amended Plan on February 20, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The Motion is denied 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 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 as moot and the plan is not confirmed.

15. 10-52114-E-13 NLE-1 — JOHN BOORINAKIS AND LEONA AZAR-BOORINAKIS — Richard D. Steffan — CONTINUED MOTION TO MODIFY PLAN 12-20-13 [32]

CONT. FROM 2-11-14, 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 granted, on terms as amended by the Stipulation of the parties. 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 post-petition 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.

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 did 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 inter vivos (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 inter vivos 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.*

STIPULATION

The parties filed a stipulation on March 11, 2014, agreeing that the first Modified Plan will provide for a lump sum payment of $28,500.00, which is not a sum that will pay all unsecured creditors in full. Both parties agree that they do not oppose confirmation of the First Modified Plan with this proposed change.

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, with the additional amendment to be set forth in the order confirming the First Modified Plan to provide for a $28,500.00 lump sum payment by the Debtors as set forth in the Stipulation between the parties, filed March 11, 2014, Dckt. 57. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, as amended, which upon approval by the Trustee shall be lodged with the court.

16. 13-35314-E-13 BORIS/ZINAIDA MURZAK — MOTION TO CONFIRM PLAN
MS-1 Mark Shmorgon — 1-15-14 [25]

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 January 15, 2014. By the court's calculation, 38 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 Chapter 13 Trustee opposes the motion on the basis that the Debtors cannot make the payments under the plan, nor has Debtors' plan been filed in good faith. Trustee states that Debtors' First Amended Plan proposes to pay $0 for months 1 and 2 and $1,200 for 58 months. Debtors indicate that they are working on a loan modification with their mortgage lender and that upon granting or denial of the modification, the Debtors intend to dismiss their Chapter 13 case. Trustee argues that Debtors have made no attempt to reorganize their debts but are merely using the Chapter 13 as a way to delay or stall mortgage lender action.

The Trustee states that in Class 1 of the plan, Debtor proposes to pay adequate protection payments of $1,000 per month and provides for no payments toward $17,256 in mortgage arrears during the life of the plan. Debtors indicate they are working on a loan modification. The court has confirmed Chapter 13 plan incorporating a loan modification, referred to as the "Ensminger Provisions."

The Trustee also states that the Debtors cannot make the payments under the plan or comply with the plan as Debtors do not offer an explanation why payments are not to begin until March 25, 2014 when the Debtors filed this case on December 3, 2013.

DISCUSSION

The Debtors' First Amended Chapter 13 Plan contains the follow provisions for the restructuring and reorganization of their finances:

A. Plan Payments by Debtors

1. $0.00 for Months 1-2
2. $1,200.00 for Months 3-60

B. Class 1 Claims

1. Ocwen Loan Servicing, LLC.....$1,000.00 adequate protection payment pending loan modification determination. FN.1.

FN.1. Since Ocwen Loan Servicing, LLC is a loan servicer, and not a creditor, it appears that the Plan attempts to restructure the debt of someone other than a creditor. In additional to raising serious in personam jurisdiction questions, it also implicates the basic Constitutional requirements for when a federal court may exercise federal judicial power – a case or controversy between the real parties in interest. U.S. Constitution Article III, Section 2.

No Proof of Claim has yet been filed by the creditor asserting the secured claim which is the subject of the Class 1 treatment.

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2. Class 2 Claims

a. None Listed

3. Class 3 Claims

a. None Listed

4. Class 4 Claims

a. None Listed

5. Class 5 Claims

a. None Listed

6. Class 6 Claims

a. None Listed

7. Class 7 Claims

a. 0.00% dividend for $0.00 in claims.

Thus, it appears that the Debtors have only one creditor – identified as Ocwen Loan Servicing, LLC. Merely because a debtor has only one creditor is not a per se showing of bad faith.

On the Amended Schedules D, E, and F the state under penalty of perjury that Ocwen Loan Servicing, LLC is their only creditor. Dckt. 33. While highly unusual for cases before this court, no evidence has been presented that the attorney or the Debtors have presented the court with false information concerning the creditors in this case.

However, the Debtors have not provided this court with any basis for concluding that a loan servicing company is a creditor in this case. Therefore, not only the plan is defective, but the actual creditor has not been sufficient served with process for this plan to be effective. Fed. R. Bankr. P. 7004, 9014.

The court also notes that the Debtors operate a sole proprietorship. Further, the court notes that the Debtors report having conducted a short sale of the 10384 Mills Tower Drive Property on September 20, 2013. Question 10, Statement of Financial Affairs, Dckt. 33. This indicates that the Debtors had, and may have, financial problems which exceed that disclosed under penalty of perjury. Further, in response to the question the Debtors state under penalty of perjury that the person to whom the short sale was made was "Unknown Third Party." This raises further questions as to how the Debtors do not know (at least from the deed they signed) the identity of the person to whom they sold the property.

In addition to the court not having before it a plan which the court can find impacts creditors for whom proper service has been made, the answers provided in the Statement of Financial Affairs raises issues of whether the Schedules and Statement of Financial Affairs have been completed in good faith.

The court denies the motion to confirm without prejudice. Further, the court orders that on or before March 31, 2014, the Debtors file with the court (redacted as appropriate) a copy of their credit report from Experian, Equifax, or TransUnion (or a combined report of all three), and serve by said date the report on the Chapter 13 Trustee and U.S. Trustee.

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 without prejudice and the proposed Chapter 13 Plan is not confirmed.

IT IS FURTHER ORDERED that on or before March 31, 2014, the Debtors file with the court (redacted as appropriate) a copy of their credit report from Experian, Equifax, or TransUnion (or a combined report of all three), and serve by said date the report on the Chapter 13 Trustee and U.S. Trustee.

17. 13-30919-E-13 BUN AUYEUNG AND SOO TSE — MOTION TO CONFIRM PLAN
PGM-3 Peter G. Macaluso — 1-29-14 [98]

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 January 29, 2014. By the court's calculation, 55 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 and a creditor 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.

TRUSTEE'S OPPOSITION

The Trustee opposes the motion on the basis that Debtors' plan is not feasible. Trustee states that Debtors' plan call for payments of $100 per month for 36 months with an additional lump sum payment of $13,000 provided to the Trustee a "gift" from some unknown party. The plan payments total $16,600.00. Debtors' obligations in the plan exceed the payments. Further, Debtors' plan relies on the Debtors valuing the claim of Christiansen's listed at $140,000, of which the Debtors propose to pay only $7,000. The Court continued Debtors' Motion to Reconsider Motion to Avoid Lien, PGM-2, to a hearing on April 22, 2014. If the motion to avoid lien is denied, Debtors' plan does not have sufficient proceeds to pay claims within 36 months.

The Trustee argues that the Debtors cannot make the payments required under 11 U.S.C. § 1325(a)(6). Debtors' household income totals $1,466.40 and of that amount $50 is received by Bun Auyeung from Social Security, $866.40 is received by Soo Tse from Social Security and the balance $550 is provided by "assistance from daughter." Schedule I, Dckt.1, page 29. On Schedule J, Debtors list minimal household expenses; $165 electricity and heating, $68.07 water/sewer, $65 cable/internet, $2 for home maintenance, $250 for food, $9 for clothing, $25 for laundry/dry cleaning, $22 for medical/dental, $100 for transportation, $10 for recreation, $48 for homeowners insurance, $323 for auto insurance and $278.86 for real estate tax. Trustee argues that Debtors have no expense for telephone service and very minimal expense for food and healthcare. Trustee states that the Debtors have created a budget to give the appearance that they can afford their plan, when in reality, they cannot.

Additionally, the Trustee argues that the Debtors' plan has not been filed in good faith, with the sincerity of the Debtor in seeking Chapter 13 relief is in question along with the accuracy of the plans statements of debts. Trustee states that Debtors appear to have filed this case to take advantage of an increased allowable homestead exemption in order to reduce further the Christensen lien on the property and that Debtors are attempting to circumvent events that transpired in the prior case. The amount of the proposed plan payments and the amount of the Debtors surplus are also in question. Trustee states that in the prior case, upon conversion to Chapter 7, Debtors income on the Form B22A, filed on February 28, 2013, was listed at $2,200.00 per month in pension and retirement without any contributions from family. Bankr. E.D. Case No. 09-35065, Dckt. 222. Trustee states in the instant case, the total income is listed at $1,466.40, of that amount; $550.00 is from family assistance. Dckt. 1. Between the conversion to chapter 7 in the prior case and the filing of Form B22A on February 28, 2013, and the filing of this case on August 19, 2013, Trustee argues that Debtor has lost his pension and retirement income all together.

The Trustee states the plan may fail liquidation in that the value of the property is not settled. In the prior chapter 13 case (09-35065) the Court confirmed a plan with the proposed sale of the property in question at $290,000.00. Dckt. 182. However, that sale was never completed. Trustee states that during the pendency of the prior chapter 13 case, Debtor's had listed the property for sale at $390,000.00 on December 2, 2011 and that the listing was removed on October 1, 2012. In the present case, Debtors list the value of the property at $185,000.00 based on an appraisal as of March 14, 2013.

Trustee also states that in Section 6.03 of the plan, it appears the Debtors trying to state that there are no unsecured claims, however, this is not a plan provision. The Trustee is uncertain whether there was a different intent with this provision of the plan.

CREDITOR'S OBJECTION

Creditors Barton and Paula Christensen object to Debtors' motion to confirm on the grounds that the plan cannot be ruled upon without the Motion to Avoid Lien being resolved. The court continued the hearing on the Motion to Avoid Lien to April 22, 2014.

DEBTOR'S REPLY

Debtors respond, stating that the plan calls for payments of $16,600, with the Trustee receiving $13,700 to date with (29) months and $2,900 remaining to be paid. Counsel for Debtor states their income is from social security and assistance from their daughter, Florence as testified at the meeting of creditors.

Debtors also state that this case was filed in good faith because they have done nothing wrong, besides mistakenly failing to remove the retirement income from the new Current Monthly Income at filing, which was not indicative of bad faith.

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))).

The Ninth Circuit Court of Appeals in *Leavitt v. Sots (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999) stated that the court considers the totality of the circumstances when determining "bad faith." The Leavitt court also considered totality of the circumstances factors discussed in *Eisen v. Curry*, 14 F.3d 469, 470 (9th Cir. 1993), (discussing the factors in the context of a Chapter 13 case) including, unfair manipulation of the Bankruptcy Code, misrepresentation of facts, history of filings and dismissals, only intention to defeat state court litigation, and whether egregious behavior is present.

Prior Rulings and Bankruptcy Case

Debtors' prior bankruptcy case was filed as a Chapter 13 case on July 21, 2009. Bankr. E.D. Cal. No. 09-35065. The case was converted to one under Chapter 7 by order filed on February 25, 2013. 09-35065 Dckt. 216. In deciding to convert the case to one under Chapter 7, the court found that the Debtors were not prosecuting the Chapter 13 case in good faith, including affirmatively making misrepresentations to the court.

> "Rather than proceeding in good faith to timely comply with the confirmed bankruptcy plan, the Debtors have demonstrated that they are merely engaging in a gamble on the current real estate market. The Debtors are gambling with the creditors' money that the market will rise, allowing the Debtors to pocket more money from a sale. If the market goes down, then creditors can bear the risk (suffer the loss).
>
> The Debtors have obtained two and one-half years of bankruptcy court protection, with all to show is that they will, sometime in the future, do what they have promised to do in the past if they determine that the real estate market has risen high enough for them to make more money by improperly delaying creditors.
>
> The Debtors are not appearing, testifying, and making representations to this court in good faith. Rather, they have acted to mislead the court, creditors, the Chapter 13 Trustee, and other parties in interest.
>
> No evidence is filed in opposition to the Motion to Dismiss, but merely short arguments of counsel. Such argument is not evidence of the facts alleged therein. The absence of such evidence causes the court to infer that such information is wholly unsupported. Even when afforded the opportunity to file supplemental pleadings, the Debtors merely had their attorney file a Supplemental Reply arguing why the case should not be dismissed. The Debtors have been careful not to make any statements under penalty of perjury to the court.
>
> At the January 9, 2013 hearing the Debtors asked the court to continue the hearing to allow Debtors to sell the property. Such would allow them to profit from their

misrepresentations to the court. Debtors' supplemental opposition states that Debtors have obtained a real estate agent and that the sale price is listed as $200,000 instead of the $250,000 initially stated by Debtors. Counsel for the Debtors argues that a modified plan will provide for all increases in value to go to creditors, with the Debtors reducing their exemption. However, the court's review of the docket indicates that a modified plan has not been filed.

In confirming the current Chapter 13 Plan, the Debtors testified under penalty of perjury that they would sell their real property to pay all lien holders and Class 2 claims in full. Declaration, ¶¶ 6, 7, Dckt. 168. In fighting to confirm the plan against opposition on the Debtors' continuing delay, the Debtors represented to the court that they had entered into a one-year listing agreement, September 26, 2011 through September 26, 2012, and were listing the property for sale for $290,000.00. Reply, Dckt. 177. Further, "The debtor's [sic.] intend to reduce the asking price accordingly over the 12 month period so that the sale occurs on or before September of 2012..." *Id.*

The court harmonized the requirements for equal monthly payments specified in 11 U.S.C. § 1325(a)(5)(B)(iii)(1) with the rehabilitation aspect of Chapter 13 and the ability of a debtor to provide for the prompt orderly liquidation of assets through a plan to provide for creditors and protect exempt interests in assets. Civil Minutes for October 14, 2011 Confirmation Hearing, Dckt. 180. The court expressed clear concern over the Debtors' continuing failure to address the issues raised in the prior confirmation hearing (confirmation denied) and unreasonable delay in the prosecution of a plan and liquidation thereunder.

Though the court's November 14, 2011 confirmation order expressly requires that the Debtors' shall immediately list the property for sale at $290,000.00 and shall have the property liquidated (sold) by September 2012, the Debtors did not actively attempt to sell the property. Rather, they impeded the sale of the property, seeking to gamble that the real estate market would increase and they could pocket more the sales proceeds.

The Debtors, in responding to this Motion, have been very careful not to provide any explanation under penalty of perjury as to the efforts they made to market and sell the property. From this lack of testimony the court infers that such testimony would be adverse to the Debtors – showing that they did not attempt to actively market and sell the property as required under the confirmed Fourth Amended Chapter 13 Plan.

...

The Debtors' conduct in this case under the confirmed plan have been in bad faith. Though representing to the court, and being ordered under the confirmed Fourth Amended Chapter 13 Plan, to promptly proceed with the liquidation of the real property commonly known as 6311 Point Pleasant Road, Elk Grove, California, the Debtors did not prosecute the case. The court finds that the Debtors did not prosecute the case because they were hoping realize a greater gain, gambling that the real estate market would appreciate, allowing them to exempt even more of the sales proceeds.

The gambling on a rise in the real estate market was not in good faith, and directly caused creditors to suffer unreasonable delay to their prejudice. While the Debtors have continued in the possession and use of the property without making regular, equal monthly payments to creditors with liens on the property. While a debtor may proceed with an orderly, prompt liquidation of assets as part of a Chapter 13 Plan, they cannot falsely promise to liquidate the property. Here, the Debtors actively misrepresented to the court that they would liquidate the property, while intending not to sell the property but allow it to hopefully appreciate in value. The Debtors secret, unstated "plan" has been to hold the property idle in the Chapter 13 case and then stumble in to "amend" the confirmed plan to have more time to gamble on appreciation of the property.

The Debtors' opposition that by delaying the prompt liquidation the property is alleged to have increased by $25,000.00 does not help their cause. Just because they believe that they can take more sales proceeds by violating the court order is not a basis for saying that violating the court's order and confirmed Fourth Amended Plan are justified. The Debtors' Opposition reflects that what they want, and always wanted, was a 60-month holding period in which they did not make any payments to creditors holding secured claims. Dckt. 201. Chapter 13 does not give such a "free stay," even when the Debtors attempt to manufacture a step transaction consisting of false promises to liquidate the property, and then when they fail to, request "only a little more time."

If the Debtors had any good faith intention to market and sell the property in an orderly liquidation, they would have done so within the time period specified in the confirmed Fourth Amended Chapter 13 Plan.

Given the Debtors' conduct, the court concludes that conversion of the case to one under Chapter 7 is in the best interests of creditors. If the property is increasing in value, then the estate and creditors may well benefit from such increases. Creditors and the Chapter 7 trustee may well conclude that grounds exist for objecting to all or

part of any exemption claim in the property or other assets based on the Debtors' conduct.

The court is convinced that only an independent fiduciary can consider how this estate was handled and what assets exists for the estate and to be properly be distributed to creditors. A Trustee can also dispassionately consider the professional fees paid in this case, as well as monies which the Debtors and estate received in the violation of automatic stay adversary proceeding, or collection any unpaid amounts of such judgment.

Additional Arguments at the Hearing

At the hearing the Debtors' counsel passionately argued that the court dismiss the case or allow these Debtors to dismiss the case rather than having it converted to one under Chapter 7. The Debtors represented to the court that the reason they wanted to dismiss the case was so that they could file a new Chapter 7 case on February 21, 2013, the day after this hearing.

When pressed as to why the court should not just convert the case, Debtors' counsel admitted that the reason was that the Debtors wanted to claim an even larger homestead exemption in that the state law exemption had increased since they commenced this Chapter 13 case on July 21, 2009.

It was explained to the court that after payment of the one claim secured by the real property, that of Christensen which the Debtors assert is $25,000 - $30,000, there will be significant sales proceeds in which the Debtors want to claim their homestead exemption. Their current exemption is $150,000, and they want to now take advantage of an increase to $175,000.

On the one hand the Debtors feign an inability to sell the real property as required by the Chapter 13 Plan and their commitment to creditors due to it not having sufficient value, and now they argue that it would be unfair to convert the case because it prevents them from pulling another $25,000 of value out of any sales proceeds. If the court were to accept this argument it would be falling further victim to the Debtors' fraud upon the court and creditors.

These Debtors committed as part of their Chapter 13 Plan to conduct an orderly liquidation sale of the property. See November 14, 2011 Order Confirming Plan, Dckt. 182. The court confirmed a plan which allowed the Debtors until September 2012 to complete a sale of the property. This case having been filed in 2009, the Debtors had effectively

used the Chapter 13 case to forestall any payment to Christensen for more than 3 years before they had to complete the promised liquidation of the real property. The Debtors convinced the court that the delay in confirming the plan for two years, and then getting another year to sell the property was reasonable, even though they had not made any plan payments to Christensen.

But the Debtors did not liquidate the property, and based on the facts of this case, the court concludes that they never intended to liquidate the property by September 2012. These Debtors are represented by knowledgeable counsel who clearly understood, or had the ability to understand, that the Debtors committed to and the order confirming the plan required the property to be sold by September 2012.

At the hearing counsel for the Debtor expressed some confusion over the order providing for the sale to be completed by September 2012, at one point disputing that the order so provided. The court recited the provision of the order, as well as noting for Debtors' counsel that he is the one who actually prepared the order confirming the Plan. There is, and there was, no bona fide confusion that the Debtors' promised and were ordered to complete the liquidation of the property by September 2012.

...

The court finds that the Debtors have prosecuted this Chapter 13 case and the confirmed plan in bad faith, abusing the bankruptcy process and creditors in this case. For the court to indulge the Debtors and dismiss the case is to give the Debtors a "bonus" for having mislead creditors and the court with the promise to liquidate the property by September 2012. Fraud committed on the parties and the court is not rewarded.

Though Debtors counsel mounted a spirited and aggressive fight, he is betrayed by the actions, or lack of action by his clients.

The court is also not impressed by the plea that the Debtors are 80 year old people living on retirement pensions. At one point counsel's arguments bordered on contending that his clients were and are incompetent. That cannot be true as they have actively sought and obtained orders from this court, in response to the Trustee's Motion they advanced a modified plan to let them serve as Debtors in a Chapter Plan for 2 more years while the "actively" liquidated the Property, and they successfully prosecuted litigation against Christensen for violating the automatic stay. If the Debtors were not competent or capable of performing a plan which provided for liquidation of the Property, counsel would not have proposed, obtained

> confirmation of, or seek to have the Debtors fulfill duties under a modified plan for another two years.
>
> Finally, conversion of the case is of little moment to the Debtors if their only concern is the exemption. They have a $150,000.00 exemption they have claim in this property. Amended Schedule C, Dckt. 46. If they are correct and the Christensen claim is $30,000, then the property would have to sell for in excess of $200,000 for there to be any money in excess of the Christensen claim and their homestead exemption. (Assumes a $200,000 sales price, 8% seller costs of sale, and prorated real property taxes.) If it is true that the property has a value in excess of $200,000, then it further highlights the Debtors bad faith in not proceeding with the required liquidation by September 2011."

09-35065, Civil Minutes, Dckt. 214.

These Debtors willfully and intentionally abused the Bankruptcy Code in the prior case, breached the order confirming the Chapter 13 Plan and failed to comply with the Chapter 13 Plan for the marketing and sale of the property which secures the Christensen claim. Through misrepresentation and intentional delay, while having committed to pay Christensen several years ago, the Debtors have hung on to the property gambling on a rising real estate market. It further appears, and the court so concludes, that the Debtors intentionally misrepresented the plan in the prior case, misrepresented that they would prosecute the plan to sell this Property that secures the Christensen claim, and then sought to dismiss the prior case as part of a strategy to not only gamble on the real estate market, but obtain a higher exemption due to the passage of time.

Chapter 13 Plan in This Case

The Debtors defaulted, intentionally, in the prior Chapter 13 case as part of their strategy to abuse the Bankruptcy Code, creditors, and the federal judicial process. They did not, and now appears would not, in good faith prosecute a Chapter 13 Plan. Dckt. 5. The same questionable issues arise in the present case.

The Debtors' plan relies on the Debtors valuing the claim of Christiansen's listed at $140,000, of which the Debtors propose to pay only $7,000. The Court continued Debtors' Motion to Reconsider Motion to Avoid Lien, PGM-2, to a hearing on April 22, 2014. If the motion to avoid lien is denied, Debtors' plan does not have sufficient proceeds to pay claims within 36 months.

Further, the Debtors' plan is not feasible and Debtors' obligations in the plan exceed the payments. Under the Proposed Chapter 13 Plan the Debtors are proposing to may $100.00 a month payments for a period of 36 months. This $3,600.00 in payments by the Debtors is not sufficient to even fund the $5,000.00 in fees which Debtor's counsel wants for shepherding the Debtors through this second bankruptcy case so they can manufacture a larger exemption and increase the lien avoidance over the existing final order.

In addition, gifts totaling $13,000.00 will be made to the Debtors by unnamed family members to fund the plan. The Debtors will use the money to pay the balance to their attorney, Trustee fees, property taxes and pay $7,000.00 to Christensen for the newly unavoided amount of their secured claim. The Plan then says that they will pay 100% of their $2,547.31 in unsecured claims. This shows several significant signs of bad faith.

First, the Debtors admit that they have no income with which to fund a plan. Debtors' household income totals $1,466.40 and of that amount $50 is received by Bun Auyeung from Social Security, $866.40 is received by Soo Tse from Social Security and the balance $550 is provided by "assistance from daughter." Schedule I, Dckt.1, page 29. Rather than a good faith plan being funded by the Debtors, some other family members appear to be pulling the strings, quite possibly for their own financial advantage. The Debtors appear to be the poor sacrificial lambs who are being deprived of their homestead exemption while other family members appear to be lining their pockets with future gain.

The court notes that under 11 U.S.C. § 109(e), "only an individual with regular income . . . may be a debtor under chapter 13 of this title." The phrase "individual with regular income" is defined in section 101 of the Code to mean an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title." Many courts have held that "gifts" do not meet the statutory requirement for a Chapter 13 Debtor to have regular income. *In re Iacovoni*, 2 B.R. 256, 260 (Bankr. Utah 1980) (must be regular income from some source, even if welfare, pensions, or investment income); *In re McGowan*, 24 B.R. 73, 74 (Bankr. N.D. Ohio 1982);*In re Campbell*, 38 B.R. 193 (Bankr. ED NY 1984); *In re Cregut*, 69 B.R. 21, 22-23 (Bankr. Ariz 1986).

See also *Tenney v. Terry, (In re Terry)*, 630 F.2d 634, 635 (8th Cir. 1980) ("We think that § 101(24) contemplates that a debtor make payments, and that the debtor's income sufficiently exceeds his expenses so that he can maintain a payment schedule. The key statutory language is "make payments." The debtors in this case have no excess income out of which to "make payments," and therefore, they are not eligible for Chapter 13 relief under § 109(e)."); and *In re Welsh*, 2003 Bankr. LEXIS 2246 (Bankr. Idaho 2003) ("Most courts have concluded that neither § 101(30) nor § 1325(a)(6) can be satisfied by gratuitous or volunteered contributions by nondebtor third parties. See, e.g., *In re Jordan*, 226 B.R. 117, 119-20 (Bankr. D. Mont. 1998); *In re Williams*, No. 97-08824-W, 1998 WL 2016786 (Bankr. D. S.C. Jan. 13, 1998); see also 2 L. King, Collier on Bankruptcy P 101.30[4], p. 101-97 (rev. 15th ed. 2002).").

Second, no creditor with general unsecured claims have come forward to file proofs of claim. Quite possibly the "unsecured claims" do not exist or have been manufactured by the Debtors and Counsel to create the illusion that there is some purpose for this bankruptcy case other than to try and circumvent the prior orders of this court and further abuse the federal judicial process. This Chapter 13 case appears to be 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). The Claim Bar Date expired on December 26, 2013. Notice of Chapter 13 Bankruptcy Case, Dckt. 9.

In reviewing the Schedules filed by the Debtors under penalty of perjury, the court notes the following:

a. Debtors' personal property consists of $70.00 in cash and bank accounts, $450.00 in household goods and effect, $25.00 in clothing, and nothing else.

b. On Schedule I the Debtors list only $916.40 in Social Security Benefits, plus an additional $550.00 a month in assistance from a Daughter.

c. The Debtors' expenses shown on Schedule J are $1,365.00 a month. To achieve this number the Debtors state, under penalty of perjury, that they spend only $250.00 a month on food, $2.00 on home maintenance, $9.00 on clothing, $100.00 on transportation, and $323.00 on auto insurance (though no car is listed on Schedule B and the Debtors state under penalty of perjury that they have no interest in any automobiles).

Schedules, Dckt.1.

Interestingly, when the prior case was converted to one under Chapter 7, the Debtors stated that Bun Auyeung alone had $2,200.00 a month in pension and retirement income. Chapter 7 Statement of Income, Dckt. 222.

Additionally, Debtors list minimal household expenses on their Schedule J for their household. For example, Debtors list $165 electricity and heating, $68.07 water/sewer, $65 cable/internet, $2 for home maintenance, $250 for food, $9 for clothing, $25 for laundry/dry cleaning, $22 for medical/dental, $100 for transportation, $10 for recreation, $48 for homeowners insurance, $323 for auto insurance and $278.86 for real estate tax. The court is concerned over the very minimal expense for food and healthcare the Debtors have listed and may have created this unrealistic budget to give the appearance that they can afford their plan.

The court has coined a phrase over the years concerning Debtors who "creatively" state under penalty of perjury their expenses on Schedule J or in declarations to create the appearance that a plan could be feasible – "Liar Declarations." A practice developed among the consumer bar to accede to their clients desire to retain some asset that they would let the Debtors lie about expenses because, "the client wants to give it a try, no matter how financially irrational or irresponsible." Judges throughout the District, once learning of the consumer attorneys allowing such "Liar Declarations," have acted to require the truthful, honest statements by parties under penalty of penalty of perjury. There is no "bonus for lying" in the Eastern District of California."

From a review of the Schedules, it appears that the Debtors are engaging in such "Liar Declarations" as to both their income and expenses. Possibly they are getting more assistance from their children. Maybe they have undisclosed assets and income. The court does not know, but it is obvious from Schedules I and J that the numbers don't add up.

It may be that whomever is pulling the financial strings, and has set in forth a pattern which has worked to deprive the Debtors of their homestead exemption for almost five years now (from the time they could have sold their home in the prior case) from receiving the financial benefits of that money than living in what, if Schedules I and J are taken as true, being forced to live in abject poverty with barely the shirt on their back and little food to eat.

Third, in April 2012, the court granted judgment for the Debtors in the amount of $15,259.95 (of which $3,900.00 was for legal fees) against Christensen. Judgment, 10-2497 Dckt. 72. Though presumably collected, this $15,259.95 is not otherwise accounted for by these Debtors who present themselves as qualified Chapter 13 Debtors. Possibly these monies were taken from the Debtors by those who are calling the financial shots and looking to invest $13,000.00 to take even more through the Debtors' homestead exemption.

This is a very sad state of affairs, which may very well warrant inquiry on many fronts concerning the possible abuse of these Debtors and may warrant dismissal.

Based on the evidence provided in support of confirmation, the court finds that the Debtors have filed this plan in bad faith. The failure of a purpose of filing the Chapter 13 plan, the inaccuracy of the plan statements and the statements made in Schedules I and J, the infeasibility of the plan, and the filing and dismissal of the prior bankruptcy case reveal that the Debtors have acted in bad faith. The Debtors have filed this case in order to take advantage of an increased allowable homestead exemption in order to reduce the Christensen lien on the property and are attempting to circumvent events that transpired in the prior case. There is no reorganization or rehabilitation to be obtained through a Chapter 13 case. The plan is not feasible and Debtors have provided liar schedules and declarations in support thereof. 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 Confirm the Chapter 13 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion is denied.

18. 14-20519-E-13 SAC-1 STEVEN/DEBORAH MCCONNELL Scott A. CoBen MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A. 2-24-14 [17]

Final Ruling: No appearance at the March 25, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 24, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 6191 Dolly Varden Ln., Pollock Pines, California. The Debtor seeks to value the property at a fair market value of $215,000 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 $225,600.00. Creditor Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately $104,000. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 6191 Dolly Varden Ln., Pollock Pines, 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 $215,000 and is encumbered by senior liens securing claims which exceed the value of the Property.

19. 14-20519-E-13 TSB-1 STEVEN/DEBORAH MCCONNELL Scott A. CoBen

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 2-26-14 [21]

Final Ruling: No appearance at the March 25, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney on February 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection and confirm the Chapter 13 Plan.

The Chapter 13 Trustee ("Trustee") opposes confirmation of the Plan on the basis that the Plan relies on a pending Motion to Value Collateral. According to the Trustee, Debtors' plan relies on the Motion to Value Collateral of Wells Fargo Bank, N.A., which is set for hearing on March 25, 2014, the same day as their Motion to Confirm Plan. The Trustee thus doubts whether Debtors can afford plan payments if the Motion to Value Collateral is denied.

Debtors' Opposition

In their opposition filed on March 3, 2014, Debtors' allege that the Trustee's objection should be overruled because their Motion to Value Collateral should be granted.

The court having granted the motion to value, the Trustee's objection is overruled.

The Plan does complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

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

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

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on January 20, 2014 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.

20. 13-30221-E-13 MMV-2 | **MICAELA VAN DINE AND PIOTR REYSNER** Pro Se | **MOTION TO CONFIRM PLAN** 2-5-14 [112]

CASE DISMISSED 2/20/14

Final Ruling: The case having previously been dismissed, the Motion is dismissed as moot.

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

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

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

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

21. 14-20321-E-13 DWIGHT BROWN
SDB-1 W. Scott de Bie

MOTION TO VALUE COLLATERAL OF RESMAE MORTGAGE CORPORATION
2-24-14 [23]

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).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 24, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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 decision is to deny the Motion without prejudice.

SERVICE ISSUES

The court has not been able to determine that service at the various addresses listed on the Proof of Service complies with Federal Rule of Bankruptcy Procedure 7004 and 9014. A search of the California Secretary of State's Business Search, and Delaware Corporation Entity Search, do not provide any results for ResMae Mortgage Corporation.

The Certificate of Services does not state how the Brea, California address used for the identified creditor. The court cannot identify how effective service was made for this Contested Matter.

The court did find using the California Secretary of State website the following information for corporations with the word "ResMae" in their names:

A. ResMae Financial Corporation

1. Status.....Forfeited

2. Address.....6 Pointe Dr, Brea, California

3. Agent for Service.....Steve Glouberman

a. 6 Pointe Dr., Brea, California

B. ResMae Service Corporation

1. Status.....Dissolved

2. Address.....2601 Saturn St Suite 101, Brea California

3. Agent for Service.....Steven Glouberman

a. Address....1925 Century Part East Suite 500, Los Angeles, California.

http://kepler.sos.ca.gov/

The court has also looked up an entity with the name ResMae Mortgage Corporation using the Lexis Nexis data bases. The information includes the following:

A. Liquidating Trust of ResMae Mortgage Corporation

1. Chapter 11 case No. 07-10177
2. Date filed.....February 2, 2007.
3. Filing Jurisdiction.....Delaware
4. Attorney for Debtor.....Douglas D. Herrman, Wilmington, Delaware.

B. ResMae Mortgage Corporation

1. State of Incorporation.....Delaware
2. Status.....Forfeited
3. Agent for Service of Process.....CAC-Lawyers Incorporating Service, 11 E Chase Street, Baltimore, Maryland 21202-2516

C. More than 40 judgments and liens issued against ResMae Mortgage Corporation.

In conducting a general internet search (using the Bing search enginge) the court identified an article in Bloomberg Businessweek which provides the following information:

"Bridgefield Mortgage Corporation provides mortgage services. Its services include free faxes, verification of mortgage, loan history, document request, name change, amortization schedule, insurance substitution, duplicate

year-end statement, cancelled check copy, loan reanalysis, and Web payment. The company was formerly known as ResMAE Mortgage Corp. and changed its name to Bridgefield Mortgage Corporation in February 2010. The company was founded in 2001 and is based in Overland Park, Kansas. Bridgefield Mortgage Corporation is a former subsidiary of ResMAE Financial Corporation.

7101 College Boulevard

Suite 1400

Overland Park, KS 66210

United States
Founded in 2001
Phone:
913-661-8728

Founded in 2001"

http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=12072067. While the court does not take the above as credible, properly authenticated evidence, it is a thread which the Debtors could have followed in figuring out who the creditor is in this case. Bridgefield Mortgage Corporation is registered with the California Secretary of State, listing CT Corporation Service as its agent for service of process.

Proper service not having been show, or that ResMae Mortgage Corporation is a creditor in this case, **the Motion is denied without prejudice.**

If the movant is able to establish that one or more of the addresses on which the moving papers were served is a proper address for the respondent creditor, the court's analysis is as follows:

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 525 Carousel Drive, Vallejo, California. The Debtor seeks to value the property at a fair market value of $260,000 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 $383,200.00. Creditor ResMae Mortgage Corporation's second deed of trust secures a loan with a balance of approximately $95,246. 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 to Value Collateral 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 pursuant to 11 U.S.C. § 506(a) is granted and the claim of ResMae Mortgage Corporation secured by a second deed of trust recorded against the real property commonly known as 525 Carousel Drive, Vallejo, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $260,000 and is encumbered by senior liens securing claims which exceed the value of the Property.

22. 14-20321-E-13 DWIGHT BROWN
NLE-1 W. Scott de Bie

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
2-20-14 [19]

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 February 20, 2014. By the court's calculation, 33 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 ("Trustee") opposes confirmation of the Plan on the basis that Debtor has failed to file a Motion to Value Collateral. According to the Trustee, Debtor proposes to value the secured claim of ResMae Mortgage Corp in Class 2 but has not filed a Motion to Value Collateral. Accordingly, the Trustee believes that Debtor cannot make plan payments or comply with the plan. 11 U.S.C. § 1325(a)(6).

Debtor's opposition

In his opposition, Debtor alleges that he has filed a Motion to Value Collateral on February 24, 2014. The hearing on the Motion is scheduled for March 25, 2014. According to Debtor, he delayed in filing the Motion because he was unable to determine the correct creditor due to conflicting information.

DISCUSSION

The court has denied the Debtors' Motion to Value the secured claim of "ResMae Mortgage Corporation." It appears that ResMae Mortgage Corporation has been liquidated through a Chapter 11 case in Delaware and no longer exists. See March 25, 2014 Civil Minutes for court's ruling on Motion to Value, DCN: SDB-1.

The court having denied without prejudice the Motion to Value filed by the Debtor, the plan cannot be confirmed.

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.

23.	**11-21422-E-13**	**SHMAVON MNATSAKANYAN AND**	**CONTINUED MOTION TO APPROVE**
	PGM-5	**YERMONIYA ARTUSHYAN**	**LOAN MODIFICATION**
		Peter G. Macaluso	**12-3-13 [113]**

CONT. FROM 2-25-14, 2-11-14, 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.

Final 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). Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to continue the hearing to 3:00 p.m. on April 8, 2014 pursuant to the Stipulation of the Parties. No appearance at the March 25, 2014 hearing is required.

MARCH 25, 2014

On March 21, 2014, the Parties filed a Second Stipulation to continue the hearing which was set for March 25, 2014. Dckt. 135. The continuance is requested "[t]o allow Green Tree to satisfy the Court's requirements to allow approval of the loan modification." As addressed below, the "Court's requirements" are merely that it be the actual creditor, whether acting through an employee or authorized agent, enter into the loan modification with the Debtors.

The court grants the Parties' request to further continue the hearing.

FEBRUARY 2014 HEARING

On February 24, 2014, the Parties filed a Second Stipulation to continue the hearing which was set for February 25, 2014. Dckt. 132. The continuance is requested "[t]o allow Green Tree to satisfy the Court's requirements to allow approval of the loan modification." As addressed below, the "Court's requirements" are merely that it be the actual creditor, whether acting through an employee or authorized agent, enter into the loan modification with the Debtors.

PRIOR HEARINGS

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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24. 10-31927-E-13 CHRISTINA BAIRD
SDB-3 W. Scott de Bie
MOTION TO VALUE COLLATERAL OF LAKE ICON PORTFOLIO MANAGEMENT I, LLC
2-14-14 [60]

Final Ruling: No appearance at the March 25, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 14, 2014. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 464 Youngsdale Drive, Vacaville, California. The Debtor seeks to value the property at a fair market value of $280,000 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 $448,710.36. Creditor Lake Icon Portfolio Management, LLC's second deed of trust secures a loan with a balance of approximately $39,718.57. 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 Lake Icon Portfolio Management, LLC secured by a second deed of trust recorded against the real property commonly known as 464 Youngsdale Drive, 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 $280,000 and is encumbered by senior liens securing claims which exceed the value of the Property.

25. 10-40028-E-13 ROBERT/PATRICIA TILLEY — MOTION TO MODIFY PLAN
SDB-6 W. Scott de Bie — 2-12-14 [119]

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 February 12, 2014. By the court's calculation, 41 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 February 12, 2014 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.

26. 10-43729-E-13 ROBERT/LINDALEE LAURENT — MOTION TO MODIFY PLAN
MTM-5 Michael T. McEnroe — 1-30-14 [71]

Final Ruling: The court's ruling is set forth below. No appearance at the March 25, 2014 hearing is required.

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 January 30, 2014. By the court's calculation, 54 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The 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). Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

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

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

The Chapter 13 Trustee opposes on the basis that the Debtors' plan proposes a plan payment of $550.00 for 60 months. However, Debtor is reducing the monthly payment from $800.00 to $550.00; thus, under the modified plan, Debtors would be paid ahead $9,501.00.

Debtors respond, stating that the proposed plan payment are as follows: 37 payments of $800.00 and 3 payments of $550.00. Debtors propose to lower the payments to $550 per month beginning on the 38th month and continuing through the 60th.

This proposed further amendment to be stated in the order confirming the Modified Chapter 13 Plan resolves the Trustee's Objection.

Based on the clarification of the Debtors' payments in the modified plan, the court grants the motion.

The modified Plan, as amended to provide that the payments are reduced to $550.00 for months 38-60 of the Plan, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on January 30, 2014, as amended to provide that the payments are reduced to $550.00 for months 38-60 of the Plan, is confirmed. Such amendment shall be stated in the order confirming the plan. 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.

27. 13-35033-E-13 SAMUEL TAPIA **MOTION TO CONFIRM PLAN**
JGD-1 John G. Downing **2-5-14 [22]**

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 February 5, 2014. By the court's calculation, 48 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 opposes confirmation offering evidence that the Debtor is $1,190.00 delinquent in plan payments. 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).

Additionally, the Trustee states the Debtor's Plan lists Bank of America as the Class 1 Mortgage creditor, however the Additional Provisions of the Plan indicate that Ocwen Financial Corporation is the Class 1 creditor. To date, neither Bank of America or Ocwen Financial Corporation have filed a claim in this case. Trustee states it is not clear who the Creditor is.

The Trustee also argues that the proposed plan is not the Debtor's best effort, under 11 U.S.C. § 1325(b). The Debtor is under the median income and proposes plan payments of $1,190.00 for 60 months with a 0% dividend to unsecured creditors. The Debtor's monthly projected disposable income listed on Schedule J reflects $2,109.00 and the Debtor is proposing a plan payment of $1,190.00. Trustee argues that it appears that the Debtor has $919.00 more per month to pay into the Plan. The Debtor's prior plan filed on January 13,2014 proposed a plan payment of $2,080.00, and the Debtor has failed to indicate why the plan payment has decreased.

Trustee also states that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). The Trustee was not able to make a payment to the Class 1 mortgage creditor for December 2013 or January 2014

as the Debtor did not make a payment to the Trustee until February 10,2014. The Debtor is now 2 post-petition payments delinquent to this creditor and based on the Additional Provisions of the Plan the Debtor is trying to get a loan modification.

Additionally, the Trustee states that the Additional Provisions of the Plan propose that the Trustee pay $1,020.00 per month as an adequate protection payment to Ocwen's 1st Deed of Trust. The original Plan, listed the Class 1 mortgage payment at $1,846.00, the amended Plan has decreased the payment in Class 1 to $1,188.00. Dckt. 17. Trustee states that Debtor has not filed a motion for approval of a loan modification to date.

Trustee also states that the Debtor's Plan fails to provide for Specialized Loan Servicing's Second Deed of Trust listed on Schedule D, and while treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment could indicate that the Debtor either cannot afford the payments called for under the Plan because they have additional debts, or that the Debtor wants to conceal the proposed treatment of a creditor.

Lastly, the Trustee states that the Plan fails the Chapter 7 liquidation analysis, under 11 U.S.C. § 1325(a)(4). The Debtor's non-exempt equity totals $55,050.00 as the Debtor has failed to claim any exemptions on Schedule C, and the Debtor is proposing a 0% dividend to unsecured creditors. Dckt. 9.

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.

28. 10-40834-E-13 PGM-2 | **PAUL COSTA AND KAROLYN COLE** | **Peter G. Macaluso** | **CONTINUED MOTION TO APPROVE LOAN MODIFICATION** | **12-18-13 [54]**

CONT. FROM 2-25-14

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's Attorney, 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, 41 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Approve Loan Modification was properly set for hearing on the notice require by Local Bankruptcy Rule 9014(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 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:

MARCH 25, 2014 HEARING

This matter was continued from January 28, 2014, to allow Ocwen Loan Servicing, LLC to provide evidence that it is the creditor or that it is authorized as the named principal to modify this loan as requested.

SUPPLEMENTAL DECLARATION

On March 19, 2014, Ocwen Loan Servicing, LLC, filed the Declaration of Joshua Wimbley, a contract management coordinator. Mr. Wimbley states that according to Ocwen Loan Servicing, LLC's business records, it is the holder of the promissory note and is currently in possession of the original Note, which is endorsed and payable to blank (bearer). Declaration, ¶ 6, Dckt. 73. Further, the business records reflect that an Assignment was executed on February 13, 2014 showing that the Deed of Trust was assigned to Ocwen Loan Servicing, LLC. *Id.* ¶ 8.

The court does not find this evidence credible. First, Mr. Wimbley states that he has been employed by Ocwen for a period of eight months. He has provided no explanation as to how in those eight months of experience he has become well versed in the books and records of Ocwen and can determine that notes endorsed in blank are in the possession of some (unnamed) person at some (unidentified) location for Ocwen.

Second Mr. Wimbley merely states legal conclusion that Ocwen Loan Servicing, LLC is the "holder" of the promissory note and his factual conclusion that Ocwen is "currently" in possession of the Note. He does not state what it means to be the "holder" of the note. Further, in stating that Ocwen is "currently" in possession of a note endorsed in blank (which is the equivalent of bearer paper), his testimony is pregnant with an admission that Ocwen was not formerly, and may not in the future, be in possession of the note endorsed in blank.

Third, Mr. Wimbley makes the general statement that he is "familiar" with the methods of Ocwen from the time "we acquire" the file until the present. This is curious language about Ocwen "acquiring" files, rather than taking possession of endorsed in blank notes.

Fourth, Mr. Wimbley states that when Ocwen "acquires" a loan, an electronic file is created. Mr. Wimbley does not testify how, in his eight months of experience, he has such comprehensive knowledge of the practices and policies about Ocwen "acquiring loans."

Fifth, Mr. Wimbley does not state what the Note actually says, where the note is located, who is actually in possession of the note, when it was (if at all) physically received by someone at Ocwen, . Mr. Wimbley merely concludes that Ocwen Loan Servicing, LLC is the "holder" of the note and is currently in possession.

Sixth, Mr. Wimbley testifies that he "knows" that the information in his declaration is true either because of his personal knowledge or from what he has read in the business records. Knowing something is true and repeating what is read in business records are two very different things. Something may be written in a business record may say something, but it may not be true. While stating under penalty of perjury that he "knows" everything in the declaration is true, Mr. Wimbley qualifies that by saying, "I know its true because somebody else told me it was true."

Finally, Mr. Wimbley's "testimony" is only that Ocwen's books and records say that Ocwen is holder of the Note and in possession of the Note – not testimony that it actually is in possession of the note.

It is also curious that the purported transfer of the Claim, and presumably the underlying Note and Security, is not executed by OneWest Bank, FSB, who has filed a claim in this case, but only by Ocwen Loan Servicing, LLC, in an transfer executed only by Ocwen Loan Servicing, LLC signed by Ocwen's attorneys in this bankruptcy case.

The court cannot and will not rely on evidence, which consists of the testimony from a Contract Management Coordinator of eight months that makes findings of fact and conclusions of law for the court.

JANUARY 28, 2014 HEARING

In their Motion, Debtors stated that Ocwen Loan Servicing, LLC, whose claim the plan provides for in Class 4, had agreed to a loan modification that would reduce the Debtor's monthly mortgage payment to $955.39. A review of the Loan Modification (attached as Exhibit A) showed that Ocwen Loan Servicing, LLC was named as the "Lender" on the loan. Dckt. 57. Proof of Claim No. 12, filed by Onewest Bank, FSB, shows a secured claim on the subject real property. The court notes an Unconditional Transfer of Claim after Proof of Claim filed 11/23/2010 was filed on November 21, 2013, showing a transfer of claim to Ocwen Loan Servicing, LLC. Dckt. 48. The Assignment was signed by Ocwen Loan Servicing, LLC's attorney, Kristin A. Zilberstein. However, this is not evidence of the real creditor or lender.

The court expressed uncertainty as to how Ocwen Loan Servicing, LLC, could name themselves as "Lender" in a Loan Modification for an obligation that appears to be owed to Onewest Bank, FSB. The court stated that it will not approve an loan modification that will not be effective against the actual owner of the obligation, which here appears to be Onewest Bank, FSB. The court noted that there have been multiple instances in which different loan servicing companies have misrepresented to the court, debtors, Chapter 13 Trustee, U.S. Trustee, creditors, and other parties in interest that the loan servicing company is the "creditor" as that term is defined in 11 U.S.C. § 101(10). In each of those cases, the loan servicing company was merely an agent with very limited authority to service the loan. The servicer was not granted a power of attorney to modify the creditor's rights, was not authorized to contract in its own name to bind the creditor, or was the authorized agent for service of process for the creditor.

The court issued an order to Debtors and Ocwen Loan Servicing, LLC to file on or before February 14, 2014, any and all properly authenticated documents identifying that Ocwen Loan Servicing, LLC is the actual creditor, as defined in 11 U.S.C. § 101(10). The court continued the hearing to this date to allow the parties to file the appropriate documentation. FN.1.

FN.1. As a reference for the parties, this court has previously addressed with another servicing company, Green Tree Servicing, LLC, the requirement to accurately identify the status of the party 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. In addition, Specialized Loan Servicing, LLC and U.S. Bank, N.A. have also addressed this issue. The servicers and this bank have altered their practices and are not improperly listing or identifying the loan servicing company as the creditor when it is not a creditor as defined by 11 U.S.C. § 101(10).

The court acknowledged that Ocwen Loan 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. The court further noted that if Ocwen Loan Servicing, LLC has expanded its business to purchase notes, it should address how it will provide that information to the federal courts.

DECLARATION OF DEBTORS' COUNSEL

In response to the court's order continuing the motion, Debtors' Counsel, Peter Macaluso ("Counsel"), filed a declaration in support of the Motion for Order Approving Loan Modification. Dckt. No. 66. The declaration states that Debtors acknowledge the definition of creditor, as provided for by 11 U.S.C. § 101(10). Counsel notes that Proof of Claim #12 was filed on November 23, 2010 by OneWest Bank, FSB, by Marisol A Nagata, Esq. of the firm Barret, Daffin, Frappier, Treder & Weiss, LLP. A Notice of Mortgage Payment Change, was filed on January 10, 2013, by Craig A. Edelman, "Authorized Agent for OneWest Bank, FSB." Additionally, a Notice of Transfer was filed on November 22, 2013, as Dckt. No. 49.

The "Note" and "Deed of Trust" on the property list the "Lender" as Sierra Pacific Mortgage Company, Inc., and the Deed of Trust names "MERS" as "acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under the Security Instrument". The Escrow Account Disclosure Statement lists Indymac Mortgage Services, a division of OneWest Bank, FSB as the Servicer. Debtors also point out that the loan modification offered and accepted by Debtors is from Ocwen Loan Servicing, LLC, references Ashley Hanson. Debtors state that Hanson is a

> Relationship Manager...whom claimed a paralegal, Roxanna Costello, as being responsible for the loan, whom then forwarded me to a Kresmir Dreurevic, Esq., and who did not answer the call, and upon re-dialing it went directly to Attorney, Kelly Rapherty and informed her personally of the Order of this Court.

Declaration of Peter G. Macaluso in Support of Motion for Order, Dckt. No. 66 at 2. Debtors' Attorney then forwarded the court's order to Kresmir Dreurevic.

DECLARATION OF KRISTIN A. ZILBERBERSTEIN

On February 14, 2014, Counsel of Record for Ocwen Loan Servicing ("Ocwen"), Kristin Zilberstein, filed a Declaration in Support of the Motion for Modification. Dckt. No. 68. Ms. Zilberstein stated that she learned of the court's order, requiring Ocwen to file documents in support of its authority to enter into a modification on February 11, 2014. ¶ 2. She states that since that time, her firm, McCarthy & Holthus, LLP, has been "working diligently with Ocwen to obtain the necessary documents to meet the Court's requirement." Id. at ¶ 3.

Ms. Zilberstein states that three days has not been sufficient time to obtain the responsive documents, and that Ocwen will file the documents on or before the February 25, 2014 deadline stated in that order.

A review of the docket shows that Ocwen has not yet filed the requested documents with the court. The court continued the hearing on the Motion to Approve Loan Modification to permit Ocwen to file and serve the requested documents, and allow time for the court to review the documents produced. The parties shall strive to adhere to the original deadline set for Ocwen to file and serve the requested documents, namely: properly authenticated documents by which it may assert to be the agent of or be granted a power of attorney for Onewest Bank, FSB or any other person who is the actual creditor in this case; and any other documents by which Ocwen Loan Servicing, LLC purports to be authorized or have the right to modify the loan at issue.

CONCLUSION

Based on the failure to provide credible evidence that Ocwen Loan Servicing, LLC is the creditor or that it is authorized as the named principal to modify this loan, the motion is denied without prejudice.

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

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

29. 10-26337-E-13 PAB-6 — CERLITO/LORNA TACULAD — Peter A. Bermejo — MOTION TO AVOID LIEN OF U.S. BANK — 2-17-14 [117]

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, respondent creditor, and Office of the United States Trustee on February 17, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Avoid Lien 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 Avoid Lien. 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 move the court to avoid the lien of creditor "US Bank." However, there are several defects with the motion.

First, the court is not certain who the Creditor is properly named in the motion. There are several federally insured depository institutions listed with the terms "U.S." and "Bank" in the name (U.S. Century Bank, Bolder U.S. Industrial Bank, U.S. Savings Bank of America, U.S. Bank, N.A., U.S. Bank of California, to name a few). The court cannot determine from the evidence presented which legal entity the Debtors wish the court to include in the order. The court will not issue orders on incorrect or partial parties that are ineffective. Debtor may always use Federal Rule of Bankruptcy 2004 to aid themselves in finding the true creditor.

SERVICE

The Motion on its face identifies the creditor as being US Bank, which is a federally insured financial institution. Congress created a specific rule to provide for service of pleadings, including this contested matter, on federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(h), which provides

> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless–

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Here, Debtors served US Bank at several locations, but neglected to serve the bank at the address listed by the FDIC. Further, the bank was not served by certified mail to an officer as required by the Federal Rules of Bankruptcy Procedure. None of the exceptions in Federal Rule of Bankruptcy Procedure 7004(h) apply.

REQUEST FOR RELIEF

The court finds that the Debtors' attempt to avoid the Creditor's lien in this motion is not permitted under the Bankruptcy Code. A request to determine the extent, validity, or priority of a security interest, or a request to avoid a lien, requires adversary proceeding. Fed. R. Bankr. P. 7001(2). Debtor cannot attempt the determine the extent, validity, or priority of the creditor's security interest through a motion.

Therefore, the motion is denied without prejudice.

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

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

The Motion to Avoid Lien filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

30. 10-28340-E-13 SHELBY/ANICETA HALEY MOTION TO INCUR DEBT
BLG-5 Pauldeep Bains 3-4-14 [80]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 21 days' notice was provided. 14 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)(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 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:

The motion seeks permission to incur debt to obtain a reverse mortgage through One Reverse Mortgage, LLC, in the amount of $435,000.00 at a variable interest rate starting at 2.66%. Debtors are seeking to refinance their home, which is necessary to cover their ongoing living expenses. The reverse mortgage is a single loan encumbering the Debtor's residence commonly known as 2981 Gulf Drive, Fairfield, California.

The Chapter 13 filed a non-opposition statement to the Motion to Incur Debt for the purpose of a reverse mortgage.

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).

Here, the proposed loan is sufficiently described in the motion and supporting pleadings and an agreement has been provided to the court. Dckt.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Debtors Shelby Douglas Haley and Aniceta Pagalunan Haley are authorized to obtain reverse mortgage for the real property commonly known as 2981 Gulf Drive, Fairfield, California according to the terms stated in the HUD Agreement filed as Exhibit "A," Docket Entry No. 83, in support of the motion.

31. 11-20341-E-13 VICTOR/DEBI GARCIA — MOTION TO MODIFY PLAN
JLK-2 James L. Keenan — 2-11-14 [45]

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 February 11, 2014. By the court's calculation, 42 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 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. The Chapter 13 Trustee opposes the motion on the basis that the Debtors incorrectly state the number of months completed and remaining in Section 6.02. Trustee states that the debtors have completed 36 months as of January 2014 and only 34 months remain effective February 2014. Trustee also states the Debtors

are proposing to decrease the percentage to unsecured creditors from 39% to 10%, but the Trustee has already disbursed 27.36% as of January 2014.

Lastly, the Trustee argues that the Debtors do not provide any explanation in the decrease of $371.92 in the debtors expenditures.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the 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.

32. 13-27044-E-13 KEVIN/BREE SEARS **CONTINUED MOTION TO CONFIRM PLAN**
DBJ-2 Douglas B. Jacobs **10-21-13 [57]**

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

Final Ruling: No appearance at the March 25, 2014 hearing is required.

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, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 21, 2013. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). A creditor 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 decision is to continue the Motion to Confirm the Amended Plan to 3:00 p.m. on April 8, 2014 pursuant to the Stipulation of the parties.

PRIOR HEARING

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Creditor Cory Adams objects to confirmation of the Debtors' Second Amended Plan on the basis of good faith. Creditor states that Debtors' income has increased and the Debtors' expenses have decreased to an amount exactly equal to their proposed plan payment under the plan which pays zero to the general unsecured claims. Creditor states his claim is a general unsecured claim, totaling nearly one-half of the entire amount of unsecured debt. Creditor states he has filed an adversary proceeding to determine that the amounts owed to him are non-dischargeable.

Debtor responds, stating that they filed an amended plan to account for all of the taxes due and allowing for the payment to their mortgage company for ongoing mortgage and all the arrears. In order to make these payments, Debtors state they reduced their monthly food bill, plan on bringing lunch to work, reduce eating out expenses and buying less expensive food. Debtor states that being faced with larger mortgage arrears and tax obligations, he has taken on more work as a public defender and private defense attorney to supplement his income. Debtor states the plan is feasible. Debtor also states that the adversary complaint referenced by Creditor is being litigated and if Creditor is successful, the plan will be modified or the case will be dismissed.

Based on the declaration providing explanations for the change in income and expenses, the court overrules the Creditor's objections. Merely because a debtor dials down otherwise realistic expenses to a lower

"battlefield" level which are necessary to make a plan work does not render the expenses not being stated in good faith. Though the court has no idea why the Debtors are filing amended Schedules I and J, Dckt. 63, for post-petition changes in income and expenses, the court will not deny confirmation on those grounds. (Though it could be argued that the Debtors misstating under penalty of perjury post-petition income and expenses as being the income and expenses as of the commencement of this case renders all of the Debtors' testimony unreliable – this Creditor and the Debtor have a bigger fight over the dischargeability of the claim.)

The adversary proceeding appears to be litigating the non-dischargeability of the Creditor's claim and if Creditor is successful, his claim will survive the bankruptcy plan and discharge.

CONTINUANCE

The court continued the hearing to allow Debtors to present discovery regarding income and contract with the creditor.

STIPULATION

On March 18, 2014 the parties filed a Stipulation to continue the hearing for two weeks to allow further discovery by Creditor, Cory Adams.

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 continued to 3:00 p.m. on April 8, 2014.

33. 09-29145-E-13 ERIC/MISTE BRIDGE MOTION TO MODIFY PLAN
WW-2 Mark A. Wolff 2-18-14 [48]

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 February 18, 2014. By the court's calculation, 35 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 Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to grant the Motion 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.

The Chapter 13 Trustee opposes the motion on the basis that the Debtors are proposing to complete their Chapter 13 plan earlier than the 60 months confirmed by making a lump sum payment of $3,500, a "gift/loan from a friend" but do not explain how they are not able to complete the plan in the allotted term of 60 months. Debtors have not filed current income or expense statements. The Trustee objects under 11 U.S.C. § 1325(b) and (a)(3), good faith, as the Debtor has not revealed the reason for the plan modification.

DEBTOR'S RESPONSE

The Debtors reply to the motion, stating that they are attempting to complete their plan in month 56 with a lump sum payment as they are now in the process of dissolution proceedings. Counsel for the Debtors explains that Debtors remain living in the same residence but their living situation is very uncomfortable. Debtors state that their income and expenses have not changed, except for $3,500 for expenses related to the dissolution proceedings. However, Debtors do not wish to stay in the residence the remaining months of the plan and wish to pay the remaining plan payments in one lump sum. Debtors argue that 11 U.S.C. § 1325(b) does not apply to modification of a plan and that they have filed their plan in good faith.

DISCUSSION

The Debtors are attempting to bring this case to a conclusion in month 56, four months early. Complicating their efforts to complete this Chapter 13 Plan is that the Debtors are proceeding with a dissolution of their marriage. Completion of the Chapter 13 Plan and freeing the Debtors to proceed with dividing up their assets will facilitate the dissolution action.

Debtor Eric Bridge provides testimony concerning the dissolution proceeding and that a "friend" will provide the monies to accelerate the last four payments under the Plan. The declaration indicates that monies are in the form of a gift (no intention to repay) from a "friend."

In light of the Debtors having completed 56 months of payments, the lack of specificity in the source of the payments is not fatal – *under these specific facts and circumstances*. This case was filed on May 7, 2009. As of the March 25, 2014 hearing date, there were really only three remaining payments (the March 25, 2014, April, and May 2014 payments). The Debtors having performed 93.333% of the plan payments monthly, accelerating the final 6.6667% of the payments by two months is not unreasonable.

The modified Plan complies does comply with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is that the Motion is granted, Debtors' Second Modified Chapter 13 Plan filed on February 18, 2014 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.

34. 14-20045-E-13 TUBAYA/DEBORAH CARTER — MOTION TO APPROVE LOAN MODIFICATION
PGM-3 Peter G. Macaluso — 2-14-14 [38]

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 February 14, 2014. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

Final 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). 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 Approve the Loan Modification is granted. No appearance required.

Bank of America, N.A., 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 $1,706.28. The modification will capitalize the pre-petition arrears and provides for an interest rate of 3.375% over the next 480 months.

There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by 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 Tubaya and Deborah Carter, Debtors, are authorized to amend the terms of their loan with Bank of America, N.A., which is secured by the real property commonly known as 4600 Chamberlin Circle, Elk Grove, California, and

such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 41, in support of the Motion.

35. 14-20150-E-13 MICHAEL/DEBORAH SOUZA — OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
TSB-1 Diana J. Cavanaugh — 2-26-14 [27]

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 February 26, 2014. By the court's calculation, 27 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 ("Trustee") opposes confirmation of the Plan on the basis that Debtors have not filed tax returns during the 4-year period preceding the filing of the Petition. According to the Trustee, Debtors admitted at the First Meeting of Creditors that they have not filed their tax returns during the 4-year period preceding the filing of the Petition. Filing of tax returns is required for plan confirmation. *See* 11 U.S.C. §§ 1308, 1325(a)(9).

The Trustee also argues that the plan does not work mathematically. The plan calls for $300,000.00 in total plan payments, at the rate of $5,000.00 per month for 60 months. The plan proposes to pay $2,900.00 in attorney fees, $123,935.28 in Class 1 arrears and $27,000.00 in Class 5 claims. Class 7 unsecured claims will receive 100% dividend, estimated at $17,299.97.

The Trustee notes that the Internal Revenue Service filed a claim on January 31, 2014 which totals $373,533.31. Of this $63,101.20 is asserted as secured, $130,965.34 as priority, and $179,466.77 as general unsecured. The Chapter 13 Plan provides for a $9,000.00 secured claim and $20,000.00 priority

claim for the Internal Revenue Service. No motions to value the secured claim or objection to claim of the Internal Revenue Service have been filed. The plan also provides for paying a 100% dividend to creditors holding general unsecured claims.

It appears that Debtor cannot make the plan payments or comply with the plan, and the Plan does not comply with the applicable law. 11 U.S.C. § 1325(a)(1)&(6).

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

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

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

36. 10-34651-E-13 CHRISTOPHER/LEANNE RAE — MOTION TO AUTHORIZE THE RELEASE OF FUNDS TO DEBTORS
SAC-1 Scott A. CoBen — 2-19-14 [51]

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, respondent creditor, and Office of the United States Trustee on February 19, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Authorize the Release of Funds 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 Release Funds to Debtors is granted. No appearance required at the March 25, 2014 hearing.

Debtors move the court for an order authorizing the release of funds to the Debtors from the sale of real property located at 2765 Clay Street, Sacramento, California. On January 31, 2014, the court authorized Mr. Rae to sell his interest in certain property. Dckt. 48. The order required all funds to be held by the trustee pending further order of the court. The Trustee currently holds $18,383.73 in funds from the sale. The motion to approve the sale had requested the fund be released to Mr. Rae so he could purchase a replacement vehicle due to the fact that his 2006 Volkswagen Jetta had a failed engine.

Debtor testifies he had the Volkswagen towed to Niello to obtain a repair estimate for the failed engine. Debtor states Niello could not determine if the engine failure was due to a failure in the cylinder head or in the engine block but that if the engine failure was due to a failure in the cylinder head, then the cylinder head would require replacement at a cost of $3,010. If the engine failure was due to a failure in the engine block, then the engine would require replacement at a cost of $6,790. Regardless of the remedy for the failed engine, Debtor state the Volkswagen also has a number of other "recommended" replacement items which will cost $2,443.95. Debtor states aside from the engine failure, the Volkswagen is in poor condition and has a rough trade in value of $4,600, if repaired.

Debtor contacted E Motors West in Sacramento to obtain an estimate on the cost of a replacement vehicle and received a price quote for a 2004 Toyota

Tacoma, which was in the inventory, for $17,876.48 including tax and license fees. While this particular vehicle may not be available by the time the funds are released, it is the type of vehicle Debtor seeks.

The Chapter 13 Trustee filed a non-opposition to the Motion.

Here, the Debtor properly requests an order releasing the funds from the sale of real property to purchase a vehicle, as his current vehicle is in poor condition and not reasonable to repair. The 2004 Toyota appears to be a reasonable vehicle for the Debtors. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Release the Funds filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the motion is granted and the Chapter 13 Trustee, David Cusick, is authorized to release the $18,383.73 in funds from the sale of the real property commonly known as 2765 C lay Street, Sacramento, California, to the Debtors, Christopher and Leanne Rae.

37. 13-29251-E-13 DAMION BOATMAN **MOTION TO CONFIRM PLAN**
SS-4 Scott D. Shumaker **1-31-14 [70]**

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 31, 2014. By the court's calculation, 53 days' notice was provided. 42 days' notice is required. That requirement was met.

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

The Motion to Confirm the Amended Plan is granted. No appearance required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on January 31, 2014 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.

38. 13-32453-E-13 KIM HALILOVIC
PPR-1 Aaron C. Koenig

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY UNITED GUARANTY RESIDENTIAL INSURANCE COMPANY OF NORTH CAROLINA
10-31-13 [31]

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, Debtor's Attorney and Chapter 13 Trustee on October 31, 2013. By the court's calculation, 19 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. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection to Confirmation. No appearance at the March 25, 2014 hearing is required.

United Guaranty Residential Insurance Company of North Carolina, holder of a secured lien on 300 Fayette Way, Folsom, California opposed the confirmation of Debtor's Plan on the grounds that it opposed Debtor's Motion to Value the Secured Claim of United Guaranty Residential Company of North Carolina (serviced by Veripro Solutions, Inc.). At the hearing on the Motion to Value, Creditor requested additional time to appraise the real property.

The court continued the hearing on the instant Objection to 3:00 p.m. on December 10, 2013 for the Creditor and Debtor to obtain valuations and confer on the Motion to Value the Secured Claim, which was set for an evidentiary hearing on that date. The Chapter 13 Trustee filed an identical Objection, Dckt. No. 28, in which he opposed confirmation on the basis that the Motion to Value the Secured Claim of United Guaranty Residential Company of North Carolina (serviced by Veripro Solutions, Inc.) Had not been resolved.

On March 10, 2014, following an evidentiary hearing, the court granted Debtor's Motion to Value the Secured Claim. The court determined that the claim of United Guaranty Residential Insurance Company of North Carolina (serviced by Veripro Solutions, Inc.) secured by a junior deed of trust recorded against the real property commonly known as 300 Fayette Way, Folsom, California, is a secured claim in the amount of $0.00. The balance of the claim was designated a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property was determined to be $419,000.00 and encumbered by a senior lien securing claims which exceed the value of the Property. Order on Motion to Value, Dckt. No. 76.

WITHDRAWAL OF OBJECTION TO CONFIRMATION

On March 18, 2014, United Guaranty Residential Insurance Company of North Carolina filed a Withdrawal of its Objection to Confirmation. Dckt. 79.

The court's decision to grant the Motion to Value the Secured Claim and this Creditor's Withdrawal resolves the Objection to Confirmation to Plan in favor of the Debtor.

The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on September 24, 2014, 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.

39. 13-32453-E-13 KIM HALILOVIC
TSB-1 Aaron C. Koenig

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
10-30-13 [28]

CONT. FROM 3-10-14

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 30, 2013. By the court's calculation, 20 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. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to overrule the Objection to Confirmation of Plan. No appearance at the March 25, 2014 hearing is required.

The Chapter 13 Trustee opposed confirmation of the Plan on the basis that the plan relied on a pending motion to value the secured claim of United Guaranty Residential Insurance Company of North Carolina (serviced by Veripro Solutions). The court continued the hearing on the motion to 3:00 p.m. on December 10, 2013 for the Creditor and Debtor to obtain valuations and confer.

The court continued the hearing on this Objection, based on the pending Motion to Value, to be heard in conjunction with the Motion to Value the Secured Claim.

On March 10, 2014, following an evidentiary hearing, the court granted Debtor's Motion to Value the Secured Claim. The court determined that the claim of United Guaranty Residential Insurance Company of North Carolina (serviced by Veripro Solutions, Inc.) secured by a junior deed of trust recorded against the real property commonly known as 300 Fayette Way, Folsom, California, is a secured claim in the amount of $0.00. The balance of the claim was designated a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property was determined to be $419,000.00 and encumbered by a senior lien securing claims which exceed the value of the Property. Order on Motion to Value, Dckt. No. 76.

This order resolves Trustee's singular Objection to Confirmation, and it now appears that Debtor's plan does sufficient funds to pay the claims of Veripro Solutions and Seterus in full. Thus, the objection is overruled and the Plan is confirmed.

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

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

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

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on September 24, 2014, 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.

40. 13-29155-E-13 TSB-1 | **JERRY DESCHLER AND SALLY HUI-DESCHLER** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
Lucas B. Garcia | **8-21-13 [20]**

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 August 21, 2013. By the court's calculation, 27 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 tentative 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:

MARCH 25, 2014 HEARING

PRIOR HEARING

The Chapter 13 Trustee opposed confirmation of the Plan on the basis that the plan relies on a pending motion to Value Collateral, which was set on September 24, 2013. If the motion is not granted, Debtor's plan does not have sufficient monies to pay the claim in full. The court continued the hearing on this Motion so that the hearing can be conducted in conjunction with the hearing on the Motion to Value the Claim of PMAC Lending Services.

ORDER ON MOTION TO VALUE

On March 10, 2014, following an evidentiary hearing, the court granted Debtors Motion to Value the Secured Claim of PMAC Lending Services pursuant to 11 U.S.C. § 506. The court determined that the claim of PMAC Lending Services, secured by a senior deed of trust recorded against the real property commonly known as 2971 Great Egret Way, Sacramento, California is a secured claim in the amount of $280,000.00. The balance of the claim was designated a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property was determined to be $280,000.00 and encumbered by a senior lien securing claims which exceed the value of the Property. Order on Motion to Value, Dckt. No. 60.

In Debtors' Plan filed on July 10, 2013, Dkct. No. 5, PMAC Lending Services is listed as a Class 2 Creditor, with a secured interest in the real property located at 3971 Great Egret Way, Sacramento, California. The value of PMAC Lending Services' interest in the collateral is listed at $221,000.00, with a monthly dividend of $3,523.12 for duration of the plan, which is 60 months. Based on the court's order determining the value of the secured claim to be $280,000, Debtor's monthly payment is not sufficient to pay the claim of PMAC Lending in full.

Thus, 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.

41. 13-31359-E-13 RANDY/KIMBERLY CRISP
GW-1 Gary H. Gale

MOTION FOR COMPENSATION BY THE LAW OFFICE OF GERALD L. WHITE FOR GARY H. GALE, DEBTORS' ATTORNEY(S), FEES: $4,482.00, EXPENSES: $0.00
2-6-14 [17]

Counsel for Debtor Shall Address At the Hearing Whether This is Final Application and No Further Fees Will be Requested, 11 U.S.C. § 330, or an Interim Application Pursuant to § 331.

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 February 6, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required. That requirement was met.

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

FEES REQUESTED

Gary H. Gale, Counsel for the Debtors, makes a Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period August 30, 2013 through January 17, 2014. The Chapter 13 Trustee has filed a statement of non-opposition to this Motion.

The Motion requests this as a final fee application pursuant to 11 U.S.C. § 330. If so approved then no further fee applications may be made by Counsel for the services provided to the Debtors in this case.

At the hearing.....

Description of Services for Which Fees Are Requested

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

A. The motion is made pursuant to the provisions of 11 U.S.C. § 329 and 330(a).

B. Debtors have agreed to pay for attorney's time at the rate of $300.00 per hour. The total attorney fees and costs already approved in this case are $0.00.

C. The attorney fees requested to be approved by this motion are $8,610.00. The cost to be approved be approved by this motion is the $281.00 filing fee paid to the Court upon filing of the Voluntary Petition. The total fees and costs to be approved are $8,891.00.

D. Counsel has been paid $4,201.00 for pre-petition attorney fees and $281.00 for the filing fee, leaving a balance of $4,409.00 due. No previous application for fees has been filed in this case.

E. The requested attorney fees and/or costs are itemized in the Billing Statements filed as Exhibits B - E.

F. These attorney fees and/or costs were incurred for actual and necessary services representing Debtors and the billing rate is reasonable for this jurisdiction.

DECLARATIONS

Counsel offers two declarations in support of the Motion for Approval of Debtors' Attorney Fees and Costs. The first is a declaration from Randy and Kimberly Crisp, the Chapter 13 Debtors in this case. Debtors testify that they reviewed the billing statements prepared by Counsel, and agree that the fees are "reasonable and necessary" for their representation, and that they approve payment from funds that they paid in advance. They certify that they understand that they are not obligated to sign the declaration approving the fees and costs, and that if refused to do so, that they may appear at the hearing on the Motion to explain any opposition that they may have. Dckt. No. 19.

Debtors' declaration consists mostly of legal conclusions drawn under the standards of 11 U.S.C. § 330, in asserting that the fees and costs claimed by Counsel in this case are "reasonable and necessary for [Debtors']

representation" in the case, and that they "approve payment from funds" that were paid in advance of the Motion. *Id.*

The Declaration of Counsel, Gary H. Gale, however, offers some insight into the actual tasks and time spent by Counsel on this matter. Counsel states that he spent 22.4 hours on collecting the information necessary to analyze Debtors' financial affairs, establish an appropriate strategy and to prepare the petition, schedules and plan.

Counsel states that he spent 6.3 hours in obtaining confirmation of the Plan, performing various tasks like communicating with the Debtors and the Trustee, attending the meeting of creditors, and preparing the confirmation order.

Counsel spent 6.3 hours in reviewing claims and communicating with the Debtors and Creditors concerning the claims, and an additional 6.3 hours in reviewing and responding correspondence from the court, Debtors, creditors, and Trustee to manage the case and advise Debtors. Counsel offers the billing records and Chapter 13 Retainer Agreement entered between Counsel and Debtors in this case.

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 led to the confirmation of Debtor's Plan on October 29, 2013. Counsel communicated with Debtors and the Trustee, attended the meeting of creditors, drafted the Chapter 13 Plan, and prepared the confirmation order to obtain confirmation of the Plan. Moreover, Counsel reviewed the Proofs of Claims filed in the case, and communicated with creditors and Debtors concerning the claims. Counsel also spent time managing the case and advising Debtors by corresponding with Debtors, creditors, and the Trustee.

FEES ALLOWED

The hourly rates for the fees billed in this case are $300.00/hour for counsel. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. Counsel states that the total fees and costs to be approved are $8,891.00. Counsel has been paid $4,201.00 for pre-petition attorney fees and $281.00 for the filing fee (for a total of $4,482.00 in previously paid

fees), leaving a balance of $4,409.00 due. As of January 29, 2014, Counsel has received $2,000.00 from the Trustee from plan payments and the sum of $2,000.00 is held in trust for post-petition attorney fees and/or costs.

Thus, Counsel is requesting the following:

1. the approval of the prior payment to Counsel of pre-petition attorney fees and costs in the amount of $4,482.00, and

2. approval of the payment to Counsel of the balance of $4,409.00 in fees from the $2,000.00 of funds held in trust as of 1/29/14, and the balance of $2,409.00 from funds as received in trust from the Trustee thereafter.

The total attorneys' fees in the amount of $8,891.00 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 to Applicant as a professional in this case from the $2,000 of funds held by the trust for post-petition attorney fee and/or costs, and the balance of $2,409.00 from funds as received in the trust from the Trustee thereafter:

Attorneys' Fees	$4,409.00
Costs and Expenses	$ 0.00

The court also approves the prior payment of pre-petition attorney fees and costs in the amount of $4,482.00, having found that the services rendered by Counsel were actual and necessary in representing Debtors in their bankruptcy case.

For a total final allowance of $8,891.00 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 Counsel is allowed attorneys' fees int eh amount of $8,610.00 and costs of $281.00. After application of the pre-petition payments received from the Debtors, and the Trustee is authorized to pay, including any amounts paid post-petition pursuant to the Chapter 13 Plan, the following amounts as compensation to Gary H. Gale as a professional in this case:

Gary H. Gale, Counsel for the Estate

Attorneys' Fees	$4,409.00
Costs and Expenses	$ 0.00

This order includes approving the pre-petition payment of $4,482.00 for the attorney fees and costs in connection with the representation of the Debtors as party of the actual and necessary in representing Debtors in their bankruptcy case.

IT IS FURTHER ORDERED that this is a final award of fees 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.

42. 14-20160-E-13 KIM SCOTT — MOTION TO CONFIRM PLAN
CYB-1 Candace Y. Brooks — 2-11-14 [23]

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 February 11, 2014. By the court's calculation, 42 days' notice was provided. 42 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Both the Trustee and Creditor 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 Chapter 13 Trustee and Creditor U.S. Bank, National Association, both opposed the motion to confirm the Chapter 13 Plan.

The Trustee opposes confirmation of the proposed Plan on the basis that the Plan does not adequately cover the arrearage of a Class 1 Creditor. The monthly dividend proposed to Class 1 Creditor, ASC, in the amount of

$100.00 per month will not pay the claim in 60 months, but will rather take 320 months to pay the claim in full.

The U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-81 ("Creditor"), opposes confirmation of the Plan on the basis that the amount of pre-petition arrears specified in the Chapter 13 Plan is incorrect. Creditor asserts that the actual pre-petition arrearage is $42,574.96, and as a result, the Plan does not satisfy the requirements of 11 U.S.C. § 1325(a)(5)(ii) which states that the value of the property distributed under the plan on account of a secured claim be no less than the allowed amount of such a claim. Additionally, Creditor argues that pursuant to 11 U.S.C. § 1322(d), Debtor will have to increase the payments to Creditor under the plan to approximately $709.58 per month, in order to cure Creditor's pre-petition arrears over a period not to exceed sixty months.

Creditor has not yet filed a Proof of Claim asserting the pre-petition arrearage of $42,574.96, which Creditor states consists of: a) Missed Payments in the amount of $38,069.08; b) Escrow in the amount of $1,663.70; c) Fees in the amount of $2,473.00; and d) Late Charges in the amount of $369.18. Creditor's exhibits, filed in support of its Objection, includes the Corporate Assignment of the Deed of Trust; a statement notarizing the transfer of the deed; the Deed of Trust for the property commonly known as 4930 Crestview Drive, Carmichael, California; and the Promissory Note for the loan borrowed by Debtor secured by the subject property. Creditor does not include any documentation supporting its calculation of the arrears, and the actual remaining amount owed on the claim.

Regardless of the amount of arrears owed on the claim of ACS, the Trustee has objected to confirmation of the Plan on the basis that it does not cure the arrearage on the Claim of ACS for the First Deed of Trust. Thus, the Plan does not comply with 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B), and the Plan cannot be 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.

43. 13-34164-E-13 ANGELINA ROBINSON — MOTION TO CONFIRM PLAN
MMA-4 Mark Alonso — 2-3-14 [52]

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 February 3, 2014. By the court's calculation, 50 days' notice was provided. 42 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee having filed an opposition, the court will address the merits of the motion 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. In this instance, the Chapter 13 Trustee opposes confirmation of the Plan based on Debtor's delinquency, and the Plan relying on two Motions to Value which were denied by the court.

Trustee states that Debtor's original plan (Dckt. No. 11), called for payments of $4,755.00 for sixty months. Debtor's Amended Plan (Dckt. No. 56) called for payments of $4,755.00 for two months, and then $4,958.00 for fifty-eight months. Debtor is $4,957.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $4,958.00 is due on March 25, 2014. The case was filed on November 1, 2013, and the Plan in § 1.01 calls for payments to be received by the Trustee no later than the 25th day of each month, beginning the month after the order for relief under Chapter 13. Debtor has paid $9,511.00 into the plan to date.

Debtor cannot make the payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6) because Debtor proposes to value the secured claims of Joanne Robinson on three secured liens; the Motions to Value the Secured Claims of Joanne Robinson, Dckt. Control Nos. MMA-2 and MMA-3 were heard and denied by this court on February 25, 2013. Civil Minute Orders, Dckt. Nos. 71 and 72. Debtor's Motion to Value the Secured Claim, Mma-5, was heard and denied by this court on March 4, 2014. Civil Minute Order, Dckt. No. 75.

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.

44. 13-32466-E-13 TANESHIA WRAY — MOTION TO CONFIRM PLAN
PLG-1 Steven A. Alpert — 2-5-14 [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 Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 5, 2014. By the court's calculation, 48 days' notice was provided. 42 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee having filed an opposition, the court will address the merits of the motion 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 Chapter 13 Trustee objects to confirmation of the Plan on the basis that:

1. Debtor cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor proposes to value the secured claim of Heritage Community Credit Union on a 2006 Lexus, but has not filed a Motion to Value Collateral to date. Creditor filed a Proof of Claim, Claim No. 1, indicating the value of the property as $8,076.00; however, the secured claim amount is listed as $14,248.87.

2. Debtor may not be able to make the plan payments required under 11 U.S.C. § 1325(a)(6), or the plan may not be the Debtor's best efforts under 11 U.S.C. § 1325(b). The Amended Schedule J, Dckt. No. 36, changes the total expenses from $1,682.00 to $1,205.00 without explanation. The Amended Schedule shows the following changes:

Expense	**Original Schedule J**	**Amended Schedule J**	**Difference**
Rent/Mortgage	$1,000.00	$0	-$1,000
Property Insurance	$0	$50.00	+$50.00
Home Maintenance	$40	$40.00	+$40.00
Electricity	$45.00	$90.00	+$45
Water/sewer/trash	$0	$125.00	+$125.00
Cell phone	$57.00	$65.00	+$8.00
Personal care	$0	$70.00	+$70.00
Medical/dental	$15.00	$50.00	+$35.00
Transportation	$225.00	$250.00	+$25.00
Vehicle	$75.00	$200.00	+$125.00
Totals	**$1,682.00**	**$1,205.00**	**+$477.00**

While Debtor's Declaration (Dckt. No. 42) indicates that Debtor is not currently paying the mortgage and is seeking a loan modification (page 2, lines 4-5), the Declaration does not offer any explanation of why the remaining living expenses have changed from $1,682.00 to $1,205.00.

3. Debtor may not able to make the plan payments required under 11 U.S.C. § 1325(a)(6). Debtor's Declaration, Dckt. No. 42, indicates that Debtor is in the process of obtaining a second job, which will pay $20.00 hourly with up to 25 hours per week of work (page 2, lines 1-3), and that she will use this extra money to pay either modified mortgage or rent if the modification is denied. The second job income is speculative at this point, and the Debtor may not have the increased income to make the mortgage/ rent payments.

4. Debtor has not filed a Motion for Approval of a Loan Modification, not provided any evidence of Debtor's application for a loan modification to date.

Based on the foregoing, 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.

45. 10-38967-E-13 DPC-1 TIM/KATY JOHNSON Al J. Patrick

OBJECTION TO CLAIM OF BANK OF THE WEST, CLAIM NUMBER 9
2-6-14 [37]

Local Rule 3007-1(c)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, respondent creditor, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 47 days' notice was provided. 44 days' notice is required. That requirement was met.

Tentative Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(1) and (d)(3). 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 court's tentative decision is to overrule without prejudice the Objection to Proof of Claim number 9-1 of Bank of the West. 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:

There appears to be a typographical error in the Certificate of Service, Dckt. No. 41. The address for Bank of the West, the Claimant in this matter, is listed as "80 Montgomery Street, San Francisco, CA 94104." The address listed for Bank of the West on the Federal Deposit Insurance Corporation Institution Directory, however, is "180 Montgomery Street San Francisco, CA 94104." Information Gateway, Bank of the West, (March 24, 2014, 11:49 PM), http://www2.fdic.gov/IDASP/main.asp. The other addresses listed for Bank of the West are entities that have different certificates than the entity located in California.

Service was not properly effected on Claimant Bank of the West for this objection. Thus, the Objection is overruled without prejudice for defective service.

Alternative Ruling – However, if the Objecting Trustee can provide the court with evidence of proper service, the court's Alternative Tentative Ruling is set forth below:

The Proof of Claim at issue, listed as claim number 9-1 on the court's official claims registry, asserts a $19,292.09 claim. The Trustee objects to the Proof of Claim on the basis that it was not timely filed. *See* Fed. R. Bankr. P. 3002(c).

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

The deadline for non-governmental units to file a Proof of Claim in this matter was November 17, 2010. Dckt. No. 30. This creditor's claim was filed on September 29, 2011.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Bank of the West, filed in this case by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim number 9 of Bank of the West is sustained and the claim is disallowed in its entirety.

46. 11-24367-E-13 KAMELIYA LOZANOVA
SDB-3 W. Scott de Bie

MOTION TO VALUE COLLATERAL OF PNC BANK, N.A.
2-21-14 [41]

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 February 21, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion is granted and creditor's secured claim is determined to be $0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property, a residential duplex, commonly known as 2184 and 2186 McGregor Drive, Rancho Cordova, California. The Debtor seeks to value the property at a fair market value of $280,000.00 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 $375,805.61. Creditor PNC Bank, N.A.'s second deed of trust secures a loan with a balance of approximately $84,393.98. 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 PNC Bank, National Association, secured by a second deed of trust recorded against the real property commonly known as 2184 and 2186 McGregor Drive, Rancho Cordova, 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 $280,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

47. 09-24071-E-13 MOHAMMAD KHAN AND CINDY EMERICK-KHAN — MOTION TO MODIFY PLAN 2-18-14 [104]
WW-5 Mark A. Wolff

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 February 18, 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. The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtors are delinquent $83.00 under the terms

of the proposed modified plan. According to the proposed modified plan, payments of $36,408.00 have become due. Debtors have paid a total of $36,325.00 to the Trustee, with the last payment posted on September 10, 2013, in the amount of $1,170.00. Debtor's modified plan proposes plan payments of $626.00 for 58 months, then $100.00 for 2 months.

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

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

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

48. 10-48671-E-13 MICHAEL/TERRI RICKER — MOTION TO REFINANCE
JSO-1 Jeffrey S. Ogilvie — 2-25-14 [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 Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 24, 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 Refinance of the Home Loan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Motion to Approve Refinance of the Home Loan 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:

Debtors seek authorization to refinance their first mortgage loan, secured by the property located at 2680 Starlight Blvd., Redding, California. Debtors currently have a loan with Wells Fargo Bank, N.A., holder of the First Deed of Trust against property commonly known as 2680 Starlight Blvd., Redding, California. The current unpaid balance is approximately $295,00.00, for 30 years with a monthly payment of $1,9868.07 and a 5.00% interest rate.

Debtors state that as of March 27, 2014, the new principle balance owed to Wells Fargo Bank, N.A. Loan No. 0368777561, will be $296.687.57. The interest rate will be 4.375% for years 1-30. Exhibit B, FHA/VA Commitment Letter, Dckt. No. 37. The proposed payment will include principal, interest, and impound account and the new total monthly payment would be $1,754.13, beginning on May 1, 2014. Exhibits C and D. Adjustments to the impound account may adjust periodically in accordance with the applicable law and therefore the total monthly payment may change accordingly. The ongoing mortgage payment with property taxes and insurance will be reduced from $1,968.07 to $1,754,13, for a savings of $213.94.

Debtors state that they are not receiving any cash from the loan refinance. Debtors have also filed revised Schedules I and J, that were filed concurrently with this Motion. Exhibit E. Debtors further state that they want a waiver of the 10-day stay under Bankruptcy Rule 6004(g). Debtors do not, however, allege any facts and circumstances that would warrant a waiver of the stay.

TRUSTEE'S RESPONSE TO DEBTORS' MOTION

Trustee has no objection to the refinance requested in Debtors' Motion, but objects specifically on the motion averring that, "Debtor will not receive any cash from the loan Refinance." Motion, Line 8 at Page 2, Dckt. No. 32. According to the Uniform Settlement Statement, Dckt. No. 35, page 16, Box 303, Debtors are to receive $1,070.83. Trustee requests that any funds received by Debtors be paid to the Trustee for the benefit of unsecured creditors, unless the reason for the Debtors needing these funds is adequately explained.

Debtors filed an Amended Schedule I, Dckt. No. 30, Pages 4-5, and an Amended Schedule J, Dckt. No. 30, Page 6, on the old official form. The Amended Schedule I is the exact same as the original, with the exception of the word Amended, which shows the Debtors' income as the same amount to the penny as it was over 40 months ago, when Debtor had been employed for only four months at the time. Dckt. No. 1, Pages 27-28. Trustee notes that the Amended Schedule J reports average monthly expenses as $5,679.02, which is the exact same as reported in Dckt. NO. 1, Page 29, even though Line 1 has decreased $287.64. Trustee also notes Line 18. Average Monthly Expenses of the Amended Schedule J total $5,680.02, not $5,679.02 as reported. Trustee is not otherwise opposed to the motion.

The Trustee requests that the court grant the motion, but order any proceeds due to the Debtors be paid into the plan, as an additional payment for the benefit of unsecured creditors.

DISCUSSION

A review of the evidence filed in support of the Motion raises the additional concern about whether Debtors loan modification is being prosecuted in good faith. In their Declaration, Debtors state that as of March 27,2013, the new balance owed on the loan will be $296,616.74; the interest rate will be 4.375% for years 1-30, with adjustments made to the impound account periodically. Debtors attach copies of a "FHA/VA Commitment Letter," a statement of their monthly housing expenses, and a "Uniform Settlement Statement," designated as Exhibits B-D, in support of this Motion. Dckt. No. 35.

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).

Debtors do not, however, attach a copy of their loan modification agreement, to the motion. Rather, Debtors offer Exhibit B, labeled on their Exhibit Cover Sheet as an "FHA/VA Commitment Letter" (presumably from lender Wells Fargo Bank, N.A., although Wells Fargo Bank, N.A.'s name is nowhere to be found in the excerpts of the letter provided).

The letter, signed by "Franklin Codel, Executive Vice President" of an undisclosed entity, indicates that, the Commitment Letter is stated to expire on March 14, 2014, though it is not clear whether expiration occurs when a response is not received, when the terms offered are not accepted, when the conditions set forth on Page 3 of the letter are not discharged, etc. The conditions outlined on Page 3 of the Commitment letter are requests for final loan documents and an overview of the escrow closing requirements. The court has no objection to Debtors or a Trustee finalizing the conditions precedent to the loan being funded after an order approving the modification issued, so long as the loan terms are specified so that the loan properly states the terms for the approved borrowing.

The court is concerned, however, that the March 14, 2014 deadline stated in the Commitment Letter has passed, and the court is uncertain as to whether actual loan modification has been negotiated, since no loan modification agreement has been presented to the court for review and approval.

The Lender has not been identified in the Exhibits filed in support of the Motion, since the Commitment Letter offered is devoid of any mention of the Lender to the agreement. Debtors have also not responded to the issues raised by Trustee, regarding the "Amended" Schedules that show that Debtors' income has remained unchanged for the last three years, and is the exact same amount as it was when Debtor had only been employed for several months at a time. Schedule J, in particular, reports the same figure for average monthly expenses, even though certain line items have decreased. Trustee also observes that Debtors' representation of the figures in the Amended Schedule J conflict with one another.

Additionally, Debtors' assertion that they will not receive any cash from the refinancing of the loan appears to be incorrect. The Uniform Settlement Statement labeled as Exhibit "C" in support of the Motion summarizes the terms of the transaction between the borrower and lender, listed here as Debtors and Wells Fargo Bank, N.A. The Statement covers the tax assessments and insurance fees calculated as part of the loan costs. The statement reflects that a cash amount of $1,070.83 will be paid to the borrower, and that the total costs paid by the borrower will be $296,687.57. Dckt. No. 35 at page 16, Boxes 220 and 303. No explanation has been provided by Debtor concerning whether these funds will be paid to the Trustee for the benefit of the estate and distribution to the holders of unsecured claims.

The Debtors not having provided an explanation for the court and Trustee's concerns regarding possible inaccuracies in the reporting of Debtors' expenses; the lack of identification of the Lender in the exhibits filed; the uncertainty surrounding the distribution of funds that will be disbursed to Debtors under the Uniform Settlement Statement; and the status of the loan modification offer after the deadline has passed to accept (as stated on the Commitment Letter), 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 Refinance 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 Motion to Approve Refinance of the Home Loan is denied without prejudice.

49. 10-49971-E-13 RAMON/KELLY YEE
CYB-3 Candace Y. Brooks

CONTINUED MOTION TO APPROVE LOAN MODIFICATION
12-17-13 [51]

Final Ruling: The court's final ruling is stated below. No appearance at the March 25, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors on December 17, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

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 decision is to continue the hearing to 3:00 p.m. on April 8, 2014.

MARCH 25, 2014 HEARING

On March 21, 2014, Green Tree Servicing, LLC and the Debtors filed a stipulation to continue the hearing April 8, 2014. The court grants that request.

REVIEW OF MOTION

Debtors state that **Green Tree Servicing, LLC**, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment from the current $3,108.61 to $1,220.80, for which payment begins on December 1, 2013. The yearly rate of 4.0000% will remain in effect until the Interest Bearing Principal Balance and all accrued interest thereon has been paid in full. $115,006.33 of the New Principal Balance shall be deferred. The new maturity date on the Note will be November 1, 2053.

PRIOR HEARING

The court previously continued this Motion for several reasons. First, the Certificate of Service for this Motion, filed on December 17, 2013 (Dckt. No. 55), reflected that the Chapter 13 Trustee, David Cusick, was not served. The court noted that one of the primary responsibilities of the Trustee is to serve as a disbursing agent, collecting payments from Debtors and distributing funds to creditors pursuant to 11 U.S.C. § 1302, making the Chapter 13 Trustee an integral player in ensuring that the

bankruptcy estate is efficiently and properly administered. The Chapter 13 Trustee must appear and be heard at any hearing that concerns the modification of a plan after confirmation, under 11 U.S.C. § 1302(b)(2). The court informed Movants that in attempting to reduce Debtors' monthly mortgage payment by seeking court approval of Debtors' Loan Modification, Debtors are pursuing a matter in which the Chapter 13 Trustee is a real party in interest, and thus the Chapter 13 Trustee had to be served.

Second, there were defects in service to one of the Debtors' Creditors, the Internal Revenue Service. The court stated that Local Bankruptcy Rule 2002-1 requires that notices in adversary proceedings and contested matters served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified. The court determined that the defect in serving the Internal Revenue Service, however, was not fatal to Debtors' Motion (as the Internal Revenue Service is not involved with Debtor's loan modification, and the modification will result in the reduction of payment to Secured Creditor Green Tree Servicing), and therefore waived the problems of service to the Internal Revenue Service.

Third, the court expressed concern that Green Tree Servicing, LLC was not the owner of the Note to be modified, and not the creditor in this case. Proof of Claim No. 19 filed by Bank of America, N.A. on May 6, 2013, states under penalty of perjury that the Bank is the creditor in this case.

At the January 14, 2014 hearing on the Motion, the court continued the hearing on this matter to March 4, 2014. The court further ordered Debtors to file supplemental documents on or before February 18, 2014. Civil Minutes, Dckt. No. 56. No supplemental documents have yet been filed.

Debtors and "Creditor" Green Tree Servicing, LLC, however, stipulated to continue the hearing on the Motion to March 25, 2014, to allow Green Tree to revise the loan modification pursuant to the previously expressed requirements of this court. Stipulation, Dckt. No. 60. The stipulation was approved by the court and the court issued an order continuing the hearing on the Motion to Approve Loan Modification to this date. Order on Stipulation, Dckt. No. 61. Nothing further has been filed by Green Tree Servicing, LLC, or the Debtors. The Trustee filed a Notice of Default and Application to Dismiss the case, based on Debtors' delinquency in payments, on March 12, 2014. Dctk. No. 62.

50. 13-34373-E-13 RUSSELL/TINA CALDWELL — MOTION TO CONFIRM PLAN
LBG-2 Lucas B. Garcia — 2-7-14 [36]

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 February 7, 2014. By the court's calculation, 46 days' notice was provided. 42 days' notice is required. That requirement was met.

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

The Motion to Confirm the Amended Plan is granted. No appearance required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the 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, Debtor's Chapter 13 Plan filed on February 7, 2014, 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.

51. 10-47375-E-13 SS-2 — DAN/JOSELYN HOWARD — Scott D. Shumaker — MOTION TO APPROVE LOAN MODIFICATION — 2-12-14 [41]

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, and Office of the United States Trustee on February 12, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required. That requirement was met.

Final 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). 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 Approve the Loan Modification is granted. No appearance required.

Wells Fargo Bank, N.A., 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 a total monthly payment of $1,30.30. The Principal Loan Balance will be reduced to $198,850.00, and the loan term shall be extended to 40 years and shall mature on December 1, 2053. The new interest rate will be 4% for the life of the loan. The new monthly mortgage payment shall be $831.49 for principal and interest. Debtors will additionally pay an escrow payment in the amount of $298.81 monthly, for a total monthly payment of $1,130.30. The escrow payment is subject to adjustment per applicable State and Federal Laws.

The amount of $44,919.47 shall be deemed a "Deferred Principal Balance" which shall be due and payable upon expiration of the 40-year loan. All liens secured by the subject property will be paid in a manner consistent with the confirmed Chapter 13 Plan. Debtors will not receive any proceeds from the loan modification, and the balance of any pre-petition mortgage arrears, if any, will be cured by the loan modification.

There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by 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 Dan and Joselyn Howard, the Debtors, are authorized to amend the terms of their loan with Wells Fargo Bank, N.A., which is secured by the real property commonly known as 4525 Spellbinder Court, Sacramento, California, and such other terms as stated in the Modification Agreement filed as Exhibit "1," Docket Entry No. 44, in support of the Motion.

52. 13-30580-E-13 JRH-3 — CHARLEE SHAW / John R. Harrison — MOTION TO VALUE COLLATERAL OF CITIMORTGAGE — 2-21-14 [56]

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, and respondent creditor on February 21, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion is granted and creditor's secured claim is determined to be $0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 6229 Jack London Circle, Sacramento, California. The Debtor seeks to value the property at a fair market value of $115,633.00 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 $210,000.00. Creditor CitiMortgage, Inc.'s second deed of trust secures a loan with a balance of approximately $31,000 (which is listed as $31,077.00 on Debtor's Amended Schedule D). 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. FN.1.

FN.1. The court makes no determination that Citimortgage, Inc. is a creditor in this case. No proof of claim has been filed for the claim at issue. Commonly it is Citibank, N.A. which is the creditor, with Citimortgage, Inc. providing loan servicing support. At this point the court does not have information from which to question Debtor's statement that it is Citimortgage, Inc. which is the creditor 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 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 CitiMortgage, Inc., secured by a second deed of trust recorded against the real property commonly known as 6229 Jack London Circle, Sacramento, 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 $115,633.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

53. 13-30580-E-13 CHARLEE SHAW **MOTION TO CONFIRM PLAN**
JRH-4 John R. Harrison **1-22-14 [49]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 22, 2014. By the court's calculation, 62 days' notice was provided. 42 days' notice is required. That requirement was met.

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

The court's tentative decision is to grant the Motion 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. Here, the Chapter 13 Trustee opposes confirmation of the Plan on two grounds:

1. The Plan relies on the pending Motion to Value the Secured Claim of CitiMortgage, which is set for hearing on this date. If the motion to value is not granted, Debtor's plan does not have sufficient monies to pay the claims in full.

   The court has granted the Motion to Value the Secured Claim of CitiMortgage, Inc., JRH-3, thus resolving this part of the Trustee's objection.

2. Trustee states that Debtor's plan term is incorrect, in that Debtor is over the median income, according to the Form B22C, and Debtor is proposing a plan term of 55 months. The plan term, however, should be 60 months. Trustee states that he would not oppose the confirmation of the plan, if this amendment is provided for in the order confirming.

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 January 8, 2014, with an amendment stating that the duration of the Plan is 60 months (and not 55 months), is confirmed.

IT IS FURTHER ORDERED that 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.

54. 14-20181-E-13 DANTE THOMAS
NLE-1 Michael H. Luu

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
2-20-14 [15]

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 February 20, 2014. By the court's calculation, 33 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:

Failure to Provide for Secured Claims

The Chapter 13 Trustee ("Trustee") opposes confirmation of the Plan on the basis that Debtor fails to provide for secured claims. According to the Trustee, Debtor's Plan fails to provide for Bank of America's second deed of trust listed on Schedule D. The Trustee alleges that the failure indicates that Debtor either cannot afford the payments due to additional debts, or that Debtor wants to conceal his property.

The Debtor's Schedule D estimates the amount of Bank of America's claim as $240,000.00 and indicates it is secured by a second trust deed on the Debtor's residence. According to the Schedule, the secured portion of Bank of America's claim is $135,043.00. The Plan does not provide for treatment of this claim.

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for the respondent creditor's secured claim, raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). This is reason to sustain the objection.

The Trustee also alleges that the Plan fails to provide for a secured claim filed by IRS in the amount of $12,180.44.

Failure to Provide a Monthly Dividend for Attorney Fees

In addition, the trustee notes that the Plan in fails to provide a monthly dividend to pay the attorney fees owed. § 2.07 of the Plan provides that $0.00 of each monthly plan payment shall be paid on account of approved additional attorney's fees.

Plan is Not Debtor's Best Effort

Lastly, the Trustee alleges that the Plan is not Debtor's best effort. According to the Trustee, Schedule I lists Debtor's non-filing spouse as self-employed but does not provide her monthly income. Debtor also fails to include the non-filing spouse's monthly expenses in his Schedule J.

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.

55. 12-34482-E-13 LRR-11 — PETER BOWLING AND MARILYN — Len ReidReynoso — OBJECTION TO CLAIM OF LEROY DEL MOWRY PRETE, CLAIM NUMBER 24 — Len ReidReynoso2-6-14 [231]

Local Rule 3007-1(c)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 6, 2014. By the court's calculation, 46 days' notice was provided. 44 days' notice is required. That requirement was met.

Tentative Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(1) and (d)(3). The 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 Objection to Proof of Claim number 24 of Leroy Del Prete is sustained, without prejudice to the Creditor filing an Amended Proof of Claim on or before April 29, 2014. 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 Proof of Claim at issue, listed as claim number 34 on the court's official claims registry, asserts a $105,333.33 claim. The Creditor, Leroy Del Prete, filed the Claim on January 15, 2014. The Debtors object to the Proof of Claim on the basis that claim is a debt of Oasis Ranch, Inc., and not a personal debt of the Debtors'. Debtors attach the Loan Agreement entered between Oasis Ranch, Inc. and Leroy Del Prete ("Creditor") as Exhibit "A," which identifies Oasis Ranch, Inc. as the borrower. FN.1.

FN.1. A review of the court docket shows that the purported Loan Agreement was not filed separately as an Exhibit, but rather, attached to the Objection itself. Dckt. No. 231. Debtors are advised that future pleadings and supporting documentation must be filed in compliance with Federal Rule of Bankruptcy Procedure 9013 (requiring the motion to state with particularity the grounds for the relief requested) and Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, which require that the motion, points and authorities, each declaration, and the exhibits document be filed as separate electronic documents.

Debtors assert that the agreement does not state that the loan is personally guaranteed, and therefore the claim should not be allowed as a claim in Debtors' personal bankruptcy. Debtors request that the claim of Leroy Del Prete be disallowed in its entirety.

OPPOSITION BY CREDITOR

The Creditor opposes the objection to the allowance of his claim, on the grounds that Oasis Ranch, Inc., is a corporation solely owned by the Debtors. Creditor loaned the sum of $100,00.00 to Oasis Ranch, Inc. On December 30, 2009. The loan was extended on December 31,2010. It was due and payable on December 29, 2012. Creditor states that he is informed and believes that the primary asset of Oasis Ranch, Inc., was "the real estate wherein it conducted business at 11905 Borden Road, Herald, California."

Debtors filed their Chapter 13 petition on August 7, 2012, at 2:17 pm. On August 7, 2012 at 2:39 pm, Joint Debtor Marilyn Mowry, acting as the president of Oasis Ranch, Inc., transferred the real estate known as 11905 Borden Road, Herald, California from Oasis Ranch, Inc., to Marilyn Mowry as a married woman. Creditor also notes that Debtors' bankruptcy counsel also acted as the notary who notarized the Grant Deed. Exhibit A, Copy of the Grant Deed, Dckt. No. As noted on the Grant Deed, there was no consideration given for transferring the property to the debtor. This is reflected in the declaration for the documentary transfer tax of -0-, referring to the transfer as a "gift."

It is the creditor's position that the transfer of real estate, which according to Schedule A of the Debtors' petition, had a value of $780,000.00,, constituted a fraudulent conveyance of the property of the corporation, which entitles the creditor to a claim in Debtors' Chapter 13 case. Creditor also points out that the Chapter 13 Plan provides for the sale of real estate for Debtors to fund their Chapter 13 Plan. Creditor requests that the court treat this objection to claim "as a contested matter," as to allow discovery to be conducted and set the matter for an evidentiary hearing. FN.1.

FN.1. An Objection to Claim is a contested matter (non-adversary proceeding) under Federal Rule of Bankruptcy Procedure 9014. The court interprets the Creditor's request to be for a discovery schedule.

DISCUSSION

The Debtors and Creditor raise several issues that require the Creditor to clearly and expressly state the basis for the claim in the Proof of Claim form itself. This affords the Debtors the opportunity to fully understand the claim being asserted, requires Creditor to state the grounds upon which the claim lives or dies, and will provide the court a claim and objection that can be properly managed through the federal judicial process. This is preferable to going with a generic claim for money loaned and then have supplemental pleadings identifying why and how the Debtors could be liable for the payment of that loan.

Summary of Positions

Debtors state that the subject loan, which serves as the basis for the claim of Leroy Del Prete, was not personally guaranteed. The Debtors offer the Loan Agreement between the Creditor, Leroy Del Prete of PO Box 1270 Linden, California, which is identified as the "Lender;" and Oasis Ranch, Inc. of 11905 Borden Road, Herald, California, which is identified as the "Borrower." Dckt. No. 231. The Agreement is signed by Leroy Del Prete and "Marilyn Mowry for Oasis Ranch, Inc."

The Declaration of Joint Debtor Marilyn Diane Mowry states that she, "as president of Oasis Ranch, Inc.," signed a Loan Agreement with Leroy Del Prete for $100,000.00. Marilyn Mowry states that the loan was not personally guaranteed. ¶ 3, Declaration of Marilyn Diane Mowry, Dckt. No. 233. A search on the California Secretary of State Business Entity Search reveals that the business known as "Oasis Ranch, Inc.," located at 11905 Borden Road, Herald, California, has been suspended and that "Marilyn Mowry" is the designated agent for service of process. Business Entity Detail, Oasis Ranch, Inc., (March 20, 2014, 12:14 PM), http://kepler.sos.ca.gov/.

Debtors appear to be the principals of the business known as Oasis Ranch, Inc., but it is unclear whether the claim is based on a personal guarantee for the loan agreement executed by Oasis Ranch, Inc. or some other legal theory. Debtors state that they did not sign a personal guarantee for the loan and agree to be personally liable for the repayment of the loan, and therefore their bankruptcy estate is not liable for the debt of Oasis Ranch, Inc. Creditor does not respond to Debtors' assertion that the loan was not personally guaranteed, and as a result is not Debtors' personal debt. The loan of Leroy Del Prete is not listed in Debtors' Schedules. Dckt. No. 1.

Furthermore, the court notes that on March 12, 2014, Debtors filed a Chapter 12 Case with the Honorable Robert S. Bardwil, Case No. 14-22483, as individual Debtors, notwithstanding being Debtors in the present case.

Creditor alleges that a fraudulent transfer of the real estate, was effected by Joint Debtor Marilyn Mowry, when Mowry, acting as the president of Oasis Ranch, Inc., transferred the real estate known as 11905 Borden Road, Herald, California from Oasis Ranch, Inc., to herself as a married woman, a mere 22 minutes after Debtors filed for Chapter 13 Bankruptcy. Creditor offers the Grant Deed recorded by the Sacramento County Recorder, Dckt. No. 238, which shows that the real property described as 11905 Borden Road, Herald, California was transferred from Oasis Ranch, Inc., a California Corporation to Marilyn Mowry, as a married woman, on August 7, 2012 at 2:39:22 pm. The transfer was indeed notarized by Len ReidReynoso, the attorney of record for Debtors in this bankruptcy case. Dckt. No. 238.

This is stated in the Opposition to the Objection to Claim and is not clearly stated on Proof of Claim No. 24. Possibly, in some generally pleaded way, monies loaned as the basis for the Claim could include "monies loaned to Oasis Ranch, Inc., for which the assets to pay were transferred to the Debtors 22 minutes before the bankruptcy case was filed, and thereon the Debtors, as transferees of a fraudulent conveyance are personally liable for

the loan up to the value of the assets transferred." However, that is not sufficient for the prosecution of a claim, if any, in this case.

Objection to Claim Standard

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

Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. FRBP 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. The court must look to 11 U.S.C. § 502(b) for the exclusive grounds to disallow a claim. *In re Heath*, 331 B.R. 424, 426 (9th Cir. BAP 2005).

11 U.S.C. § 502(d) additionally provides that the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

In Creditor's opposition to the Objection to Claim, Creditor states that,

> [T]he transfer of real estate, which according to the Schedule A of the debtors' petition on file herein had a value of $780,000, constituted a fraudulent conveyance of the property of the corporation which entitles the creditor to a claim in the debtors' Chapter 13 case pending herein.

Here, Proof of Claim No. 24 fails to expressly state that or other basis for Creditor asserting the claim in this case for "monies loaned" or that Creditor has the right to recover the Property from the estate.

Proof of Claim No. 24 consists only of the Proof of Claim form, which indicates that,

A. The amount of claim is $105,333.33,

B. The basis for the claim is "money loaned," and that

C. The claim was filed and signed by Charles Hastings, attorney of record for the Creditor.

The claim does not include:

A. Any supporting documentation showing the basis for the claim;

B. A copy of the loan agreement entered between Debtors' corporation and the Creditor;

C. Arguments made on the grounds stated in Creditor's opposition, namely that the "midnight transfer" that Joint Debtor Marilyn Mowry executed as an officer of Oasis Ranch, constitutes a fraudulent conveyance of the property of the corporation under California law.

D. Allegations that Creditor is entitled to the recovery of the amount loaned, on the grounds that property of the corporation was fraudulently transferred to Debtors.

RULING OF THE COURT

At this juncture, the court cannot rule on the merits of the Claim because the grounds are not clearly stated in the Proof of Claim. As stated above, the court will not proceed with a generic demand for money, with "actual grounds to follow at trial."

However, Creditor Leroy Del Prete's allegations that the transfer of property from Oasis Ranch, Inc. to Joint Debtor Marilyn Mowry constitutes a fraudulent conveyance states a cognizable basis for not rejecting the Claim by final order out of hand. Creditor has alleged particular facts, such as the timing of the transfer, the identities of the transferee and transferor, and that the attorney of record for Debtors role in notarizing the transfer documents, that indicate Creditor has reasonable grounds in bringing an action against Debtors as the beneficiary of such a conveyance under potential non-bankruptcy law claims.

Therefore, the court sustains the Objection to Proof of Claim No. 24, without prejudice, and with leave granted the Creditor to file an amended proof of claim on or before April 29, 2014. The amended proof of claim shall include as an attachment a document setting forth the allegations upon which Creditor asserts the claim, using the same pleading format as used in a Complaint in Federal Court (including complying with the requirements of and Federal Rule of Bankruptcy Procedure 7007, 7008, and 7009, and Federal Rule of Civil Procedure 7, 8, and 9 to the extent incorporated into said Federal Rule of Bankruptcy Procedure.

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

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

The Objection to Claim of 24 of Leroy Del Prete, "Creditor," filed in this case by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim number 24 of Leroy Del Prete, Creditor, is sustained, without prejudice, and with leave for Creditor to file and serve on counsel for the Debtors amended proof of claim as further provided in this Order.

IT IS FURTHER ORDERED that Creditor is granted leave to file an amended proof of claim on or before April 29, 2014. The amended proof of claim shall include as an attachment a document setting forth the allegations upon which Creditor asserts the claim, using the same pleading format as used in a Complaint in Federal Court (including complying with the requirements of and Federal Rule of Bankruptcy Procedure 7007, 7008, and 7009, and Federal Rule of Civil Procedure 7, 8, and 9 to the extent incorporated into said Federal Rule of Bankruptcy Procedure.

56. 10-36985-E-13 DANIEL/KRISTINA BROWN CONTINUED MOTION TO MODIFY PLAN
WW-4 Mark A. Wolff 1-23-14 [64]

Final Ruling: The court has issued a final ruling on this Motion. No appearance at the March 25, 2014 hearing is required.

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 23, 2014. By the court's calculation, 61 days' notice was provided. 35 days' notice is required. That requirement was met.

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 decision is to grant the Motion to Confirm the Modified Plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the feasibility of the plan is dependent on the Motion to Authorize Loan Modification, WW-5, set for March 11, 2014. According to the Trustee's calculations, if the Motion to Authorize Loan Modification is denied, the plan will be overextended and complete in 71 months, as opposed to the 60 months proposed.

The court has granting Debtors' Motion to Approve the Loan Modification, WW-5. Thus, the Trustee's sole objection is resolved. 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 January 23, 2014 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.

57. 10-36985-E-13 DANIEL/KRISTINA BROWN
WW-5 Mark A. Wolff
CONTINUED MOTION TO APPROVE LOAN MODIFICATION
1-23-14 [70]

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 23, 2014. By the court's calculation, 61 days' notice was provided. 28 days' notice is required. That requirement was met.

Final 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). 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 Approve the Loan Modification is granted. No appearance required.

Debtors seek an order authorizing a loan modification agreement with Green Tree Servicing, LLC, which now services the first trust deed of BAC Home Loans Servicing for Debtors' residence, located at 10145 Saintsbury Court, Elk Grove, California. Green Tree Servicing, LLC, whose claim the plan provides for in Class 1 (as Debtors prefer Trustee to continue to pay the first mortgage), has agreed to a loan modification which will reduce the Debtor's monthly payment, including escrow, to $1,488.93. The new principal balance will be $299,552.68, with a commitment term of 480 months, and an interest rate of 4.0000%.

The value of Debtors' residence at the time the case was filed was $240,000.00. The amount owed to BAC Home Loans Servicing was $303,779.00 at the time the case was filed. A copy of the Loan Modification Agreement was filed in support of the Motion, and is designated as Exhibit "A" on Dckt. No. 73. The Agreement identifies Green Tree Servicing, LLC, as the Lender, and the subject property as 10145 Saintsbury Ct., Elk Grove, California.

There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by 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 Debtors are authorized to amend the terms of their loan with Green Tree Servicing, LLC, which is secured by the real property commonly known as 10145 Saintsbury Ct., Elk Grove, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 73, in support of the Motion.

58. 12-27387-E-13 ERROL/MELANI LAYTON — **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, N.A.**
Mary Ellen Terranella — **5-23-12 [30]**

Final Ruling: The court having approved the Joint Stipulation continuing the hearing on the Debtor's Plan from March 25, 2015, the **hearing on this matter is continued to 3:00 pm on June 3, 2014.** Dckt. No. 96. The discovery cut-off date in connection with the Objection and Debtors' Plan is extended from February 28, 2014, up to and including April 30, 2014. No appearance is required at the March 25, 2014 hearing.

59. 14-20187-E-13 JOANNA FRITTER
TSB-1 Gary H. Gale

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
2-26-14 [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 and Debtor's Attorney on February 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

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 hearing on the Objection to Confirmation of Plan is continued to 3:00 pm on April 29, 2014. No appearance at the March 25, 2014 hearing is required.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor admitted at the First Meeting of Creditors, held on February 20, 2014, that she has not filed her tax returns during the 4-year period preceding the filing of the Petition, specifically for the tax year of 2012. Filing of the return is required. 11 U.S.C. § 1308. Debtor's failure to file the return is grounds to dismiss the case. 11 U.S.C. § 1307(e). The Meeting of Creditors was continued pursuant to Debtor's counsel's request, to April 17, 2014 at 10:30 am, to allow Debtor time to file the tax return.

Trustee therefore requests that the court continue this Objection to Confirmation to April 29, 2014 at 3:00 pm, which is after the Continued First Meeting of Creditors set for April 17, 2014 at 10:30 am. If Debtor does not resolve the Trustee's objection, then Trustee asks that the court deny confirmation of the Plan.

Statement of Non-Opposition by Debtor

Debtor filed a notice of non-opposition to Trustee's Objection, Dckt. No. 40, stating that she has no objection to the court continuing the hearing to April 29, 2013 at 3:00 pm. Debtor also states that she will not appear at the March 25, 2014 hearing.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The 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 hearing on the Objection to Confirmation of Plan is continued to 3:00 pm at April 29, 2013.

60. 13-26191-E-13 WANDA MOORE — MOTION TO MODIFY PLAN
PGM-2 Peter G. Macaluso — 2-5-14 [32]

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 February 5, 2014. By the court's calculation, 48 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. The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor may not be able to afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Section 1.01 of Debtor's modified plan proposes plan payments of $9,800.00 total paid in through December 13, 2013, a $1,500.00 payment in January, 2014, then $1,910.00 for 52 months beginning on February 2014.

Debtor's Supplemental Schedule J, filed on February 5, 2014, Dckt. No. 35, indicates Debtor's monthly expenses are $1,718.93, with a monthly net income of $1,910.07. Debtor's Supplemental Schedule I reflects a monthly income of $3,629.00, which is the same as Debtor's prior Schedule I filed May 3, 2013. However, Debtor's income as listed is actually only $3,179.00 due to Debtor's Schedule I no longer including $450.00 in monthly rental income ($3,629.00-$450.00=$3,179.00). A monthly net income of $3,179.00 less expenses of $1,718.93 leaves a net income of $1,460.06, which is insufficient to make the proposed plan payment of $1,910.00.

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

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

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

61. 13-35991-E-13 RAMON CRUZ — **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
THRU #65 — **Karl-Fredric J. Seligman** — **11-22-13 [1]**

Debtor's Atty: Karl-Fredric J. Seligman

Notes:

Continued from 1/14/14 to be heard in conjunction with other matters on calendar.

62. 13-35991-E-13 RAMON CRUZ **MOTION TO DISMISS CASE**
Karl-Fredric J. Seligman **2-13-14 [52]**

Correct Notice Not Provided: No Proof of Service was filed. Thus, the court cannot determine whether notice was provided and whether the Motion to Dismiss Case and supporting documentation were served on the Chapter 13 Trustee, the Office of the United States Trustee, and creditors in this case.

No Tentative Ruling: The Motion to Dismiss was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified here and such other issues as are necessary and appropriate to the court's resolution of the matter.

MARCH 25, 2014 HEARING

At the Hearing, XXXXXXXXXXXXXXXXXXXX

DISCUSSION OF CASE AND CONDUCT OF DEBTOR

Debtor moves for an order to dismiss the case pursuant to 11 U.S.C. § 1307. In his motion, Debtor alleges that he cannot propose a feasible plan in the Eastern District. Debtor states that he can only propose such a plan in the Northern District, which allows for a confirmation order notwithstanding the pendency of a home loan modification. Debtor attempted to file his case in the Northern District twice; both cases were dismissed based on improper venue.

Although 11 U.S.C. § 1307 allows Debtor to dismiss a Chapter 13 case at anytime, the court will not issue a tentative order granting the dismissal for several reasons.

Debtor's assertion that he cannot include a loan modification in his plan in this District is incorrect. Although one judge in the Sacramento division may not confirm a plan which incorporates loan modification, all other four judges in the division are likely to include the modification as long as the plan does not modify the loan secured only by Debtor's residence. This court has confirmed many such plans, with the provisions having been refined through the combined efforts of debtor and creditor attorneys. This language is commonly referred to as the "Ensminger Additional Plan Modification Negotiation Provisions." This language has been repeated by the court in tentative rulings, as well as consumer attorneys advised I of its existence in open court. Many plans confirmed by judges from this division have provided for the contingent completion or denial of loan modifications in debtors' Chapter 13 Plans.

In responding to why the Debtor has filed multiple bankruptcy cases in the Northern District of California, when venue is proper in the Eastern

District of California (and filing a second case after the court in the first Northern District Court so held), Debtor's only response has been that the Debtor likes the law in the Northern District better, premised on the incorrect belief that he could not confirm a plan that includes provisions for the pendency of a loan modification in the Eastern District of California.

The court issued an Order for Hearing on the Motion to Dismiss and Attendance of the Debtor and Counsel for Debtor on February 20, 2014. Dckt. No. 58. The court expressed its concern that Debtor and his counsel are attempting to dodge the Trustee and the court's issues with serious repeat and improper filing issues by dismissing the case. This court set a Status Conference on January 14, 2014 to address the multiple bankruptcy cases which have been filed and dismissed by Debtor. Although telephonic appearance was permitted, neither Debtor nor his attorney appeared. Rather than following court order and attend the Status Conference, Debtor and his attorney filed the current Motion to Dismiss Case. In light of the circumstances, the court requires Ramon Raul Cruz, the Debtor, and Karl-Fredric J. Seligman, counsel for the Debtor in this case, to appear at the hearing in person and address these issues.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Case 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 xxxx.

63. 13-35991-E-13 RAMON CRUZ — **CONTINUED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Karl-Fredric J. Seligman — **12-30-13 [36]**

No Tentative Ruling: The court issued an order to show cause based on Debtors failure to pay the required fees in this case ($94.00 due on December 26, 2013). The court docket reflects that the Debtor still has not paid the fees upon which the Order to Show Cause was based and fees that have subsequently became due remain unpaid.

The court issued an Order for Hearing on the Motion to Dismiss and Attendance of the Debtor and Counsel for Debtor on February 20, 2014. Dckt. No. 58. The court expressed its concern that Debtor and his counsel are attempting to dodge the Trustee and the court's issues with serious repeat and improper filing issues by dismissing the case.

This court had previously set a Status Conference on January 14, 2014 to address the multiple bankruptcy cases which have been filed and dismissed by Debtor. Although telephonic appearance was permitted, neither Debtor nor his attorney appeared. Rather than following court order and attend the Status Conference, Debtor and his attorney filed a Motion to Dismiss the Case. In light of the circumstances, the court requires Ramon Raul Cruz, the Debtor, and Karl-Fredric J. Seligman, counsel for the Debtor in this case, to appear at this hearing, on March 25, 2014, in person and address these issues.

MARCH 25, 2014 HEARING

At the hearing, XXXX

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 XXXX.

64. 13-35991-E-13 RAMON CRUZ — **CONTINUED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Karl-Fredric J. Seligman — **1-31-14 [50]**

No Tentative Ruling: The court issued an order to show cause based on Debtors failure to pay the required fees in this case ($93.00 due on January 27, 2014). The court docket reflects that the Debtor still has not paid the fees upon which the Order to Show Cause was based and fees that have subsequently became due remain unpaid.

The court issued an Order for Hearing on the Motion to Dismiss and Attendance of the Debtor and Counsel for Debtor on February 20, 2014. Dckt. No. 58. The court expressed its concern that Debtor and his counsel are attempting to dodge the Trustee and the court's issues with serious repeat and improper filing issues by dismissing the case.

This court had previously set a Status Conference on January 14, 2014 to address the multiple bankruptcy cases which have been filed and dismissed by Debtor. Although telephonic appearance was permitted, neither Debtor nor his attorney appeared. Rather than following court order and attend the Status Conference, Debtor and his attorney filed a Motion to Dismiss the Case. In light of the circumstances, the court requires Ramon Raul Cruz, the Debtor, and Karl-Fredric J. Seligman, counsel for the Debtor in this case, to appear at this hearing, on March 25, 2014, in person and address these issues.

MARCH 25, 2014 HEARING

At the hearing, XXXX

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 XXXX.

65. 13-35991-E-13 RAMON CRUZ — **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Karl-Fredric J. Seligman — **2-28-14 [71]**

No Tentative Ruling: The court issued an order to show cause based on Debtors failure to pay the required fees in this case ($93.00 due on February 24, 2014). The court docket reflects that the Debtor still has not paid the fees upon which the Order to Show Cause was based and fees that have subsequently became due remain unpaid.

The court issued an Order for Hearing on the Motion to Dismiss and Attendance of the Debtor and Counsel for Debtor on February 20, 2014. Dckt. No. 58. The court expressed its concern that Debtor and his counsel are attempting to dodge the Trustee and the court's issues with serious repeat and improper filing issues by dismissing the case.

This court had previously set a Status Conference on January 14, 2014 to address the multiple bankruptcy cases which have been filed and dismissed by Debtor. Although telephonic appearance was permitted, neither Debtor nor his attorney appeared. Rather than following court order and attend the Status Conference, Debtor and his attorney filed a Motion to Dismiss the Case. In light of the circumstances, the court requires Ramon Raul Cruz, the Debtor, and Karl-Fredric J. Seligman, counsel for the Debtor in this case, to appear at this hearing, on March 25, 2014, in person and address these issues.

MARCH 25, 2014 HEARING

At the hearing, XXXX

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 XXXX.

66. 13-32493-E-13 WILLIAM/JANET FORTIER MOTION TO CONFIRM PLAN
RPH-1 Robert P. Huckaby 2-5-14 [30]

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 February 5, 2014. By the court's calculation, 48 days' notice was provided. 42 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee and Creditor 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. In this instance, both the Trustee and a Creditor, U.S. Bank, N.A., have filed opposition to the confirmation of Plan.

OPPOSITION BY TRUSTEE

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtors propose to avoid the secured lien of the Internal Revenue Service, but have not filed a Motion to Avoid Lien to date. Debtors' Declaration states that the have filed the Motion to Avoid the Lien of the Internal Revenue Service. Declaration, Dckt. No. 32. Based on the court and Trustee's review of the docket, however, no such motion has been filed.

Trustee also argues that the secured debt of US Bank for real property at 5830 Touloun, listed as a Class 4 debt in the Plan (Dckt. No. 29), is improperly classified. Debtors' Schedule A lists this property address as 5830 Toulon Street, Couer d'Alene, ID. Creditor US Bank Home Mortgage filed a secured claim, Claim No. 13, listing as collateral the real property as 5830 N. Toulon Drive, Couer D'Alene, Idaho. The creditor's claim lists mortgage arrears of $19,927.94. The language of the plan in Section 2.11 indicates that Class 4 claims are "not in default." Delinquent secured claims are to be treated in Class 1 of the plan, and the arrears cured through the plan, based on the plain language of the Plan.

OPPOSITION BY CREDITOR

U.S. Bank, National Association ("Creditor"), states that it is the current payee of a Note dated February 20, 2009 in the original amount of $196,377.00, and executed by Joint Debtor William A. Fortier. The Note is secured by a first priority Deed of Trust on the real property located at 5830 N Toulon Dr, Coeur D'Alene, Idaho 83815. The Note and Deed of Trust were filed with the Court as part of Creditor's Proof of Claim #13.

On February 5, 2014, the Debtors filed their Motion, asking the Court to confirm their First Amended Chapter 13 Plan. The First Amended Chapter 13 Plan lists the Secured Creditor's Claim in Class 4, which provides that the loan was current at filing and the monthly installment payments will be paid by the Debtors' daughter at the monthly installment payment of $1,437.00. Debtors state that they filed this bankruptcy case partly because they wanted to stop a foreclosure sale for which their daughter is obligated to make the payments. Lines 22-23, Declaration, Dckt. No. 30.

Creditor opposes confirmation of Debtors' Plan on the basis that its secured claim is improperly classified, and their assertion that the First Amended Chapter 13 Plan is not feasible.

Creditor states that, as evidenced by Secured Creditor's Proof of Claim No. 13, the pre-petition arrears are $19,927.94, so this loan should not be classified in Class 4, which provides that the loan is current. Furthermore, the Debtors' daughter is not obligated to make payments since William Fortier is the only obligor under the Note and is, thereby, the only person obligated to make payments under the Note. Since the First Amended Chapter 13 Plan provides for the Secured Creditor's claim (in the incorrect class), and since the Creditor does not accept the Plan's terms, Creditor argues that 11 U.S.C. § 1325(a)(5)(B) and (C) limit the Debtors' options as to the treatment of the loan to either providing for full payment under the loan or surrendering the property.

Additionally, Creditor asserts that the First Amended Chapter 13 Plan does not appear to be feasible under 11 U.S.C. §1325(a)(6). Debtors' Schedule I reveals that the Debtors' income is based solely on disability and unemployment benefits. The Debtors' Schedule J shows that the Debtors' monthly net income is only $64.00. Dckt. No. 1 at at 22. Creditor correctly points out that there is no indication of how long the unemployment benefits will last, and there is nothing in the Debtors' budget regarding the payment of the Creditor's mortgage and the cure of the pre-petition arrears. Creditor states that if Joint Debtor William Fortier has no intention of making the mortgage payments or curing the pre-petition arrears and is also not residing in the Subject Property, then the First Amended Chapter 13 Plan should be amended to surrender the Subject Property rather than "extend the umbrella of the automatic stay in his bankruptcy case to benefit his daughter."

Based on the foregoing, 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.

67. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2004
G & K HEAVEN'S BEST, INC. V. MCQUEEN ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-4-14 [1]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: C. Anthony Hughes

Adv. Filed: 1/4/14
Answer: 2/5/14

Crossclaim Filed: 2/5/14
Answer: 2/24/14

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury

Notes:

Continued from 3/19/14 to be heard in conjunction with other matters on calendar.

Debtors/Defendants/Cross-Complainants' Continued Status Conference Statement filed 3/20/14 [Dckt 27]

68. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2004
G & K HEAVEN'S BEST, INC. V.
MCQUEEN ET AL

ORDER FOR COUNSEL FOR DEFENDANTS/COUNTER CLAIMANTS TO APPEAR
3-20-14 [23]

Notice Provided: The Order for Counsel for Defendants to Appear was served by the Clerk of the Court through the Bankruptcy Noticing Center on Defendants, Counsel for Defendants, Plaintiffs, Counsel for Plaintiffs and the Office of the U.S. Trustee on March 20, 2014. 5 days notice of the hearing was provided.

No Tentative Ruling.

MARCH 25, 2014 HEARING

REVIEW OF COUNSEL ASSERTING ESTATE CLAIMS AND DEBTOR DEFENSES

The court conducted the Status Conference in this Adversary Proceeding on March 19, 2014. At the Status Conference it was disclosed that counsel Anthony Hughes, Hughes Financial Law, for Defendants/Counter Claimants, has been receiving post-petition payments of $1,000.00 from the Debtors. The monies are being paid from property of the estate. The payments are disclosed in the proposed Chapter 13 Plan filed in the Defendants/Counter Claimants' bankruptcy case. Bankr. E.D. Cal. 13-32494. No order authorizing the employment of special counsel to represent the Debtors in this Adversary Proceeding, as Defendants/Counter Claimants asserting claims of the estate, has been entered by the court. No order approving the payment of a post-petition retainer to counsel has been entered by this court.

It was further disclosed at the Status Conference that Anthony Hughes represented the Defendants/Counter Claimants' corporation, from which the assets were transferred on September 1, 2013. Schedule B, 13-32494, Dckt. 9. The Statement of Financial Affairs, Question 9, discloses that Hughes Financial Law was paid $3,500.00 for the Debtors in connection with their debts or bankruptcy. At the hearing it was disclosed that Hughes Financial Law was paid $2,000.00 for legal services in the year prior to bankruptcy provided to the Debtors' corporation.

Review of Applicable Law Relating to Debtors' Attorneys' Fees

The First Amended Chapter 13 Plan proposed in the Defendants/Counter Claimants' Chapter 13 case appears to provide for the unlimited payments of $1,000.00 a month to Hughes Financial Law for "the adversary proceedings," without regard to court authorization to employ or any fees being approved by the court. 11 U.S.C. §§ 327, 328, 329, 330 and 331.

Based on the uncontradicted representations to the court, Hughes Financial Law has been accepting $1,000.00 a month payments. Counsel for Defendants/Counter Claimants stated that the monies were being held in the law firm trust account – which contention was challenged by Plaintiff.

With respect to accepting the $1,000.00 a month payments, Counsel for Defendants/Counter Claimants offered two explanations. First, that upon researching the issue, Counsel concluded that the Bankruptcy Code did not preclude the collection of post-petition payments or retainer without court approval. No authority for such propositions was presented at the Status Conference. Second, that Counsel spoke with counsel for the Chapter 13 Trustee and was told "to hold the money in the law firm trust account." The court did not find either of these statements to be appropriate from knowledgeable bankruptcy counsel.

Exercise of Trustee Powers, Duties and Responsibilities by Chapter 13 Debtor

Courts have held that the word "trustee" in section 327(e) includes a chapter 13 debtor if he is in possession of a non-bankruptcy cause of action. In re Cahill, 478 B.R. 173, 176 (Bankr. S.D.N.Y. 2012); *In re Goines*, 465 B.R. 704, 706-07 (Bankr. N.D. Ga. 2012). Section 327 is not a requirement that must be met before a chapter 13 debtor may hire counsel in chapter 13 cases for work to be performed as part of the bankruptcy proceeding. 3 Collier on Bankruptcy ¶ 327.01 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Rather, a chapter 13 debtor has the right to employ counsel so long as the following two requirements are met: 1) the need to disclose compensation paid or agreed to be paid pursuant to section 329 and 2) the need for approval of post-petition payments from property of the estate pursuant to section 330(a)(4)(B). See In re Berg, 356 B.R. 378, 380 (Bankr. E.D. Pa. 2006); see also In re Butts, 2010 Bankr. LEXIS 3236, 2010 WL 3369138, at *1 (Bankr. D. Mass. 2010) ("Nothing in the Bankruptcy Code... precludes a Chapter 13 debtor from retaining successor counsel, special counsel, or even co-counsel, with the fees of such counsel, which are paid out of property of the estate, being subject to review and approval by the court.").

According to section 330(a)(4)(B), "the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." 11 U.S.C. § 330(a)(4). Employment of Chapter 13 debtor's counsel is not subject to prior approval pursuant to 11 U.S.C. § 327, and compensation by estate is not authorized under 11 U.S.C. §§ 331, 330(a)(1); however, 11 U.S.C. § 330(a)(4)(B) provides that in Chapter 13 case, court may allow reasonable compensation. In re Young, 285 B.R. 168 (Bankr. D. Md. 2002).

How and why a Chapter 13 debtor's attorney is allowed to be paid from property of the estate requires a trip through the statutory maze of 11 U.S.C. §§ 327 and 330. In 2004 the United States Supreme Court ruled that,

> Adhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize

> compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a chapter [*539] 7 case, he must be employed by the trustee and approved by the court.

Lamie v. United State Trustee, 540 U.S. 526, 538 (2004). As further noted by the Supreme Court, "Compensation for debtors' attorneys in chapter 12 and 13 bankruptcies, for example, is not much disturbed by *§ 330* as a whole. See, *e.g., 11 U.S.C. § 330(a)(4)(B)* ('In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney')." *Id.* at 536.

In a Chapter 12 case the Debtor also serves the dual role of "debtor in possession," as does a debtor in a Chapter 11 case (as slightly modified for the obligations arising under 11 U.S.C. § 1106(a)(3) and (4)). 11 U.S.C. § 1203. Debtors in Possession in Chapter 12 cases seek approval to employ professionals and such professionals seek approval of their compensation pursuant to 11 U.S.C. §§ 330, 331. The Chapter 12 debtor in possession exercises the rights and powers of a trustee to engage the services of professionals to assist in the performance of the debtor in possession fiduciary duties. 11 U.S.C. § 327.

In a Chapter 13 case the Chapter 13 debtor's ability to exercise various powers on behalf of the estate and take all actions necessary, such as bringing avoiding actions and seeking the related relief (including 11 U.S.C. §§ 544, 547, 548, 549, and 550) has required a bit more work in interpreting the Bankruptcy Code.

No "debtor in possession" has been created by Congress in Chapter 13 cases. Congress has defined a limited role for the Chapter 13 Trustee, creating an investigatory, reporting, and disbursing role for the Chapter 13 Trustee. 11 U.S.C. § 1302. For the Chapter 13 Debtor, Congress granted the following powers and rights:

A. "[T]he rights and powers of a trustee under sections 363(b) [sell, use, or lease other than in ordinary course of business], 363(d) [sell, use, or lease subject to provisions of 11 U.S.C. § 362(c),(d), (e), or (f)], 363(e) [protection of non-debtor interest holding in property being sold, used, or leased], 363(f) [sale free and clear of liens], and 363(l) [subject to 11 U.S.C. § 365 use, sell, or lease property notwithstanding a contractual or statutory bankruptcy or financial solvency grounds restriction] of this title." 11 U.S.C. § 1303.

B. For a Chapter Debtor engaged in business, the power to operate the business, and subject to the limitations of 11 U.S.C. § 363(c) [sale, use, lease in ordinary course of business and use of cash collateral] and § 364 [post-petition credit], the rights and powers under those sections. Further, such Chapter 13 debtor engaged in business shall also perform the duties of a trustee specified in 11 U.S.C. § 704(a)(8) [filing of business reports]. 11 U.S.C. § 1304

Collier on Bankruptcy, Sixteenth Edition, ¶ 1303.04 cites to the legislative history, stating,

> "Section 1303 lists certain powers that a chapter 13 debtor has, exclusive of the chapter 13 trustee. It is not by any means a complete listing of the chapter 13 debtor's powers. The legislative history of the section states: '[Section 1303] does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although section 1323 [sic] is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.'" Citing, 124 Cong. Rec. H11106 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).

Further, in connection with 11 U.S.C. § 323(b), "Role and capacity of trustee,"

> "[Section 323(b)] grants the trustee the capacity to sue and be sued. If the debtor remains in possession in a chapter 11 case, section 1107 gives the debtor in possession these rights of the trustee: the debtor in possession becomes the representative of the estate, and may sue and be sued. The same applies in a chapter 13 case." Citing, H.R. Rep. No. 595, 95th Cong., 1st Sess., 326 (1977).

Id.

Congress provided for compensation to be allowed professionals in a bankruptcy case through 11 U.S.C. § 330. In this section Congress provides that the court may award compensation to a trustee, consumer privacy ombudsman, an examiner, or a professional person employed under 11 U.S.C. § 327 or 1103. 11 U.S.C. § 330(a)(1). No direct provision is made to pay the attorney for a Chapter 13 debtor.

This Bankruptcy Code section further provides that,

A. The court shall not allow compensation for

   1. Unnecessary duplication of Services; or

   2. Services which were not -

      a. Reasonably likely to benefit the debtor's estate; or

      b. Necessary to the administration of the case.

B. However, in a Chapter 12 or Chapter 13 case in which the debtor is an individual, the court may grant debtor's counsel reasonable compensation based on the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(A) and (B). Further, 11 U.S.C. § 329 provides that an attorney representing the debtor must provide a statement of the compensation paid or agreed to be paid for services rendered the Debtor. The court may cancel the agreement or order the return of the payment to the extent "excessive."

While there is just the Debtor in a Chapter 13 case and the Chapter 13 Trustee has limited responsibilities, the Chapter 13 debtor does more than merely act as debtor. By incorporation the Chapter 13 debtor undertakes the duties and responsibilities of a trustee. In doing so, the Chapter 13 trustee may engage counsel to assist in the "trustee duties" of the Chapter 13 debtor. In doing so the Chapter 13 debtor must comply with the requirements for a trustee – which includes engaging the services of counsel subject to the requirements of 11 U.S.C. § 327 and such counsel obtaining authorization before taking any fees from the Debtor.

Review of Applicable Law Relating to Chapter 13 Debtor Attorneys' Fees

The First Amended Chapter 13 Plan proposed in the Defendants/Counter Claimants' Chapter 13 case appears to provide for the unlimited payments of $1,000.00 a month to Hughes Financial Law for "the adversary proceedings," without regard to court authorization to employ or any fees being approved by the court. 11 U.S.C. §§ 327, 328, 329, 330 and 331. Additionally, Local Bankruptcy Rule 2016-1 governing attorneys' fees in Chapter 13 cases provides that attorney(s) for debtors must either elect to accept a fixed fee for such representation or seek approval of fees pursuant to 11 U.S.C. §§ 329, 330. Local Bankruptcy Rule 2016-1(a) and (b) further provides (emphasis added),

> (a) Compensation. **Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c).** The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). **When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.**
>
> (b) Court Approval Required. **After the filing of the petition, a debtor's attorney shall not accept or demand** from the debtor or any other person **any payment for services or cost reimbursement without first obtaining a court order** authorizing the fees and/or costs and specifically permitting direct payment of those fees and/or costs by the debtor.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals,

including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

When determining whether a professional holds a disqualifying "interest materially adverse" under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee's past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest). The U.S. Bankruptcy Appellate Panel for the Ninth Circuit agrees that a court should apply a totality-of-circumstances analysis in determining lack of disinterestedness under § 101(14)(C). *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 152 (B.A.P. 9th Cir. 2006). The court does not subscribe to a rigid application of factors, however, but views them as aids for the court's discretionary review. *Id.*

Section 101(14)(C) has been described as a "catch-all clause" and appears broad enough to include anyone who in the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code. COLLIER, supra at 327.04[2][a]. Examples of such materially adverse interests include:

-- a pre-petition claim against the debtor;
-- representation of a shareholder;
-- representation of an adversary;
-- representation of certain investors of the debtors; and
-- performance of services for an entity whose subsidiary is a member of the creditors' committee.

Id. A professional failing to comply with the requirements of the Code or Bankruptcy Rules may forfeit the right to compensation. *Lamie v. United States Tr.*, 540 U.S. 526, 538-39 (2004). The services for which compensation is requested should be performed pursuant to appropriate authority under the Code and in accordance with an order of the court. 3 COLLIER ON BANKRUPTCY ¶ 327.03[c] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Until proper disclosure has been made, it is premature to award fees because employment is a prerequisite to compensation and until there is proper disclosure it cannot be known whether the professional was validly employed. *See First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 175 B.R. 52, 55-56 (B.A.P. 9th Cir. 1994)(§ 327(a) "clearly states that the court cannot approve the employment of a person who is not disinterested" and "bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language"). Thus, professionals must disclose all connections with the debtor, no matter how irrelevant or trivial those connections seem. *Mehdipour v. Marcus & Millichap (In re Mehdipour)*, 202 B.R. 474, 480 (B.A.P. 9th Cir. 1996).

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

However, the bankruptcy court has discretion to excuse a failure to disclose. *CIC Inv. Corp.*, 175 B.R. at 54. Once the bankruptcy court acquaints itself with the true facts, it "has considerable discretion in determining to allow all, part or none of the fees and expenses of a properly employed professional." *Movitz v. Baker (In re Triple Star Welding, Inc.)*, 324 B.R. 778, 789 (B.A.P. 9th Cir. 2005). *See also Film Ventures Int'l Inc.*, 75 B.R. 250, 253 (B.A.P. 9th Cir. Cal. 1987) ("[T]he trial court is in the best position to resolve disputes over legal fees."). If the bankruptcy court finds no need to take remedial measures, it appropriately can do so in the exercise of its discretion. *CIC Inv. Corp.*, 175 B.R. at 54 (*citing Film Ventures Int'l, Inc.*, 75 B.R. at 253).

Furthermore, Congress addressed the pre and post-petition fees of counsel for a debtor for services relating to a bankruptcy case.

> § 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
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> (2) the entity that made such payment.

11 U.S.C. § 329.

Additionally, in Adversary Proceedings, unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as

costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party in the Adversary Proceeding must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

Order For Counsel to Transfer Fees and Provide an Accounting For Fees Received

Very serious issues have been raised concerning Counsel for the Defendants/Counter Claimants in connection with the Adversary Proceeding and whether such Counsel, having represented Defendants/Counter Claimants' corporation can be independent counsel as required by 11 U.S.C. § 327 to represent the Debtors as the fiduciaries of the bankruptcy estate.

Therefore, the court ordered Anthony Hughes, lead counsel for Defendants/Counter Claimants in this Adversary Proceeding and for them as Debtors in their Chapter 13 case to appear at the continued Status Conference, no telephonic appearance permitted. The court also ordered that all payments of $1,000.00 a month received by Hughes Financial Law or Anthony Hughes from the Debtors since the September 25, 2013 commencement of their Chapter 13 case be transferred to the Chapter 13 Trustee on or before 3:00 p.m. on March 24, 2014. Furthermore, the court ordered Hughes Financial Law to file with the court and serve on Plaintiffs, Chapter 13 Trustee, and U.S. Trustee on or before March 29, 2014, an accounting documenting the receipt of the $1,000.00 a month payments, the deposits of the payments, the account(s) in which the monies were held and transferred, and the tracing of such monies to the funds delivered to the Chapter 13 Trustee.

The court ordered that Theodore McQueen and Molly Ann McQueen, and each of them, to make the $1,000.00 a month payment described in the First Amended Plan as to be made to Hughes Financial Law to the Chapter 13 Trustee for each month from the date of this order until further order of the court is issued. The payment of the $1,000.00 shall be made with the regular monthly plan payment to the Trustee.

Lastly, the court ordered that the Chapter 13 Trustee hold and retain the monies received from the Hughes Financial Law and the Defendants/Counter Claimants pursuant to this order pending further order of the court. Any attorneys' lien which may exist on the monies held by Hughes Financial Law in its client trust account which are turned over to the Chapter 13 Trustee and the $1,000.00 a month payments received from the

Defendants/Counter Claimants are maintained on such monies held by the Chapter 13 Trustee.

STATUS CONFERENCE STATEMENT

Defendants filed a Status Conference Statement, stating that Hughes Financial Law has received three checks as of March 20, 2014:

A. A check dated December 16, 2013 in the amount of $1,500 mistakenly deposited to the business account; Defendants/Counter Claimants' attorney is writing a check from such account in the same amount payable to Chapter 13 Trustee.

B. A check dated December 30, 2013, in the amount of $1,000, deposited to trust account on or about January 8, 2014.

C. A check dated February 9, 2014 in the amount of $750, deposited to the trust account on or about February 18, 2014. Defendants/Counter Claimants' attorney is writing a check from such account in the amount of $1,750 payable to the Chapter 13 Trustee

Counsel states that Defendants/Counter Claimants Michael and Molly McQueen have been fully informed by Hughes Financial Law about and waived the potential conflict of interest between representing their corporation in debt negotiation and representing themselves in the bankruptcy and adversary proceedings.

Counsel states that the McQueens are unsophisticated business owners with high school as their highest level of education. He states they established a corporation around 2011 only because they were informed that they could save taxes. Counsel states the corporation ceased operations around September 2013 and the McQueens have assumed all debts and responsibilities from the corporation.

69. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2027
MCQUEEN ET AL V. G & K
HEAVEN'S BEST, INC.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-21-14 [1]

Plaintiff's Atty: C. Anthony Hughes
Defendant's Atty: Peter G. Macaluso

Adv. Filed: 1/21/14
Answer: 2/17/14

Nature of Action:
Validity, priority or extent of lien or other interest in property
Recovery of money/property - preference

Notes:

Continued from 3/19/14 to be heard in conjunction with other matters on calendar.

Plaintiffs' Continued Status Conference Statement filed 3/20/14 [Dckt 22]

70. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2027
MCQUEEN ET AL V. G & K
HEAVEN'S BEST, INC.

ORDER FOR COUNSEL FOR PLAINTIFFS TO APPEAR
3-20-14 [18]

Notice Provided: The Order for Counsel for Plaintiffs to Appear was served by the Clerk of the Court through the Bankruptcy Noticing Center on Defendants, Counsel for Defendants, Plaintiffs, Counsel for Plaintiffs and the Office of the U.S. Trustee on March 20, 2014. 5 days notice of the hearing was provided.

No Tentative Ruling.

MARCH 25, 2014 HEARING

REVIEW OF COUNSEL ASSERTING ESTATE CLAIMS AND DEBTOR DEFENSES

The court conducted the Status Conference in this Adversary Proceeding on March 19, 2014. At the Status Conference it was disclosed that counsel Anthony Hughes, Hughes Financial Law, for Theodore and Molly Ann McQueen, Plaintiffs, (Plaintiffs-McQueens") has been receiving post-petition payments of $1,000.00 from the Debtors. The monies are being paid from property of the estate. The payments are disclosed in the proposed Chapter 13 Plan filed in the Plaintiff-McQueens' bankruptcy case. Bankr. E.D. Cal. 13-32494. No order authorizing the employment of special counsel to represent the Debtors in this Adversary Proceeding, as Plaintiff-McQueens asserting claims of the estate, has been entered by the court. No order approving the payment of a post-petition retainer to counsel has been entered by this court.

It was further disclosed at the Status Conference that Anthony Hughes represented the Plaintiff-McQueens' corporation, from which the assets were transferred on September 1, 2013. Schedule B, 13-32494, Dckt. 9. The Statement of Financial Affairs, Question 9, discloses that Hughes Financial Law was paid $3,500.00 for the Debtors in connection with their debts or bankruptcy. At the hearing it was disclosed that Hughes Financial Law was paid $2,000.00 for legal services in the year prior to bankruptcy provided to the Debtors' corporation.

Review of Debtors' Attorneys' Fees

The First Amended Chapter 13 Plan proposed in the Plaintiff-McQueens' Chapter 13 case appears to provide for the unlimited payments of $1,000.00 a month to Hughes Financial Law for "the adversary proceedings," without regard to court authorization to employ or any fees being approved by the court. 11 U.S.C. §§ 327, 328, 329, 330 and 331.

Based on the uncontradicted representations to the court, Hughes Financial Law has been accepting $1,000.00 a month payments. Counsel for

Plaintiff-McQueens stated that the monies were being held in the law firm trust account – which contention was challenged by Defendant.

With respect to accepting the $1,000.00 a month payments, Counsel for Plaintiff-McQueens offered two explanations. First, that upon researching the issue, Counsel concluded that the Bankruptcy Code did not preclude the collection of post-petition payments or retainer without court approval. No authority for such propositions was presented at the Status Conference. Second, that Counsel spoke with counsel for the Chapter 13 Trustee and was told "to hold the money in the law firm trust account." The court did not find either of these statements to be appropriate from knowledgeable bankruptcy counsel.

Exercise of Trustee Powers, Duties and Responsibilities by Chapter 13 Debtor

Courts have held that the word "trustee" in section 327(e) includes a chapter 13 debtor if he is in possession of a non-bankruptcy cause of action. In re Cahill, 478 B.R. 173, 176 (Bankr. S.D.N.Y. 2012); *In re Goines*, 465 B.R. 704, 706-07 (Bankr. N.D. Ga. 2012). Section 327 is not a requirement that must be met before a chapter 13 debtor may hire counsel in chapter 13 cases for work to be performed as part of the bankruptcy proceeding. 3 Collier on Bankruptcy ¶ 327.01 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Rather, a chapter 13 debtor has the right to employ counsel so long as the following two requirements are met: 1) the need to disclose compensation paid or agreed to be paid pursuant to section 329 and 2) the need for approval of post-petition payments from property of the estate pursuant to section 330(a)(4)(B). See In re Berg, 356 B.R. 378, 380 (Bankr. E.D. Pa. 2006); see also In re Butts, 2010 Bankr. LEXIS 3236, 2010 WL 3369138, at *1 (Bankr. D. Mass. 2010) ("Nothing in the Bankruptcy Code... precludes a Chapter 13 debtor from retaining successor counsel, special counsel, or even co-counsel, with the fees of such counsel, which are paid out of property of the estate, being subject to review and approval by the court.").

According to section 330(a)(4)(B), "the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." 11 U.S.C. § 330(a)(4). Employment of Chapter 13 debtor's counsel is not subject to prior approval pursuant to 11 U.S.C. § 327, and compensation by estate is not authorized under 11 U.S.C. §§ 331, 330(a)(1); however, 11 U.S.C. § 330(a)(4)(B) provides that in Chapter 13 case, court may allow reasonable compensation. In re Young, 285 B.R. 168 (Bankr. D. Md. 2002).

How and why a Chapter 13 debtor’s attorney is allowed to be paid from property of the estate requires a trip through the statutory maze of 11 U.S.C. §§ 327 and 330. In 2004 the United States Supreme Court ruled that,

> Adhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the

> attorney is to be paid from estate funds under § 330(a)(1) in a chapter [*539] 7 case, he must be employed by the trustee and approved by the court.

Lamie v. United State Trustee, 540 U.S. 526, 538 (2004). As further noted by the Supreme Court, "Compensation for debtors' attorneys in chapter 12 and 13 bankruptcies, for example, is not much disturbed by *§ 330* as a whole. See, *e.g., 11 U.S.C. § 330(a)(4)(B)* ('In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney')." *Id.* at 536.

In a Chapter 12 case the Debtor also serves the dual role of "debtor in possession," as does a debtor in a Chapter 11 case (as slightly modified for the obligations arising under 11 U.S.C. § 1106(a)(3) and (4)). 11 U.S.C. § 1203. Debtors in Possession in Chapter 12 cases seek approval to employ professionals and such professionals seek approval of their compensation pursuant to 11 U.S.C. §§ 330, 331. The Chapter 12 debtor in possession exercises the rights and powers of a trustee to engage the services of professionals to assist in the performance of the debtor in possession fiduciary duties. 11 U.S.C. § 327.

In a Chapter 13 case the Chapter 13 debtor's ability to exercise various powers on behalf of the estate and take all actions necessary, such as bringing avoiding actions and seeking the related relief (including 11 U.S.C. §§ 544, 547, 548, 549, and 550) has required a bit more work in interpreting the Bankruptcy Code.

No "debtor in possession" has been created by Congress in Chapter 13 cases. Congress has defined a limited role for the Chapter 13 Trustee, creating an investigatory, reporting, and disbursing role for the Chapter 13 Trustee. 11 U.S.C. § 1302. For the Chapter 13 Debtor, Congress granted the following powers and rights:

A. "[T]he rights and powers of a trustee under sections 363(b) [sell, use, or lease other than in ordinary course of business], 363(d) [sell, use, or lease subject to provisions of 11 U.S.C. § 362(c),(d), (e), or (f)], 363(e) [protection of non-debtor interest holding in property being sold, used, or leased], 363(f) [sale free and clear of liens], and 363(l) [subject to 11 U.S.C. § 365 use, sell, or lease property notwithstanding a contractual or statutory bankruptcy or financial solvency grounds restriction] of this title." 11 U.S.C. § 1303.

B. For a Chapter Debtor engaged in business, the power to operate the business, and subject to the limitations of 11 U.S.C. § 363(c) [sale, use, lease in ordinary course of business and use of cash collateral] and § 364 [post-petition credit], the rights and powers under those sections. Further, such Chapter 13 debtor engaged in business shall also perform the duties of a trustee specified in 11 U.S.C. § 704(a)(8) [filing of business reports]. 11 U.S.C. § 1304

Collier on Bankruptcy, Sixteenth Edition, ¶ 1303.04 cites to the legislative history, stating,

> "Section 1303 lists certain powers that a chapter 13 debtor has, exclusive of the chapter 13 trustee. It is not by any means a complete listing of the chapter 13 debtor's powers. The legislative history of the section states: '[Section 1303] does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although section 1323 [sic] is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.'" Citing, 124 Cong. Rec. H11106 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).

Further, in connection with 11 U.S.C. § 323(b), "Role and capacity of trustee,"

> "[Section 323(b)] grants the trustee the capacity to sue and be sued. If the debtor remains in possession in a chapter 11 case, section 1107 gives the debtor in possession these rights of the trustee: the debtor in possession becomes the representative of the estate, and may sue and be sued. The same applies in a chapter 13 case." Citing, H.R. Rep. No. 595, 95th Cong., 1st Sess., 326 (1977).

Id.

Congress provided for compensation to be allowed professionals in a bankruptcy case through 11 U.S.C. § 330. In this section Congress provides that the court may award compensation to a trustee, consumer privacy ombudsman, an examiner, or a professional person employed under 11 U.S.C. § 327 or 1103. 11 U.S.C. § 330(a)(1). No direct provision is made to pay the attorney for a Chapter 13 debtor.

This Bankruptcy Code section further provides that,

A. The court shall not allow compensation for

   1. Unnecessary duplication of Services; or

   2. Services which were not -

      a. Reasonably likely to benefit the debtor's estate; or

      b. Necessary to the administration of the case.

B. However, in a Chapter 12 or Chapter 13 case in which the debtor is an individual, the court may grant debtor's counsel reasonable compensation based on the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(A) and (B). Further, 11 U.S.C. § 329 provides that an attorney representing the debtor must provide a statement of the compensation paid or agreed to be paid for services rendered the Debtor. The court may cancel the agreement or order the return of the payment to the extent "excessive."

While there is just the Debtor in a Chapter 13 case and the Chapter 13 Trustee has limited responsibilities, the Chapter 13 debtor does more than merely act as debtor. By incorporation the Chapter 13 debtor undertakes the duties and responsibilities of a trustee. In doing so, the Chapter 13 trustee may engage counsel to assist in the "trustee duties" of the Chapter 13 debtor. In doing so the Chapter 13 debtor must comply with the requirements for a trustee – which includes engaging the services of counsel subject to the requirements of 11 U.S.C. § 327 and such counsel obtaining authorization before taking any fees from the Debtor.

Review of Applicable Law Relating to Chapter 13 Debtor Attorneys' Fees

The First Amended Chapter 13 Plan proposed in the Plaintiff-McQueens' Chapter 13 case appears to provide for the unlimited payments of $1,000.00 a month to Hughes Financial Law for "the adversary proceedings," without regard to court authorization to employ or any fees being approved by the court. 11 U.S.C. §§ 327, 328, 329, 330 and 331. Additionally, Local Bankruptcy Rule 2016-1 governing attorneys' fees in Chapter 13 cases provides that attorney(s) for debtors must either elect to accept a fixed fee for such representation or seek approval of fees pursuant to 11 U.S.C. §§ 329, 330. Local Bankruptcy Rule 2016-1(a) and (b) further provides (emphasis added),

> (a) Compensation. **Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c).** The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). **When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.**
>
> (b) Court Approval Required. **After the filing of the petition, a debtor's attorney shall not accept or demand** from the debtor or any other person **any payment for services or cost reimbursement without first obtaining a court order** authorizing the fees and/or costs and specifically permitting direct payment of those fees and/or costs by the debtor.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals,

including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

When determining whether a professional holds a disqualifying "interest materially adverse" under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee's past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest). The U.S. Bankruptcy Appellate Panel for the Ninth Circuit agrees that a court should apply a totality-of-circumstances analysis in determining lack of disinterestedness under § 101(14)(C). *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 152 (B.A.P. 9th Cir. 2006). The court does not subscribe to a rigid application of factors, however, but views them as aids for the court's discretionary review. *Id.*

Section 101(14)(C) has been described as a "catch-all clause" and appears broad enough to include anyone who in the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code. COLLIER, supra at 327.04[2][a]. Examples of such materially adverse interests include:

-- a pre-petition claim against the debtor;
-- representation of a shareholder;
-- representation of an adversary;
-- representation of certain investors of the debtors; and
-- performance of services for an entity whose subsidiary is a member of the creditors' committee.

Id. A professional failing to comply with the requirements of the Code or Bankruptcy Rules may forfeit the right to compensation. *Lamie v. United States Tr.*, 540 U.S. 526, 538-39 (2004). The services for which compensation is requested should be performed pursuant to appropriate authority under the Code and in accordance with an order of the court. 3 COLLIER ON BANKRUPTCY ¶ 327.03[c] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

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Furthermore, Congress addressed the pre and post-petition fees of counsel for a debtor for services relating to a bankruptcy case.

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> (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.
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> (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–
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costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party in the Adversary Proceeding must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

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C. A check dated February 9, 2014 in the amount of $750, deposited to the trust account on or about February 18, 2014. Plaintiff-McQueens' attorney is writing a check from such account in the amount of $1,750 payable to the Chapter 13 Trustee

Counsel states that Defendants Michael and Molly McQueen have been fully informed by Hughes Financial Law about and waived the potential conflict of interest between representing their corporation in debt negotiation and representing themselves in the bankruptcy and adversary proceedings.

Counsel states that the McQueens are unsophisticated business owners with high school as their highest level of education. He states they established a corporation around 2011 only because they were informed that they could save taxes. Counsel states the corporation ceased operations around September 2013 and the McQueens have assumed all debts and responsibilities from the corporation.

71. 13-32494-E-13 THEODORE/MOLLY MCQUEEN — MOTION TO CONFIRM PLAN
CAH-2 C. Anthony Hughes — 1-20-14 [58]

No Tentative Ruling.

72. 11-48695-E-13 JT-2 | **DALE GAGEL AND SUZANNE Aaron C. Koenig** | **CONTINUED OBJECTION TO CLAIM OF MARY BRYAN, CLAIM NUMBER 8 Aaron C. Koenig8-29-13 [37]**

Local Rule 3007-1(c)(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 creditor, and Office of the United States Trustee on August 29, 2013. By the court's calculation, 61 days' notice was provided. 44 days' notice is required.

No Tentative Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(1) and (d). 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 XXXXX the Objection to Proof of Claim Number 8 of Mary Bryan. 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:

MARCH 25, 2014 HEARING

At the hearing, XXXXXXXXXXXXXXXXXXXXXXXXXX

DISCUSSION OF OBJECTION

The Proof of Claim at issue, listed as claim number 8 on the Court's Official Registry of Claims, was filed by Mary Bryan and asserts a $48,717.01 priority claim (11 U.S.C. § 507(a)(1)(A) or (B) Domestic Support Claim). Dale Gagel and Suzanne May ("Debtor") filed an objection to the claim which states with particularity the following grounds,

A. Though filed as a secured claim and a priority claim, there is evidence of neither.

B. The $48,718.01 claim is based on money owed for a credit card obligation. The Debtor was to make the credit card payments.

C. The Debtor's obligation to make the credit card payment is not a "support" obligation.

Objection to Claim, Dckt. 37.

Both Debtors filed a declaration testifying under penalty of perjury, based on their personal knowledge, to the following.

A. The obligation owed to Creditor is from the dissolution of the marriage between Dale Gagel and the Creditor. (Though both Debtors are testifying, the court is presuming that when the reference is made to "ex wife" and "our marriage," it is Dale Gagel speaking and not Suzanne May. The parties can correct the court as to any mischaracterization of the testimony.)

B. The claim is not secured.

Declaration, Dckt. 39. No copies of any of the marital dissolution proceeding documents are provided by Debtor.

CREDITOR'S OPPOSITION

Creditor Mary Bryan opposes the Objection and argues that Debtor needs to fulfill his agreement that was determined in the Family Court in their divorce from 2007. Creditor states that Debtor Dale Gagel was to pay her $825.00 a month to pay his portion of medical insurance, student loan, car loan, credit card and other charges generated during the marriage that she was obligated to pay pursuant to a divorce agreement. Creditor states Debtor Gagel defaulted on his payments to her in October of 2008.

Creditor explained she had some difficulty in filing a claim and accidentally filed both 7-1 and 8-1, 8-1 being the one with the supporting documents and 7-1 being solely the cover page. Creditor believes the debt should be secured and cannot be dismissed in a bankruptcy.

DISCUSSION

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

Here, the Proof of Claim filed by Creditor indicates both a secured and a priority debt. Such could be possible, and is commonly seen with the Internal Revenue Service and the California Franchise Tax Board. Proof of Claim Number 8 filed by Creditor does not have any documents evidencing either a judicial or consensual lien having been granted.

With respect to the contention that the claim is entitled to priority status, the situation has been made murky by the parties. 11 U.S.C. § 507(a)(1) allows first priority for allowed unsecured claims for domestic support obligations that as of the date of the filing of the petition are owed to or recoverable by a spouse, former spouse or child of the debtor. 11 U.S.C. § 101(14A) provides that a "domestic support obligation" means a debt that accrues before, on or after the date of the order for relief, that is owed to a former spouse in the "nature of alimony, maintenance, or support...without regard to whether such debt is expressly so designated" of such former spouse.

Whether an obligation is in the nature of support and thus qualifies as a support under bankruptcy law is a question of federal law. *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996), *rev'd on other grounds, In re Bammer*, 131 F.3d 788 (9th Cir. 1997). In determining whether an obligation is a domestic support obligation entitled to priority under § 507(a), the court looks to the interpretation of domestic support obligation discussed in cases relating to the dischargeability of support under former § 523(a)(5). *In re Chang*, 163 F.3d 1138, 1142 (9th Cir. 1998).

The issue to be determined is whether the obligation is in the nature of support. In making that determination, "the court must look beyond the language of the decree to the intent of the parties and to the substance of the obligation." *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984). When the obligation is created by a stipulated dissolution judgment, the intent of the parties at the time the settlement agreement is executed is dispositive. *Sternberg*, 85 F.3d at 1405. Factors to be considered in determining the intent of the parties include whether the recipient spouse actually needed spousal support at the time of the divorce, which requires looking at whether there was an "imbalance in the relative income of the parties" at the time of the divorce. *Id.* Other considerations are whether the obligation terminates on the death or remarriage of the recipient spouse, and whether payments are made directly to the spouse in installments over a substantial period of time. *Id.*; *Shaver*, 736 F.2d at 1316-17. The labels the parties used for the payments may also provide evidence of the parties' intent. *Sternberg*, 85 F.3d at 1405.

Here, the parties have chosen language for the Dissolution Judgment which are cryptic at best. Part 1 of the attached agreement states,

> "1. Spousal Support:
>
> a. Spousal Support is reserved for purposes of enforcement of the payment of debt only, until debts are paid in full on April 30, 2011 (as set forth in Section 2.h.(i), the date of which is contingent on no missed payments."
>
> b. If necessary for payment of debts, any spousal support ordered shall be without tax consequences to either party.
>
> 2. Division of Property
>
> h. Equalization Payment:

> I. To equalize the payment of the community debts, beginning May 1, 2007, Husband shall pay to wife $825 per month ($412.50 on the 5th of the month and $412.50 on the 21st of the month) for a period of 48 months. This amount includes Husband's share of the community debt, Husband's separate debt and reimbursements owed to Wife. The last payment to Wife shall be made in April 2011, irrespective of the balances on the credit cards awarded to Wife.
>
> ii. Should Wife decide, at any point during the 48 month, to file bankruptcy and the debts are discharged, Husband shall no longer owe the $825 per month and shall only owe a total of $3,261.18 to Wife for the reimbursement portion of the total. If Wife files for Chapter 13 bankruptcy, Husband's share of the debt will need to be recalculated pursuant to what is actually being paid by Wife. If Wife does file bankruptcy, she shall notify Husband, in writing, within 72 hours of filling."

Proof of Claim Number 8, attachment.

This court does not understand what is means to say that "Spousal support is reserved for purposes of the payment of debt only...." Possibly, as the Debtors argue, the debt payments required by the Debtor were only for purposes of equalizing the assets and liabilities, and not support. On the other hand, the State Court judge may have been saying that so long as the debts are being paid by the Debtor, the State Court judge was reserving requiring support payments. For state law purposes, it is not necessary for characterize an obligation as support for the recipient spouse being able to enforce the monetary obligation.

There is little judicial economy or the economy of the parties to try and recreate the specialized State Court dissolution proceedings before this bankruptcy judge. Further, these family law, support matters are ones in which the federal courts give due deference to the state courts, so long as the state court proceedings can be diligently prosecuted in a timely manner.

At the initial hearing of October 29, 2013, the court ordered the parties to proceed in state court to obtain the issuance or determination of the obligations of the parties and any spousal support obligation pursuant to paragraph 1 of the Judgment of Dissolution in California Superior Court, for the County of Sacramento, case no. 05FL08596.

The court ordered that on or before December 16, 2013, Mary Bryan should file such motions or other proceedings to obtain a determination that the monetary obligations, or whatever portion there is so ordered by the State Court judge, is a Spousal Support obligation, and the necessary findings of fact and conclusions of law for this court to apply that determination to federal law in this bankruptcy case. As the court was unable to interpret the meaning of spousal support as set forth in the state

court judgment, the court allowed a continuance of 60-90 days for the parties to return to family court and have the judge retaining jurisdiction clarify the judgment.

Clarification of Judgment Hearing Date Set

On December 13, 2013, Mary Bryan filed a document from the Family Law Court of the Sacramento County Superior Court, showing that a hearing date on Creditor Bryan's request for a clarification of judgment from the family law court has been set for January 22, 2014. The document shows that Bryan has requested a clarification of the Judgment of Dissolution dated October, 2007. The family court is being asked to determine whether or not the obligation arising out of Joint Debtor Dale Gagel and Bryan's settlement agreement, where Debtor agreed to pay half of the outstanding credit card and other obligations, constitutes spousal support.

The court previously continued this Objection to March 4, 2014, to allow Creditor and Debtor to obtain a clarification of the judgment of dissolution from the originating family court. The court continued the hearing to afford the state court and parties the ability to address any supplemental pleading and evidentiary issues, and for the state court to issue its ruling prior to another hearing.

Reported Failure of Debtor to Participate in State Family Court Action

On March 20, 2014, Creditor Mary Bryan informed the court that a hearing had been held by the family law court, in which Joint Debtor Dale Gagel did not appear. Because Dale Gagel did not attend the hearing, Mary Bryan stated that she had not been able to obtain the documents requested by the court. Mary Bryan also stated her intent to attend the hearing on this matter, and to provide the court with a status update on what has transpired since the last hearing on Debtors' Objection.

In light of the concerns raised by Creditor Mary Bryan regarding Debtor's failure to attend the state court clarification proceeding, the court issued an Order to Set a Status Conference on March 25, 2014, with counsel for the Debtors and Mary Bryant to address any problems with the parties prosecuting the necessary state court family law proceedings and whether the address which the Debtor has provided this court, in Roseville, California, is correct. Dckt. No. 62.

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

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

73. 12-33397-E-13 JONATHAN/CORAL PRICE — MOTION TO CONFIRM PLAN
JLK-2 James L. Keenan — 2-5-14 [50]

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 the Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 5, 2014. By the court's calculation, 48 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. The Chapter 13 Trustee opposes confirmation of the Plan on the basis that it appears that Debtors cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtors are delinquent $696.01 under the terms of the proposed modified plan. According to the proposed modified plan, payments of $13,300.00 have become due. Debtor has paid a total of $12,603.99 to the Trustee with the last payment posted on February 13, 2014, in the amount of $500.00.

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

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

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

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

74. 14-20297-E-13 ANDREW LUMPKINS — **OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK**
NLE-1 Timothy J. Walsh — **2-20-14 [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 Debtor and Debtor's Attorney on February 20, 2014. By the court's calculation, 33 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 ("Trustee") opposes confirmation of the Plan on the basis that Debtor has failed to provide the Trustee with tax returns for the most recent pre-petition tax year. Debtor must provide his tax return to the Trustee no later than 7 days before the first meeting with creditors. 11 U.S.C. § 521(e)(2)(A)(i); Fed. R. Bankr. P. 4002(b)(3).

The Trustee also states that Debtor has failed to file tax returns for the four year period prior to filing. Debtor admitted at the First Meeting of Creditors that he had not filed all of his personal income tax returns during the 4-year period preceding the filing of the Petition. Filing of tax returns is required to confirm a plan. 11 U.S.C. § 1325(a)(9).

According to the Proof of Claim filed by the Internal Revenue Service on January 29, 2014, as a priority claim in the amount of $300.00; Debtor has not filed tax returns for 2010, 2012, and 2013. Claim No. 2-2.

Debtor's Response

In his Response, Debtor alleges that he is working on preparing and filing his tax returns, or a declaration that the returns were not required. Debtor states that he filed the tax return for a business, the corporate return for Landscaping from the Heart, a California corporation. Debtor determined that there was insufficient personal income to require him to file a personal return. Debtor states that he will double check with his accountant, and Debtor will provide a statement based upon the advice of his accountant, or prepare the returns based upon what is advised.

However, Debtor has still not filed a copy of his Federal Income Tax Returns (which according to the Internal Revenue Service, is cause for a tax penalty of $100 for each of the 2010-2013 tax years), or filed documentation that states that no such documentation exists. Debtor has not requested a continuance on the matter to file such supplemental documentation. In its current form, the Plan does not comply with 11 U.S.C. §§ 521(e), 1322, 1325(a) and Fed. R. Bankr. P. 4002(b). 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.

75. 10-27399-E-13 12-2195 — DAN GOODLOW — RHS-1 — GOODLOW V. MARTIN ET AL — ORDER TO SHOW CAUSE — 2-18-14 [82]

Tentative Ruling: Plaintiff-Debtor has been ordered to show cause as to why the court should not dismiss Adversary Proceeding No. 12-2195 for the failure to prosecute. It was further ordered that any opposition to the issuance of the Order to Show Cause shall be in writing and filed with the court in compliance with Local Bankruptcy Rule 9014-1, and must be filed at least fourteen (14) days before the date of the hearing date.

As has been addressed at several hearings, the Debtor is pursuing resolution of the dispute in this Adversary Proceeding through the State Family Law Court proceedings. The court has reviewed these issues previously in connection with the Motion to allow Plaintiff-Debtor's counsel to withdraw from representing the Plaintiff-Debtor in this Adversary Proceeding.

Plaintiff-Debtor is not prosecuting this Adversary Proceeding, having chosen to use the State Family Law Court as the jurisdiction of preference. The Defendant ex-spouse of the Plaintiff-Debtor is not prosecuting this case, her attorney having been previously allowed to withdraw due to the Defendant's failure to communicate with said counsel. Order, Dckt. 74; Civil Minutes, Dckt. 72.

Proper grounds exist to dismiss the Adversary Proceeding without prejudice.

The court's tentative decision is to sustain the Order to Show Cause and dismiss without prejudice the Adversary Proceeding.

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 sustained and the Adversary Proceeding is dismissed without prejudice.

76. 10-27399-E-13 DAN GOODLOW — **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
12-2195 Peter G. Macaluso — **4-27-12 [1]**
GOODLOW V. MARTIN ET AL

Plaintiff's Atty: Peter G. Macaluso
Defendants' Atty:
Kelly M. Raftery [EMC Mortgage Corp.]
Pro Se [Dorice Goodlow; Antoinette Johnson; Robert Martin; Gloria Wellington]
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

Tentative Ruling: The court having dismissed the Adversary Proceedings without prejudice, the Status Conference is removed from the calendar.

Notes:
Continued from 2/11/14 to be heard in conjunction with other matters on calendar.

77. 10-27399-E-13 DAN GOODLOW **CONTINUED MOTION TO MODIFY PLAN**
PGM-2 Peter G. Macaluso **4-11-12 [37]**

CONT. FROM 2/11/14

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.

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:

PRIOR HEARINGS

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.

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.

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.

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.

Status of Adversary Proceeding

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 in the adversary case 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). 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. There is no indication that the parties have reached a settlement.

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. Plaintiff's counsel submitted a written proposal to Defendant and hopes for fair and equitable resolution of the matter. Defendant asserted 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. Defendant was indicated to be receiving medical treatment, which impaired the ability of the parties to consummate a settlement in that Proceeding which would then allow for the confirmation of a plan. Civil Minutes, Dckt. No. 77,

The latest Status Conference Statement, filed by Plaintiff Debtor, indicates that Peter G. Macaluso, Counsel for Plaintiff Debtor, has filed a Motion to Withdraw as Attorney; in light of Plaintiff's expected lack of Counsel, Plaintiff Debtor requested and was granted an allowance of a few weeks to seek new counsel. The Status Conference was continued to this hearing date, and an Order to Show Cause was issued by the court to discern why the adversary case should not be dismissed without prejudice for lack of prosecution by all parties.

On February 18, 2014, the court issued an Order to Show Cause, ordering Plaintiff's attorney, Peter G. Macaluso, to show cause as to why the court should not dismiss Adversary Proceeding No. 12-2195 for the failure to prosecute. It was further ordered that any opposition to the issuance of the Order to Show Cause shall be in writing and filed with the court in compliance with Local Bankruptcy Rule 9014-1, and must be filed at least fourteen (14) days before the date of the hearing date. The court further ordered that Peter G. Macaluso appear in the hearing in person, and

that no telephonic appearance is authorized for the order to show cause. Dckt. No. 82 in Adv. Proc. No. 12-02195.

Debtor's Supplemental Declarations and Supplemental Motion to Modify

On February 27, 2014, Debtor filed a supplement to the Motion to Modify the Chapter 13 Plan. Dckt. No. 81. Debtor states that the intent of the First Modified Plan was to pay the Mortgage lender EMC Mortgage in full, over 36 months. Additionally the Plan purposes to pay attorney fees, remove a Judicial Lien, with general unsecured creditors 0% of their allowed claims. Debtor was to pay a minimum of $28,025 into the Plan over the 36 months, and has Debtor has paid a total of $26,585 and is in the 47th month of the Plan. Debtors last payment was in March of 2013.

The Trustee has $11,905.84 on hand to be disbursed, with the last disbursement on the case in November 2011. The balance on the case consists of the Class 1 Claim of EMC owed $6,552.67 plus interest and attorney fees of $9,465.00. With Trustee fees and interest it is estimated that the balance owed is $17,133.56 less monies on hand of -$11,905.84 the Debtor needs to contribute an additional $5,227.72 to end the plan.

Debtor has not addressed the Trustee's or the court's concerns with regard to feasibility of the proposed plan. Debtor has not filed revised schedules, correcting the Schedules' reporting of Debtor's wife's income, and clarifying Debtor's interest in the property known as 1147 Bald Rock Road, and the property which secures the debt owed to the EMC Mortgage Corporation. Further, Debtor's potential ownership interest in the Bald Creek Road Property has not been resolved, and it appears that the adversary case which would adjudicate the issue of who has ownership of the title of the property, is floundering due to the lack of prosecution by both parties.

The court first addressed these issues at the initial hearing on May 22, 2012 and has continued the hearing multiple times to allow the Debtor to file supplemental information. The Debtor has not responded to the Trustee and the court's concerns accordingly, and instead files non-responsive pleadings that asserts his right to confirmation of the modified plan in this case. In its current form, the modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

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

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

78. 09-37057-E-13 LISA NICKEL **MOTION TO SELL O.S.T.**
RLC-4 Stephen M. Reynolds **3-12-14 [29]**

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

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 12, 2014. By the court's calculation, 13 days' notice was provided.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 deny the Motion to Sell Property. 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 Bankruptcy Code permits the Debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b) and 1303. The Debtor proposes to sell the property described as a 1996 Dodge Ram with a value reported at $575.00 and a 2003 Dodge Durango with a value reported at $5,875.00. Debtor did not state what the sales price of the vehicles or named any buyers.

The Motion, Dckt. 29, states with particularity the following grounds upon which the requested relief (sale of property) are based:

A. Debtor moves for an order authorizing her to sell two vehicles.

B. The two vehicles, with values as stated on Schedule B (in 2009), are:

1. 1996 Dodge RAM.....$575.00

2. 2003 Dodge Durango.....$5,875.00

C. Debtor's confirmed plan revests the property of the estate in Debtor upon confirmation.

D. Debtor seeks authority to sell the 2003 Dodge Durango to an unidentified buyer for an unstated price, who is alleged not to be an insider.

E. The Debtor alleges,

1. All payments are current under the Plan,

2. The Plan is not in default,

3. There are no liens on the vehicles,

4. All costs of sale will be paid from the sales proceeds,

5. Debtor will not relinquish title to or possession of the vehicles prior to payment in full of the purchase price, and

6. The proposed sales are arms length transactions.

No declaration or other properly authenticated evidence in support of the Motion has been filed by the Debtor. The court is cited to Schedules B and D filed in this case in 2009.

Federal Rule of Bankruptcy Procedure 9013 Requirements

The Motion to Sell does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion does not identify the sales price or purchasers of the vehicles.

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

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

probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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

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

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

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

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

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial,

> "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

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

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

RESPONSE FILED BY DEBTOR

On March 19, 2014 the Debtor filed a response to the Order to Show Cause and Order Setting the Hearing. Order, Dckt. 35. In the Response the Debtor asserts,

A. The Motion to Sell was marred by a "procedural hiccup," consisting of the Debtor filing the ex parte motion with the court rather than forwarding to the Chapter 13 Trustee for his consent as provided under Local Bankruptcy Rule 3015-1(i)(4) (which applies only to assets being sold with a value of less than $1,000.00).

B. The Debtor argues that she has complied with Federal Rule of Bankruptcy Procedure 6004 and Local Bankruptcy Rule 3015(i)(5).

C. Debtor is not and was not seeking approval of any particular sale, but a "generic authority" to sell exempt property.

D. The vehicles do not secure any claims in this case.

E. After the present Motion was filed, a second ex parte motion was transmitted to the Chapter 13 Trustee.

F. The Debtor received an offer to purchase one of the vehicles (not identified in the responsive pleading).

G. Property of the Debtor claimed as exempt may be used despite that the Chapter 13 case has not been concluded.

H. Federal Rule of Bankruptcy Procedure 6004 does not require that the purchaser be identified.

I. It was alleged in the Motion that the unidentified purchaser was not an insider.

J. Debtor does not want any specific sale approved by the court, but the authority to sell the vehicle.

K. The Motion was supported (by unauthenticated) exhibits.

L. The Debtor's Plan is near completion.

M. There was no improper purpose, or intent to harass or delay in the pleadings seeking the authorization to sell the vehicles.

Response, Dckt. 36.

The Debtor has provided her declaration in support of the Response. In the declaration she testifies,

A. She has been approached by a third party (unidentified) to purchase the Dodge Durango when it was parked at the Debtor's mother's property.

B. Paris Johnson (from the drafting the court infers this is the buyer, but could be the Debtor's mother) has offered to buy the Dodge Durango for $4,000.00.

C. The Debtor and her (non-debtor) husband do not use the vehicles (and after having been in the bankruptcy case for more than four years) would like to sell them before any major repairs are required.

Declaration, Dckt. 37.

PROCEDURES GOVERNING SALE OF PROPERTY

The gist of the Debtor's arguments are that since she has claimed an exemption in the two vehicles they are hers to do as she pleases. While the confirmed Chapter 13 Plan has revested the property of the estate in the Debtor, such is not absolute. If the Debtor defaults and the case is converted, the property is back in the bankruptcy estate. 11 U.S.C. §§ 1307, 348(f). Further, though an exemption has been claimed *in* the vehicles, that exemption is only for a dollar amount and does not give the asset to the Debtor. *Schwab v. Reilly*, 130 S.Ct. 2652, 2667, 177 L. Ed. 2d 234 (2010); *Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1210 (9th Cir. 2010).

Federal Rule of Bankruptcy Procedure requires that notice of a proposed use, sale, or lease of property be given. The Local Bankruptcy Rules require that the request for an order be made by motion. Local Bankruptcy Rule 9014-1. The notice and opportunity for hearing process is allowed for very limited Chapter 13 purposes, none of which apply here. Local Bankruptcy Rule 9014-1(k), 3015-1(c) [confirmation of plan] and (d) [confirmation of modified plan].

Contrary to the Debtor's apparent contention that the court's "approval" of a sale is nothing merely more than abdicating its authority and authorizing the Debtor to sell the personal property to whomever, whenever, for whatever she wants, the court must exercise the federal judicial power to approve a sale, not the Debtor.

Here, the Debtor proposes no sale to the court for which approval can be granted. The Debtor does not propose to sell the vehicles through a recognized auction or other process intended to obtain the fair value for the vehicles.

The court has no sale to authorize or sale procedure to authorize, but merely turn over approval of a sale to the Debtor. The court declines the opportunity to turn over the exercise of federal judicial power to one of the parties in this case.

The court denies the motion without prejudice. If and when the Debtor has a sale to be approved or a sale procedure (such as delivering to an auction company or dealer (such as CarMax or other consignment lot), she may seek approval from the court to actually sell the vehicles.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to sell property filed by the Debtor in Possession 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.

79. 09-37057-E-13 LISA NICKEL **ORDER TO SHOW CAUSE**
Stephen M. Reynolds **3-13-14 [35]**

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on Debtor's Counsel, on March 13, 2014. 12 days notice of the hearing was provided.

The Debtor filed a Motion to Shorten Time to hear a Motion to Sell. The Court granted the Motion to Shorten Time, ordering that Debtor shall file ans serve a Supplemental Pleadings which identified the purchaser of the vehicles and the sale price of each vehicle. The court also ordered counsel for Debtor to show cause why the court does not impose sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 for failing to identify the sales price for assets requesting to be sold and the buyers, failing to file a contract as an exhibit, declaration or evidence in support of the motion.

COUNSEL'S RESPONSE

On March 19, 2014, counsel for Debtor filed a Response to the Order to Show Cause, stating that Debtor sought authority not for a particular sale, but generic authority to sell exempt property that revested to the Debtor upon plan confirmation in October 2009. Dckt. 36. The vehicles in question are a 1996 Dodge RAM with a scheduled value of $575.00 and a 2003 Dodge Durango with a scheduled value of $5,875.00.

Counsel states he originally sought *ex parte* relief for authority to sell, RLC-1, incorrectly filed with the court rather than forwarded to the Trustee. Docket No. 25, 26 and 27. Counsel states there was a misunderstanding within counsel's office regarding the procedure for requesting a sale of assets in a Chapter 13 case. Counsel states a second ex parte motion for authority to sell was lodged with the Chapter 13 Trustee on March 5, 2014 and that there were communications with the Trustee's office regarding the status of the application but there was no clear acceptance or rejection of the application. Counsel states that the Debtor sought authority to sell with no particular sale arranged, with RLC-4 modified to state "Debtor seeks authority to sell, she has a potential purchaser for the 2003 Dodge Durango, the buyer is not an insider as contemplated by 11 U.S.C. §101(31)(A)."

Counsel states he modified the language of the motion to reflect a change in position; Debtor now had a potential purchaser for the Durango. The requested relief remained the same; authority to sell her two exempt vehicles prior to the completion of Chapter 13 Plan.

Counsel states that property that is claimed exempt is available for the use of the Debtor after the objection period has passed despite the fact that a chapter 13 case has not yet been concluded. *In re Gamble*, 168 F.3d 442 (11th Cir. 1999). In this case, Counsel argues that the Debtor claimed both vehicles as exempt and no timely exemption was filed. Counsel states that the purpose of the Motion to Approve Sale was to comply LBR 3015-1(i)(5) which requires only a noticed motion. There is no requirement

in Local Rule of Bankruptcy Practice 3015-1(i)(5) that the identity of a purchaser be disclosed or that the sale price be determined.

Counsel argues that Federal Rule of Bankruptcy Procedure 6004 does not require identification of a purchaser and that the ex parte application filed with the court disclosed that a potential buyer had been identified. Counsel states that no written sales contract existed and the potential sale was not guaranteed. Counsel states that Debtor does not want a sale at a particular price to a particular buyer approved; debtor wants authority to sell the vehicles generally. Counsel argues that it is in her interest to obtain the best price possible and that the sale will not change the outcome of this case.

Lastly, Counsel argues that there was no improper purpose or intent to delay or harass in the pleadings filed seeking permission to sell the vehicles. Counsel believed that permission to sell in the circumstances of the present case was akin to an abandonment. Counsel state the vehicles in question are not necessary to the completion of the nearly complete Chapter 13 Plan, the vehicles are exempt and not collateral for a secured claim, the proposed sale is not to an insider.

DEBTOR'S DECLARATION

Debtor filed a Declaration stating that she seeks permission to sell her two vehicles. Dckt. 37. She was approached by Paris Johnson, who offered $4,000.00 for the 2003 Dodge Durango, and has no connection with the Debtor. Debtor states that there is only an oral agreement and that no one has expressed interest in the 1996 Dodge RAM.

DISCUSSION

The Bankruptcy Code permits the Debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b) and 1303. Federal Rule of Bankruptcy Procedure 9013 governs motion practice. The Motion to Sell does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion does not identify the sales price or purchasers of the vehicles.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a

pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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

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

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

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

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

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

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

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

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

Additionally, no evidence was filed in support of the Motion to Sell. Pursuant to Local Bankruptcy Rule 9014-1(d)(6) requires that every motion shall be accompanied with evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested.

At the hearing, xxxx