UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

April 1, 2014 at 3:00 p.m.

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1. 11-43701-E-13 LEAH MEJIA — **MOTION TO APPROVE LOAN MODIFICATION**
JE-1 Steele Lanphier — **3-11-14 [30]**

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 and Office of the United States Trustee on March 11, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Approve the Loan Modification without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor moves for an order to approve the loan modification agreement entered she entered into with Wells Fargo Home Mortgage. The motion is denied without prejudice due to various defects in the motion and proof of service.

Chapter 13 Trustee's opposition

The Chapter 13 Trustee ("Trustee") opposes to the motion on the ground that the subject of the motion is confusing. According to the Trustee, the **Notice indicates Debtor is filing a "NOTICE OF MOTION OF DEBTOR'S TO PURCHASE A VEHICLE**," and within the Notice Debtor states, "By this motion debtor seeks to obtain an order for the US Trustee to abandon debtor's business." Dckt. 31. Debtor's motion appears that she is seeking a motion

to approve loan modification.

The Trustee also claims that Debtor has not filed a Declaration in support of the Motion. Instead, Debtor attached a Verification to the motion. Debtor's verification does not include any facts regarding the loan modification but only says that the motion is true and correct.

Debtor has not addressed why use of a "verification" is a proper method of providing this court with competent, credible evidence in support of the motion. Such verifications often appear to be devices merely to have perfunctory presentation of documents without a witness really providing any testimony. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Pleadings require that the motion, points and authorities, each declaration, and the exhibits be filed as separate electronic pleadings.

Further, when a party is too busy or incapable of reading a declaration and providing testimony, the court questions whether such a motion has been presented in good faith. .

The court also notes that if the verification were to be accepted as the Debtor's testimony she states, under penalty of perjury that the are multiple "Debtors" in this bankruptcy case. However, only one debtor is listed on the Petition and is shown on the caption. When the Debtor states under penalty of perjury there are multiple debtors in this case, it further shows that the Debtor did not review in any meaningful way what is stated in the Motion, but appears to have signed it (if she did actually sign it) as some "legal document" not worth her time to read.

The Debtor's "perjury," if the court were to accept the Motion as the Debtor's testimony, is compounded by her "testimony" that she is purchasing a vehicle (Motion ¶ 4), she has a "mature plan" (Motion ¶ 4, the court not recognizing that "legal term" used in the motion or the significance of any personal knowledge "testimony" by the Debtor that the Plan is "mature"), the last payment on the Plan will be made in July 2014 (Motion, ¶ 4), and the first payment on the vehicle which is the subject of the motion will be made in January 2014 (three months prior to the Motion being filed (Motion, ¶ 4).

To the extent that the Debtor read the Motion she was "verifying," she is either intentionally committing perjury or did not bother to read (or possibly sign) the verification when it was put in front of her by her attorney. FN. 1.

FN.1. The court notes that the page of the Motion on which the verification is located only has the Debtor's attorney's signature at the top of the page. The pages of the Motion are unnumbered. The court does not know if this is a coincidence or a sign of a practice by which signatures of declarants are obtained in advance and then attached to the pleadings prepared by the attorney, without review by the declarant.

The Trustee also claims that service is inadequate. Debtor's Proof of Service indicates that the only parties served were the Office of the US Trustee and the Chapter 13 Trustee.

Service of process issue

Debtor's Proof of Service shows that no creditors was served with the Notice, Motion and a Proposed Order. Dckt. 32. All creditors must be served in a motion to approve loan modification. Fed. R. Bankr. P. § 2002(a)(3).

Document

The court notes that the moving party filed the motion and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1), and that attorneys practicing in federal court comply with the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. Failure to comply with the *Guidelines* and filing pleading which do not comply with the Federal Rules of Civil Procedure shall result in th emotion being summarily dismissed without prejudice.

Correct party not named in the motion

The court has not been presented with any evidence from the Debtor that Wells Fargo Home Mortgage is actually the creditor having a claim in this case. A creditor is defined by 11 U.S.C. § 101(1)(A), as relevant to this Motion, to be an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." The term claim is defined by 11 U.S.C. § 101(5)(A), as relevant to this Motion, to be a "right to payment. . . ."

This court has made it clear on many occasions that it can and will only issue orders against parties properly named in motions and for which there is a colorable basis for the court issuing an order effecting the rights of such party. Debtor provides no evidence showing that Wells Fargo Home Mortgage is the creditor. The Debtors do not testify that they borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred to Wells Fargo Home Mortgage. In fact, Wells Fargo Bank, N.A. filed a claim alleging that it is the real creditor in this case. Claim #2.

The court will not speculate and hope that it has named a real creditor and that it's order will have any legal effect.

Motion does not state with particularity the grounds for relief sought

Debtor's motion is confusing. It first alleges that Debtor is seeking approval of a loan modification agreement. However later in the motion, Debtor refers to the agreement as a purchase. If Debtor wishes to purchase a new residence she should file a motion to incur debt.

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

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

The Motion to Approve the Loan Modification filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

2. 13-34801-E-13 ESTHER HWANG — MOTION FOR ORDER PERMITTING RELEASE OF GARNISHED FUNDS
DCG-2 Eric J. Gravel — 3-3-14 [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 JPMorgan Chase Bank, N.A., National Collegiate Student Loan Trust and Office of the United States Trustee on March 3, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Order Permitting Release of Garnished 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 for Order Permitting Release of Garnished Funds is granted. No appearance required.

Debtor moves for an order permitting JPMorgan Chase Bank, N.A. to release the funds currently on hold as a result of a post-petition garnishment. This case was filed November 20, 2013. Debtor states that pursuant to a pre-petition judgment obtained in the San Francisco Superior Court on or around July 16, 2013, National Collegiate Student Loan Trust delivered an Order for a Garnishment to the San Diego County Sheriff's Office. The San Diego County Sheriff's Office was instructed to deliver and serve the Order for Garnishment on JPMorgan Chase Bank, N.A. Debtor states that on December 24, 2013, over a month after the filing of Debtor's petition, JPMorgan Chase Bank, N.A. placed a hold of $2,615.20 on Debtor's

funds, stating “we have been instructed by legal order to place a hold on these funds.” Exhibit A, Dckt. 43.

Debtors asserts that as a result of this garnishment, at the time of the filing of this Motion, JPMorgan Chase Bank, N.A. is in possession of $2,615.20, which it describes as being on hold and unavailable to the Debtor. Debtor states she has disclosed an interest in the Garnished Funds in Schedule B and claimed an exemption in the entire amount on Schedule C. Debtor further asserts that the underlying pre-petition judgment rendered against the Debtor does NOT relate to a ‘Domestic Support Obligation’, as defined under 11 U.S.C. § 101(14A).

Debtor asserts that JPMorgan Chase Bank, N.A. is in possession of $2,615.20, representing funds of the Debtor's Bankruptcy estate that have been disclosed and exempted. Debtor states these funds are not in the possession of the creditor National Collegiate Student Loan Trust.

DISCUSSION

11 U.S.C. § 362 (a) (2), (3), (4), (5) and (6) prevents the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case.

Property of the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541.

Here, the Debtor had the amount of $2,615.20 in her bank account at JPMorgan Chase Bank, N.A. and after the commencement of the case, JPMorgan Chase Bank, N.A. placed a hold on the funds pursuant to the pre-petition judgment of National Collegiate Student Loan Trust.

11 U.S.C. § 542(a) provides for turnover of property to the estate,

> (a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Here, JPMorgan Chase Bank, N.A. has been properly served with notice of this Motion. No response, objection or right to setoff for the funds has been asserted. *See In re Drum Corps Asso.*, 22 B.R. 929 (Bankr. E.D. Wash. 1982) (Where bank-creditor should have within its answer to garnishment asserted its ownership of right to setoff for funds in question or intervened in action claiming interest in said funds but did neither, bank held funds for garnishee-debtor and those funds were no longer being held in ordinary course of business by bank and therefore were not subject to setoff pursuant to 11 U.S.C. § 553(a) because of lack of mutuality, nor did facts fit within exceptions in § 553 where debtor filed its petition of bankruptcy since order of payout was stayed as debtor still possessed interest in those

funds and said funds became property of estate pursuant to 11 U.S.C. § 541(a); thus, trustee had right to turnover of said funds pursuant to 11 U.S.C. § 542).

Based on the foregoing, the court orders that JPMorgan Chase Bank, N.A. release the property of the estate in the amount of $2,615.20 to the Debtor, Esther Hwang.

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 Order Permitting Release of Garnished Funds filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and JPMorgan Chase Bank, N.A. is ordered to release the property of the estate in the amount of $2,615.20 to the Debtor, Esther Hwang.

3. 14-20708-E-13 NOEL ORLANDO
TSB-1 Scott D. Hughes

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
3-3-14 [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 March 3, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

Plan exceeds 60 months

The Chapter 13 Trustee ("Trustee") opposes confirmation of the Plan on the basis that the plan exceeds 60 months. According to the Trustee's calculations the Plan will complete in 69 months as opposed to 60 months. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). The cause of the extending of terms is Debtor has payments in Class 1 and Class 2 totaling $3,745.44 per month but a plan payment of only $3,738 per month.

Debtor fails liquidation

The Trustee also claims that Debtor fails the Chapter 7 liquidation for the following reasons:

A. Debtor's non-exempt equity totals $146,000.00 but Debtor is proposing a 0% dividend to unsecured creditors.

B. Debtor fails to disclose all assets. Debtor is 90% owner of Big Willie Style Inc and his girlfriend is the owner of the other 10%. Debtor failed to list interest in this corporation on Schedule B and any value in this business is not exempted on Schedule C.

C. Debtor fails to list and exempt any interest in 2013 Federal and State Tax Refunds. According to the Trustee, Debtor received approximately $1,078 from his 2012 federal return and $108.00 from his 2012 state return. He does not disclose the amount received in 2013 on Schedule B and exempt on Schedule C.

D. Debtor lists on Schedule B a 1995 Mercedes S500 with a value of $1,000 and a 1991 Chevy Camaro with a value of $500.00. The Trustee claims that Debtor provides no specific details of the autos to assist the Trustee and creditors in determining the value listed.

Lack of detailed business expenses

The Trustee also claims that Debtor does not provide Trustee with a Business Budget detailing their business income and expenses. The Trustee alleges that Debtor's business income reported on Schedule I appears to be a combined income generated from a corporation (Big Willie Style Inc.) and a sole proprietorship (Super Shuttle). Debtor deducts $2,000 for business expenses on Schedule J but failed to file a breakdown of each business's income and expense.

The plan is not Debtor's best effort

The Trustee alleges that the continued operation of Debtor's business is not in the best interest of the estate. The Trustee notes that Debtor reports net business income of $1,200.00 on Schedule I but also deducts $2,000.00 for business expenses on Schedule J. It appears that the business costs the estate $800.00 a month. Moreover, Debtor proposes to pay $9,122.00 for his business debts.

Not all income reported

According to the Trustee, Debtor admits at the creditor's meeting that both of his dependents listed on Schedule J work for the corporation. No income is reported for either dependent on Schedule I. Debtor must report all of his projected disposable income. 11 U.S.C. § 1325(b).

Misclassified claim

The Trustee also claims that Debtor misclassified the claim of Cresco Capital. Debtor listed Cresco Capital as a Class 2 creditor in his plan. But Cresco Capital's claim appears to represent that the agreement between the parties is a lease. As a lease, the claim should be provided for in Section 3.02 of the plan.

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

4. 11-35409-E-13 JAY/CHRISTINA JUNG — MOTION TO APPROVE LOAN MODIFICATION
EJS-5 Eric John Schwab — 3-18-14 [75]

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

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

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Approve the Loan Modification 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 a loan modification with Regions Bank, dba Regions Mortgage.

Service of process issue

However, service on the creditor was made to a post office box. Service upon a post office box is deficient. *Beneficial Cal., Inc. V. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9 Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve

a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously."). Furthermore, Federal Rule of Bankruptcy Procedure 7004(b) requires service on a corporation to be made to an officer or agent for service of process.

Alternative Ruling: If the Movant can show service was proper, the court will issue the following alternative ruling:

Regions Bank, dba Regions Mortgage, 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 $2,182.10. The modification will capitalize the pre-petition arrears and provides for stepped increases in the interest rate from 4.000% to 9.000% over the next 30 years. The loan begins as an interest-only loan and will adjust not sooner than April 1, 2024. The maturity date will be March1, 2044.

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 Jay and Christina Jung, Debtors are authorized to amend the terms of their loan with Regions Bank, dba Regions Mortgage, which is secured by the real property commonly known as 2139 Letterkenny Lane, Lincoln, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 78, in support of the Motion.

5. 11-21410-E-13 AMADEO MALDONADO
PGM-5 Peter G. Macaluso

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTOR'S ATTORNEY(S), FEES: $2,050.00, EXPENSES: $0.00
3-4-14 [89]

Local Rule 90134-1(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 March 4, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Compensation is granted. No appearance required.

Law Offices of Peter G. Macaluso, Counsel for Debtor, seeks additional attorney fees in the amount of $2,050.00. Counsel argues that these additional fees are actual, reasonable, necessary and unanticipated as post-confirmation work required.

Description of Services for Which Fees Are Requested

1. Motion to Modify due to Motion to Dismiss. Counsel states this motion was unanticipated, as the Debtor received a Motion to Dismiss filed by the Trustee. Counsel prepared an opposition to the motion, met with client, appeared at the hearing, prepared documents for motion to modify and attending the hearing; and

2. Motion to Modify due to Motion to Dismiss. Counsel states this motion was unanticipated, as the Debtor received a second Motion to Dismiss filed by the Trustee. Counsel prepared an opposition to the motion, met with client, appeared at the hearing, prepared documents for motion to modify and attending the hearing.

The hourly rates for the fees billed in this case are $200.00/hour for counsel for 10.25 hours of unanticipated and substantial work. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $2,050.00 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.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Compensation filed by Counsel for Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Law Offices of Peter G. Macaluso, Counsel for Debtor, is allowed the following fees and expenses as a professional of the Estate:
>
> Law Offices of Peter G. Macaluso, Counsel for Debtor Applicant's Fees Allowed in the amount of $ 2,050.00.

6. 13-32112-E-13 JESS BAILEY — MOTION TO CONFIRM PLAN
JGD-2 John G. Downing — 2-18-14 [36]

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

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, 42 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.

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 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.

7. 14-20717-E-13 MMM-1 | **CANDICE SILVA**
Mohammad M. Mokarram | **MOTION TO VALUE COLLATERAL OF CITIMORTGAGE, INC.**
2-25-14 [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 Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 25, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 6710 Calista Street Organevale, California. The Debtor seeks to value the property at a fair market value of $225,000.00 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 $269,568.00. Creditor Citimortgage Inc.'s second deed of trust secures a loan with a balance of approximately $45,635.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Citimortgage, Inc. secured by a second deed of trust recorded against the real property commonly known as 6710 Calista Street, Orangevale, 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 $225,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

8. 14-20717-E-13 CANDICE SILVA
TSB-1 Mohammad M. Mokarram

AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
3-3-14 [24]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Debtor's Attorney on March 3, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan relies on a pending motion to value, which is set for hearing the same date as this Objection. The court having granted the motion, the Trustee's objection on this basis is overruled.

The Trustee also opposes confirmation offering evidence that the Debtor is $310.00 delinquent in plan payments and has paid $0.00 into the plan to date. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The 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.

9. 12-35521-E-13 13-2289 CHRISTOPHER DEAN PGM-1 DEAN V. COLLEGE GREENS EAST HOMEOWNER ET AL

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT 3-3-14 [51]

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 Plaintiff, Defendants' Attorneys, Chapter 13 Trustee, and Office of the United States Trustee on March 3, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Dismiss Adversary Proceeding 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 continue the hearing to 3:00 p.m on April 29, 2014 for the Motion for Leave to File Amended Complaint. No appearance at the April 1, 2014 hearing is required.

CONTINUANCE OF HEARING

The court has set forth below the draft tentative ruling on the Motion which was prepared for the April 1, 2014 hearing on this Motion. The parties can review the draft ruling and consider the observations of the court.

The court continues the hearing for several reasons. The Plaintiff-Debtor is in the process of concluding a settlement with the Homeowners Association which dispossessed the Debtor of the real property which secures the Defendant's claim. The Debtors assert that upon that settlement being completed and they are back in possession of the Property, they can proceed with the payment of the Defendants claim under the terms of the loan modification.

At this juncture the court does not express any opinion as to the asserted loan modification, the defaults which may exist, and the Debtors ability (financially and legally) to cure any arrearage. However, the

lynchpin to anything positively occurring between the Plaintiff-Debtor and the Defendant is the settlement with the Homeowner's Association.

The court has ordered adequate protection payments be made by the Chapter 13 Trustee (from monies paid into the case by the Debtor) to the Defendant for two months of payments under the asserted modified loan. This will prevent any arrearage from getting larger. The court has also "encouraged" the Plaintiff-Debtor to meet with and realistically discuss with the Defendant how its claim will be paid through this case – not merely state that something will happen once the Plaintiff-Debtor obtains title and possession from the Homeowners' Association.

Rather than the Parties spending more time and money keeping this Adversary Proceeding bumping along with further preliminary amendments, the real economic and legal discussions need to be taking place in anticipation of the settlement. Thus, the court continues the hearing to the time and date of the hearing on the motion to approve the settlement to allow the Plaintiff-Debtor to engage in the constructive discussions with the Defendant. If Plaintiff-Debtor's counsel does not believe that his oral attempts to have such discussions are being sufficiently responded to, then putting the information in a letter and assisting Defendant's counsel in communicating that constructive financial information should move the process forward.

REVIEW OF MOTION

Plaintiff-Debtor seeks leave to amend the complaint to plead with specificity the request for declaratory relief in determining in this case that the mortgage loan modification granted through the mortgage holder's servicing agent is enforceable and valid or in the alternative a breach of contract. Plaintiff-Debtor states that this modification was granted only for Plaintiff-Debtor to be told later that the home was lost in a pre-petition foreclosure and that the modification was thus fruitless, resulting the Plaintiff-Debtor being locked out of the residence.

Plaintiff-Debtor states that he has reached a settlement agreement with the Homeowner's Association, pending court approval, which will dismiss them from this Adversary Proceeding. Plaintiff-Debtor now seeks a declaratory judgment on whether the loan modification agreement is still binding on Defendants San Francisco Fire Credit Union and Cenlar, FSB ("Defendants"), or in the alternative if there is a breach of contract.

DEFENDANTS' OPPOSITION

Defendants San Francisco Fire Credit Union and Cenlar, FSB ("Defendants") oppose the motion on the basis that the proposed amended complaint filed in support of the motion contain nearly identical claims as he previously asserted against Defendants. Defendants also argue that the ownership claim has not basis because Defendants do not nor have ever claimed to be the owner of the property but that the Homeowner's Association has been the record owner by virtue of a pre-petition foreclosure sale. The Defendants also argue the breach of contract claim is meritless because there is no contract that states they must protect the subject property from another party's foreclosure sale.

Defendants argue that the amended complaint is devoid of any factual averments establishing that a ownership dispute exists between Plaintiff and Defendants. Defendants state that Plaintiff-Debtor has not established that declaratory relief will serve any useful purpose as between himself and Defendants, and that they have honored the Modification, as evidenced by their amended claim. As such, Defendants state there is no actual controversy regarding the parties rights' under the loan.

Defendants also argue that the claim for breach of contract fails because it does not identify the contractual provision that Defendants purportedly breached, as one for protecting the subject real property from the Homeowner's Association's foreclosure sale does not exist. Defendants states that despite multiple attempts by them to pursue foreclosure alternatives with Plaintiff-Debtor (the last of which culminated in the Modification), Plaintiff-Debtor has failed to satisfy his obligations to Defendants.

PLAINTIFF'S REPLY

Plaintiff-Debtor filed a reply, stating he had hoped that this adversary would have been resolved by now, in that the Homeowner's Association agreed to stipulate a dismissal of this case as to Defendants College Greens East Homeowners Association and Eugene Burger Management Corporation. Plaintiff-Debtor states the stipulation will authorize the Trustee to disburse approximately $6,000.00, thereby restoring title and possession to the Plaintiff-Debtor and allowing the Plaintiff-Debtor thirty (30) days to restore the damage caused by the eviction of the tenants.

Plaintiff-Debtor states he is hopeful that upon possession he can initiate payments pursuant to the loan modification, re-capitalizing the post-petition arrears, and thereafter dismissing this action with prejudice. As such, Plaintiff-Debtor requests a continuance of this motion for approximately (90) ninety days. Additionally, the Debtor/Plaintiff would suggest the parties agree to Bankruptcy Dispute Resolution in order to facilitate a judicially economic resolution to this matter.

DISCUSSION

"A party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. § 15(a)(2), as incorporated by Fed. R. Bankr. P. 7015. There is a strong policy of liberal authorization to amend pleadings in the Federal Courts. *In re Kashami*, 190 B.A.P. 875 (9th Cir. 1995). In situations where Plaintiff's causes of actions have been dismissed without leave to amend, the Plaintiff bears the burden of proving there is a reasonable possibility of amendment. *Blank v. Kirwan*, 39 Cal.3d 311 (1985).

While there is a strong policy of liberal authorization to amend pleadings in the Federal Courts, the court is correct to deny leave where there is undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Moore v. Kayport Package Exp., Inc.* 885 F.2d 531 (9th Cir. 1989). Furthermore, an amendment that would

serve no useful purpose, i.e. be subject to a motion to dismiss, should not be allowed. *Foman v. Davis* 371 U.S. at 182.

The proposed Amended Complaint seeks the following relief and determination against the Defendants:

A. First Cause of Action - Declaratory Relief: Plaintiff alleges there is a dispute as to ownership rights to the subject property and seeks a judicial determination of the rights and obligations of the parties, including a statement of the amount of contractual monthly payments proper due, the correction of the accounting and a declaration as to which party's interpretation is correct.

B. Second Cause of Action - Breach of Contract: Plaintiff alleges Cenlar failed to protect the subject property from foreclosure before offering Plaintiff a loan modification and that Defendants have therefore not satisfied their obligations under the contract.

It appears the proposed Amended Complaint is *very* similar to the original complaint filed against Defendants. The court will not merely allow the Plaintiff to amend a pleading to restate contentions which, after previous briefing were determined against the Plaintiff.

Even assuming that the allegations are true, it appears on the face of the proposed Amended Complaint that the pleadings fall short of stating "plausible claims" against the remaining Defendants. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). While the court does not pre-judge the merits on a Rule 12(b) motion, it appears the Plaintiff has not properly plead sufficient claims against Defendants, as the court previously addressed in the Defendants Motion to Dismiss. *See* Civil Minutes, Dckt. 41. In its ruling, the court noted,

> Plaintiff-Debtor does not cite to any specific provision of the Deed of Trust to support his breach of contract claim.
>
> Plaintiff-Debtor only generally alleges that Defendant breached some unspecified provisions of the contract by allowing College Greens to foreclose the Property. This allegation is insufficient to state a claim for breach of contract. Furthermore, there appear to be no provisions under the Deed of Trust requiring SFFCU or Cenlar to protect Plaintiff-Debtor from a foreclosure by a homeowner's association.
>
> In his Opposition to this Motion, the Plaintiff-Debtor alludes to the Proof of Claim and Objection to Confirmation of the Plan not being consistent with the loan modification entered into between the Plaintiff-Debtor and SFFCU. Opposition, 12-35521 Dckt. 32. (Claim asserting a pre-petition arrearage and escrow arrearage.) The Proof of Claim stating the arrearage was filed on October 10, 2012. 12-35521 Proof of Claim No. 4. The Notice of Mortgage

> Payment Change was filed on November 12, 2012. The Objection to Confirmation by SFFCU was filed on October 2, 2012. 12-35521 Dckt. 15.
>
> The courts order approving the Loan Modification with SFFCU was filed on March 6, 2013. 12-35521 Dckt. 70. All of the events referenced in the Opposition filed by the Plaintiff-Debtor (which are not stated in the Complaint) occurred prior to there being a loan modification approved by the court.
>
> If there is an actual dispute between the Plaintiff-Debtor and SFFCU, then it could possibly be addressed by or through (1) the confirmation hearing at which the court determines if the SFFCU claim is properly provided for in the plan, (2) an objection to the claim, or (3) an adversary proceeding in which there is a claim asserted that SFFCU has and is breaching the contract as amended by the court approved loan modification.
>
> The Plaintiff-Debtor fails to plead a claim for breach of contract by the Defendants. The Motion is granted. Because no controversy may exist or, in light of the settlement reported by the Plaintiff-Debtor and College Greens East, Dckt. 34, the controversy may be resolved through the Chapter 13 Plan confirmation process, the court does not grant leave to amend at this time. If such a controversy exists and the Plaintiff-Debtor concludes that it would not likely be resolved through the confirmation or objection to claim process, Plaintiff-Debtor may seek leave to file a first amended complaint which leave will be freely granted by the court. The court requiring a motion for leave to file a first amended complaint is done to manage this Adversary Proceeding litigation and not have the Plaintiff-Debtor feel compelled to file an amended complaint or it being argued they waived such right, and setting off a new round of possibly unnecessary motions in this Adversary Proceeding.

Id. Plaintiff-Debtor attempt to amend the complaint regarding the breach of contract claim is not sufficient as it does not allege any factual grounds that there has been a breach of *the court approved loan modification*. The claim is nearly identical to the original complaint in which the court dismissed against the Defendants.

Furthermore, the court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

INTERIM CONCLUSIONS

On the one hand the proposed Amended Complaint could be read that the Defendant has disavowed the asserted loan modification. However, that does not appear consistent with the Amended Complaint in toto or the positions stated by the parties. The Amended Complaint asserts that there is a dispute as to ownership of the Property, but fails to state what are the opposing assertions.

In many respects it may be that this Adversary Proceeding is not merely for declaratory relief, in which parties are making counter assertions but for which no breach has occurred. Rather, it may well be that there has been asserted that a breach has occurred and the court is being called on to make determinations as to the breach, issue the appropriate findings of fact and conclusions of law, and determine the damages flowing therefrom.

In the Second Cause of Action it is asserted that Cenlar, acting as the agent of Defendant San Francisco Fire Credit Union, "failed to protect the Subject Property from foreclosure before offering plaintiff a loan modification." The court cannot tie that legal conclusion, a duty to protect the Subject Property, to the allegation of the breach of some duty.

As there has not been pleaded a dispute between the rights of Plaintiff-Debtor and these Defendants, there is not a basis for the court to adjudicate the rights and interests of the Plaintiff-Debtor and the Defendants.

The court does not grant the motion to allow the Plaintiff-Debtor to file an Amended Complaint against Defendants for breach of contract and declaratory relief.

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 Leave to Amend filed by Plaintiff-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 hearing on the Motion to Amend is continued to 3:00 p.m. on April 29, 2014.
>
> **IT IS FURTHER ORDERED** that no further pleadings shall be filed in connection with this Motion until after the April 29, 2014 hearing, if any are permitted by the court, except for stipulations of the Parties.

10. 12-26623-E-13 NAVRAJ/INDU JASUJA — MOTION TO MODIFY PLAN
PGM-7 Peter G. Macaluso — 2-25-14 [146]

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 25, 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 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 Trustee opposes the motion on the basis that the Debtor has not abided by the Court's February 28, 2014 Civil Minute Order, Dckt. 144, and the Court's February 18, 2014 Civil Minutes, Dckt. 142, wherein Debtor's claimed exemptions in the restaurant assets and $20,000.00 in sale proceeds were disallowed in their entirety.

The Trustee notes that the Debtor's Motion and Declaration indicate Debtor's are modifying their plan due to the court denying their claim of exemptions. Debtor's Modified Plan proposes a plan payment of $6,880.00 total paid in through January 2014, a lump sum payment of $5,000.00 in February 2014, then $550.00 for 38 months. Dckt. 145. Under the proposed modified plan Debtor will pay a total of $32,780.00 throughout the life of the plan ($6,880.00 + $5,000.00 + $20,900.00 ($550.00 x 38)). Under the confirmed plan, Debtor's plan payments are $280.00 for 60 months or a total of $16,800.00. Trustee argues that to comply with the Court's order, Debtor would need to pay to the Trustee over the life of the plan a total of $36,800.00. Trustee states the Debtor's proposed plan payments totaling $32,780.00 fall short by $4,020.00. Trustee states that Debtor would need to increase the proposed plan payment for the remaining 38 months by $105.79 for a monthly payment of $655.79 to fully comply with the Court's order.

The Trustee also opposes the motion on the basis that Section 3.02 of Debtor's modified plan includes a commercial lease with a regular monthly payment of $2,400.00. Trustee states that Debtors did not file updated

income and expense statements as stated in their Motion and Declaration, but Debtor's prior Schedule Js do not budget for lease payments. Dckts. 62 and 121. Trustee states that Debtor's sold their business inventory without Court authorization and are no longer in business.

Lastly, the Trustee argues that the Debtor has not filed amended Schedules I and J as stated in their Motion and Declaration. While Debtor's Declaration states they will decrease their cell phone expense by $25.00 to provide for the increased plan payment, no schedules were filed to support this claim, nor was evidence submitted such as copies of the cell phone expense bills for both before and after the amendment. Additionally, Debtor's prior Schedule J provides for a mortgage payment of $1,527.00, when creditor, Bank of America's, proof of claim (Court Claim No. 26) states Debtor has a fixed interest loan of 5.250% with principal and interest payments of $1,387.96, a difference of $139.04. Dckt. 121.

DEBTOR'S REPLY

Counsel for the Debtors responds, stating they are willing to "correct their math" and increase the remaining payment to $656 per month. Debtors Request to Strike section 3.02, as Debtors are no longer in the lease and that the listing was in error. Counsel states that the Debtor's decreased cell-phone payment, and the difference in the mortgage payment is based on the "escrow analysis" being conducted at the time, i.e. $139.00 variance. Given the factors of this case, the debtors also state that they would not be adverse to increasing the monthly plan payment to $700 for the remained of the plan, in good faith.

DISCUSSION

The court has addressed the conduct of the Debtors, as the fiduciaries to the Bankruptcy Estate, in selling property of the estate. The first motion to sell was filed on August 14, 2012, Dckt. 46. That motion was denied without prejudice. Order, Dckt. 61. In denying the Motion, the court stated,

> "The Chapter 13 Trustee objects to the sale of the real property since the real property is not listed on Schedule A. The Debtors disclose on the Statement of Financial Affairs that they operate a business at 7467 Village Parkway in Dublin, but they do not claim an ownership interest. Debtors do no disclose any executory contracts or unexpired lease on Schedule G.
>
> Debtors admit in their reply that they do not seek to sell the real property, but the business operated at the real property. The motion, however, it quite clear as to the relief Debtors seek. As the sale is not in the ordinary course of business, all creditors are entitled to notice. Fed. R. Bankr. P. 2002(a)(2). In this case, creditors have notice that the Debtor seeks to sell the real property. They do not have notice that the Debtor instead seeks to sell the business located the real property.

> This Motion is fatally defective as it does not identify the property to be sold. The Notice of Hearing is fatally defective because it misidentifies the property being sold. If the Debtors wish to sell their business and the personal property of the business then they may file a motion to sell those personal property assets, with that motion actually identifying what is to be sold (and not merely generically describing the assets as business and inventory."

Civil Minutes, Dckt. 59.

The Debtors then quickly returned with a second motion to sell. Motion, Dckt. 62. That motion was denied. Order, Dckt. 77. Again, the court had significant problems with the Debtors' credibility and good faith.

> "The undisclosed assets, the multiple amended Schedules, and the failure to disclose payment of property taxes on the eve of bankruptcy significantly impair the Debtors' credibility. The Debtors state under penalty of perjury in the Schedules that the business only has a liquidation value of $12,000.00 and no goodwill value. For the current sale, the value has risen sufficient to sell it for $20,000.00, with the buyer paying $3,000.00 for goodwill. Not coincidently, the additional values are just enough to pay what the Debtors identify as sale expenses so that they can claim a new exemption in the remaining net proceeds of just less than $12,000.00 (the amount of the exemption claimed in the business, including the tools of the trade exemption).
>
> The testimony and Purchase Agreement provided to the court is devoid on any information as to the purported $5,735.00 costs of sale and the $3,000.00 in purported taxes. Fortunately, from the Debtors' perspective, this works out to be exactly the number of expenses and taxes so that the remaining net proceeds can be within the re-reamended exemption amounts previously stated by the Debtors. The court does not find the Debtors' testimony as to the expenses and taxes to be credible.
>
> The court will not approve a sale which purports to authorize the payment of unidentified expenses and taxes. Further, the court will not approve a sale that may purport to authorize the Debtors to claim the proceeds as exempt. The Debtors have filed a blizzard of amended schedules, including amended exemptions. Further, the amended schedules have disclosed cash accounts for which no plausible explanation has been provided for the failure to disclose when the case was filed or earlier in these proceedings.
>
> Finally, the court has no idea what assets are being sold. The motion sees [sic.] to sell generically described assets consisting of "business inventory, equipment and goodwill located in the property commonly known as 7467-69 Village Parkway, Dublin, California." Dckt. 62. The court

> has no idea if the inventory consists of two boxes of salt, three chickens, and a bottle of pepper, or a freezer full of food to prepare a banquet for 200 persons. Additionally, the equipment could consist of a one burner stove, hot plate, to pans, and a spatula, or may be a 14 burner Wolf stove, six oven, three walk in freezers, three stainless steel work tables with built in sinks and disposals.
>
> The Business Purchase Agreement states that a list of the equipment being sold is attached, but that disclosure has been omitted from the Exhibit A filed with the court. Dckt. 65. Further, though not disclosed in the Motion, the Business Purchase Agreement allocates $2,000.00 for the Debtors and estate not to compete within 5 miles of the Dublin, California location of the business being sold.
>
> The court cannot issue an order which effectively states that the Debtors may sell the "Stuff" used in the business. That is what has been requested by the Debtors. The court also will not approve a sale and blindly parrot purported expenses merely because the Debtors say that such expenses exist."

Civil Minutes, Dckt. 75.

With no order from the court, the Debtors, in their fiduciary capacity, took property of the bankruptcy estate and disposed of it.

Consideration of Plan

The Debtors' Modified Plan manifests their continued ambiguity for their fiduciary obligations. The Debtor's Motion and Declaration indicate Debtor's are modifying their plan due to the court denying their claim of exemptions. This is "true" in a partial sense, the claimed exemptions were disallowed. That the Debtors' neglect to say that they had sold an asset without court approval, took the cash from the sale without court approval, and then attempted to exempt the proceeds from the sale of assets they were authorized to take is a "creative" stating of the facts in the Motion. The Debtors have taken $20,000.00 cash for which they were and are the fiduciaries. They have the money, yet in the proposed Modified Plan propose to pay $5,000.00 now and then finance repayment of the balance for free over 38 months.

If the Debtors were beneficiaries of a trust and the Trustee took $20,000.00 of the trust assets, it is highly unlikely that they (or their attorney in this case) would let the trustee pay the $20,000.00 over time at no interest. The court can all but here Debtors' counsel stating a case for not only a judgment for the $20,000.00, for an additional $60,000.00 of punitive damages for breach of the trustee's fiduciary duty.

At the hearing on the objection to claim of exemption the court recalls stating that these Debtors clearly have the ability to immediately put the $20,000.00 they improperly took, back into the estate.

> The court is very surprised that, after hearing the court's comments at the prior hearing and reading the ruling, the Debtors have not come forward providing for the $20,000.00 of ill gotten gain to be paid into the plan. The breach of fiduciary duty is not a mere "technicality" or "faux truth" that can be ignored. Converting property of a bankruptcy estate by a fiduciary raise substantial civil and criminal law issues.
>
> The Debtor clearly have the ability to place the $20,000.00 they improperly took and now claim as exempt back into the estate. But this appears to be the farthest thing from their mind, trying to nickel and dime the way out of their breach of fiduciary duty. This appear to be part of what may be a larger strategy to abuse the Bankruptcy Code, Estate, and creditors, hide assets, and steal as much as they can from the estate.
>
> The court finds that Debtors have acted in bad faith and therefore, sustains the Trustee's objection. The Debtors' exemptions claimed in the Restaurant business and assets is denied.

Civil Minutes, Dckt. 142. In addition to having $5,146.44 in theretofore undisclosed bank accounts in India, the Debtors have $9,534.47 value in life insurance, $6,640.00 in a $401K, $2,235.77 in stock, $12,001.91 in checking account (with the Debtors have elected to pay additional amounts from this account post-petition totaling $6,400.00 to creditors outside of a plan to be "current" on their house), and $57,000.00 in a TSP Retirement Account. The Debtors have amended their Schedules multiple times amending their assets finding and losing assets. *Id.* and Third Amended Schedule B, Dckt. 121.

Debtor's Modified Plan proposes a plan payment of $6,880.00 total paid in through January 2014, a lump sum payment of $5,000.00 in February 2014, then $550.00 for 38 months. Dckt. 145. Under the proposed modified plan Debtor will pay a total of $32,780.00 throughout the life of the plan ($6,880.00 + $5,000.00 + $20,900.00 ($550.00 x 38)). Under the confirmed plan, Debtor's plan payments are $280.00 for 60 months for a total of $16,800.00. Therefore, to comply with the Court's order, Debtor would need to pay over the life of the plan a total of $36,800.00. The Debtor's proposed plan payments totaling $32,780.00 fall short by $4,020.00 and do not fully comply with the Court's order.

Debtors state they are **now willing to pay** the proceeds of the sale back to the Chapter 13 estate over the remaining months of the plan, increasing the plan payments to $550.00 (for the remainder of the plan). However, the court is not satisfied with this treatment. The "now that you've caught me I'll pay some money back" does not comply with the Bankruptcy Code or the Debtors' fiduciary duties.

Recently discussed by the Ninth Circuit Court of Appeals in *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013),

> the bankruptcy court noted that it "reviews the totality of the circumstances to determine whether a plan has been proposed in good faith." The bankruptcy court observed that, in *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999), we had looked to four factors to determine whether a plan had been proposed in good faith: "(1) whether debtors misrepresented facts in their plan or unfairly manipulated the [Bankruptcy] Code, (2) the debtors' history of filings and dismissals, (3) whether the debtors intended to defeat state court litigation, and (4) whether egregious behavior is present."

Id. at 1123. Under the totality of the circumstances, the actions by the Debtor in selling their business, not only without approval but after two attempted motions to sell that were denied, the subsequent non-disclosure to the court and the parties, and the failure to provide credible testimony in support of the proposed plan, the court finds that the Debtors did not propose the plan in good faith pursuant to 11 U.S.C. § 1325(a)(3).

Income to Fund Plan

As addressed above, on multiple occasions these Debtors have stated under penalty of perjury their assets. On multiple occasions the Debtors have stated under penalty of perjury that their prior statement under penalty of perjury was incorrect. Assets appear, then disappear. As demonstrated on multiple occasions the Debtor believe they are not “limited by the Bankruptcy Code,” but can *sui generis* take assets of the estate they want, spend money as they please without regard to any orders of the court or bankruptcy plan, and maintain a lifestyle as they deem appropriate with the minimal amount of “bankruptcy court interference.”

Presumably, if the Debtors, after their multiple transgressions truly saw the error in their ways, they would not be marching their counsel out with such a bad faith plan to repay the money they stole over time, interest free. In reviewing the latest version of the Schedules, to the extent that they correctly represent the actual assets and finances of these Debtors, the court notes the following income of the Debtors.

The Debtors have gross income of $7,131.06 a month. The Debtor is employed by the U.S. Postal Service ($5,130.82) and the Co-Debtor works for Immuno Concepts ($2,020.24). Amended Schedule I, Dckt. 121. From this income it is then “necessary” for the Debtors to have $3,058.24 (43% of gross monthly income) in deductions. These include the following:

A.	Retirement	$397.48
B.	401K/Tsr	$215.17
C.	Union	$ 49.60
D.	VDP	$ 16.79
E.	Tsp	$ 44.24
F.	TsLp	$628.23
G.	HP112	$176.97
H.	FBV	$ 26.82
I.	Fdv-D	$ 92.69

Id. Curiously, the Debtors and their counsel do not identify these deduction, but snow the court with abreviations. While some may be clear, other are not, as if the meaning is willfully and intentionally being hidden.

In conducting a review it appears that the following items are not "mandatory" withholding but diversions of monies by the Debtors,

A. 401K/Tsr.....$215.17

1. This appears to be a 401K (tax savings retirement plan) voluntary contribution

A. Federal Thrift Savings Plan.....$ 44.24

1. This is a voluntary federal plan, in addition to the post service federal retirement plan, for which there is a matching contribution. www.tsp.gov.

B. TsLP.....$628.23

1. The court is left guessing as to this withholding. Quite possibly this is a Thrift Savings Plan loan repayment, by which the Debtors are preferring themselves as creditors, repaying money into their own "pocket" at the expense of creditors.

C. HP112.....$176.97

1. The court is again left guessing as to why and what is being deduction. An internet search turned up as the closest match a reference to the term "HP112" (1) an HP iPAQ handheld, (2) a Harbinger HP112 Powered Loudspeaker, and (3) a series of small parts and items on eBay. http://www.bing.com/search?q=HP112&src=IE-SearchBox&FORM=IE8SRC.

D. FBV.....$ 26.82

1. Unidentifiable.

E. Fdv-D.....$ 92.69

1. Appears to be Dental and Vision insurance.

The court also notes that on the latest Amended Schedule J (Dckt. 121) the Debtors have an "expense of $200.00 a month for life insurance payments. This is for the whole life insurance listed on Third Amended Schedule B as having a present value of $9,353.47. The $200.00 a month payment is merely an additional investment the Debtors are making for them selves in derogation of the rights of, and obligations owed to, creditors.

Additional Income

Based on the information from the Debtors, it appears that there is an additional $1,264.61 a month (401K, TSP, TsLP, HP112, whole life insurance) which the Debtors seek to divert from creditors into a voluntary retirement account or pay back to themselves into their retirement account in preference to the debts they owe creditors. This is not a situation where all the Debtors have for retirement is their 401K or TSP, but they have the Debtor's Postal Service Retirement Benefits. Also, it should not be forgotten that these additional diversions to the Debtors are attempted after then have taken $20,000.00 of property of the estate and seek to pay most of it back, if ever, over time with no interest.

No Rental Property Expenses

In reviewing the latest Amended Schedule J (Dckt. 112) the Debtors list a monthly expense of $1,387.00 for the Chamberlin Property Rental. Schedule I lists $0.00 of income for rental income, but there is $1,350.00 of additional income which appears on Line 9 of the latest Amended Schedule J. No breakdown of this $1,387.00 expense is shown on the latest Amended Schedule J.

In the proposed Third Modified Plan the Debtors list Bank of America as the Class 4 creditor having a claim secured by a First Deed of Trust against the Chamberlin Property. The monthly claim payment to be made directly by the Debtors to Bank of America is $1,387.00 just for that secured claim.

The court cannot identify any other expenses on the latest Amended Schedule J for the Debtors owning and operating rental real estate. The court is at a loss to understand how these Debtors own and operate residential rental property without any expenses whatsoever. Further, that the "income" attributable to the property is almost exactly the amount necessary to pay the Bank of America, N.A. secured claim. This is not credible, and in light of the Debtors' prior breach of fiduciary duty and their inconsistent statements, appears to be part of an organized campaign of misrepresentations and deceit.

Not Credible Expenses

On the latest Amended Schedule J (Dckt. 121) the Debtors state under penalty of perjury that their expenses, excluding the $1,387.00 for the rental mortgage payment, are $3,829.04 a month. From this they subtract $1,527.00 for their home mortgage, $350.00 and $308.50 for real estate taxes, and 58.34 for homeowner's insurance. That leaves the Debtors stating under penalty of perjury that the living expenses for a family of four (the Debtors and two teenage sons) are $1,585.20 a month.

The court does not find these statements under penalty of perjury credible. The Debtors list their total food and housekeeping supply expense to be only $400.00 a month. If there is $50.00 a month spent on housekeeping supplies, the Debtors are representing that the two adults and two teenage boys have a food expense of only $87.50 a month per person. No evidence has been presented in support of such a contention.

The Debtors further state that there are no childcare or education expenses. Presumably the two teenage son's normal education expenses

(school events, programs, and supplies) are in the entertainment, recreation, clubs expense. However, that cannot be as the Debtors have placed only $4.00 in that expense.

The Debtors state under penalty of perjury that they have no personal care products and services expenses. No haircuts, no deodorant, no soap, no shampoo, no care products at all. No evidence has been provided for the court to find this statement under penalty of perjury credible.

The Debtors state under penalty of perjury that they, a family of four with two teenage sons, have a clothing expense of only $20.00 a month. No evidence has been presented for the court to find this statement under penalty of perjury credible.

The Debtors state under penalty of perjury that their vehicle expense is only $150.00 a month. This includes fuel, maintenance and repair. The Debtors list owning a 1997 Toyota Corolla and a 2008 Acura, both of which are old enough to require moderate to significant annual repair expenses. Allowing only $50.00 a month for two vehicle maintenance expenses, and assuming no significant repairs, leaves only $100.00 a month for fuel for two vehicles. At $3.50 a gallon for regular unleaded gas, the Debtors could purchase 14.3 gallon of gas for each car ($50.00/$3.50). At 20 miles to the gallon this allow for only about 285 a month in mileage per car. There is no evidence presented for the court to find these statements under penalty of perjury credible.

The Debtors also state under penalty of perjury that their monthly car insurance expense is only $25.00 a month. No evidence is provided as to how an auto insurance expense of only $25.00 a month is reasonable for two adult drivers and a 17 year old teenage driver. No evidence has been presented for the court to find this statement under penalty of perjury credible.

The Debtors also state under penalty of perjury that they will continue to make a $200.00 a month payment on their whole life insurance which has a present value of $9,353.47. Third Amended Schedule B, Dckt. 121. In reality, the Debtors are paying themselves an additional $200.00 a month in preference to creditors.

The Debtors state under penalty of perjury that they have $4.00 a month in expenses for Entertainment, clubs, recreation, newspapers, magazines, and books. This appears to be a made up expense solely for the purpose of achieving the bottom line Net Monthly Income number. No evidence has been presented to the court to find this statement under penalty of perjury credible.

In total, the Debtors statements under penalty of perjury are not credible. Rather, they demonstrate a continued contempt for the federal court process and the obligations of the Debtors to act in good faith and make truthful statements. These expenses appear to be made up numbers to justify the financial conclusions reached. It appears that the Debtors may well have substantial monthly income and assets well in excess of what is being reported under penalty of perjury.

Substantial Tax Refunds

In the Amended Statement of Financial Affairs the Debtors report receiving substantial tax refunds annually,

A. 2012 YTD.....$17,439.00
B. 2011.....$14,292.00
C. 2010.....$10,520.00

Dckt. 29. From comparing the withholding listed on Original Schedule I (Dckt. 1) with the latest Amended Schedule I (Dckt. 121) the Debtors have increased their withholding for taxes, medicare and Social Security from $973.47 a month to $1,320.29 a month. It appears that the Debtors are increasing what may be a tax overpayment with the intention to divert those monies from creditors. The Debtors do not provide any testimony as to the amount of refund for their 2013 taxes. Declaration, Dckt. 148.

Liquidation Analysis

The Debtors also make the questionable statement that creditors would receive 1.82$ dividend in a Chapter 7 case. That ignores that a Chapter 7 trustee would recover not only the $20,000.00 of the estate monies the Debtors have converted, but most likely punitive damages. The Debtors' analysis and conclusions are not credible.

Having been caught with their "hands in the cookie jar," the Debtors and their counsel had an opportunity to address the breach of their fiduciary duties and diversion of estate assets. They chose not to do so, but instead to further their scheme of deceit. Additionally, the Debtors, as fiduciaries of the estate have done nothing to recover the assets, or value of the assets, which were sold by them to third parties.

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.

11. 14-20250-E-13 MBB-1 JAYMESON MITCHELL AND ELIZABETH Steele Lanphier

OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO FINANCIAL NATIONAL BANK 3-5-14 [22]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on March 5, 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 objecting creditor, Wells Fargo Bank, N.A. ("Creditor") opposes confirmation of the Plan on the basis that Debtor does not provide for its secured claims in the Plan. FN.1.

FN.1. The moving party filed the declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Creditor asserts a secured claim of $4,593.10 and an unsecured claim of $330.05 in this case. The creditor alleges that it has a purchase money security interest in the goods purchased with their credit card. The Debtor's Schedule F lists Wells Fargo Bank, N.A. as an unsecured creditor with a claim of $4,772.63.

The Opposition is supported by a Declaration by a bankruptcy specialist for Wells Fargo Bank, N.A. authenticating the documents upon which the purchase money security interest is based.

> SIGNATURE: Your Signature means that you have read and agree to the terms of our Credit Card Agreement, including the Important Terms of Your
> Credit Card Account, and our Arbitration Agreement. You acknowledge receipt of a copy of our Credit card Agreement, our Arbitration Agreement and our Privacy Policy. You give us and we will retain a purchase-money security interest in goods purchased under this agreement.

Declaration, Dckt. 24.

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

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

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

(1) provide a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A),

(2) provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan, 11 U.S.C. § 1325(a)(5)(B), or

(3) surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

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

When a plan does not provide for a secured claim, the remedy is not automatic denial of confirmation. Instead, the claim holder may seek the

termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the Debtor's reorganization and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

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 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 creditor Wells Fargo Bank, N.A. having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

12. 14-20250-E-13 TSB-1 JAYMESON MITCHELL AND ELIZABETH Steele Lanphier

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 3-3-14 [18]

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 March 3, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

The Plan is not Debtors' Best Efforts

The Chapter 13 Trustee ("Trustee") opposes confirmation of the Plan on the basis that the plan is not Debtors' best effort under 11 U.S.C. § 1325(b). Debtors are above median income. According to Debtors' Form 22C, Debtors have a net excess income of $528.48 per month, but they propose a 60 month plan at 0% to general unsecured creditors. Based on the applicable commitment period of 60 months, the unsecured creditors would be entitled to $31,708.80.

On Schedule I, Debtors list deductions for three 401K loans. Dckt. No. 9. The deductions consist of the following: $22.88 for the a 401K loan, $46.19 for the 401K loan 2, and $271.25 for 401K loan A. At the 341 meeting held on February 27, 2014, Joint Debtor Elizabeth Mitchell admitted that loan A is expected to end in approximately 3 years. However, Debtors fail to propose to increase the plan payment upon payoff of the loans.

On Schedule J, Debtors deduct $574.78 for auto payments toward Class 4 creditor Safe Credit Union. Debtors admitted at the 341 meeting held on

February 27, 2014 that the loan will payoff in approximately 4.5 years. Debtors fail to propose to increase the plan upon payoff of the loan.

Delinquency

All sums required by the plan have not been paid, which is required by 11 U.S.C. § 1325(a)(2). Debtors are $3,100.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $3,100.00 is due on March 25, 2014. Debtors have paid $0.00 in the plan to date.

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

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

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

13. 13-32258-E-13 ELLEN MACDONALD
CLH-7 Charles L. Hastings

CONTINUED MOTION TO VALUE COLLATERAL OF SUSQUEHANNA COMMERCIAL FINANCE, INC.
10-21-13 [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 Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on October 21, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant Motion to Value the Secured Claim of Susquehanna Commercial Finance, Inc., and to determine the creditor's secured claim to be $0.00. 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 court continued the hearing on this matter from November 18, 2013. Creditor had alleged that Debtor undervalued the subject property, and requested an evidentiary hearing to obtain an appraisal of the real property at issue. The court continued the hearing to permit Creditor time to obtain an appraisal report and file any supplemental pleadings. Civil Minutes, Dckt. No. 77.

Debtor seeks to value the claim of Creditor Susquehanna Commercial Finance, Inc., a Pennsylvania Corporation ("Creditor") at $0.00. Debtor states that her indebtedness to Creditor arises from a lien created by the recording of an abstract of judgment against Debtor's real property located at 3714 Hwy 88, Pioneer, California. This abstract of judgment recorded by Susequehanna Commercial Finance, Inc., a Pennsylvania corporation was recorded on August 17, 2011.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 23714 Hwy 88, Pioneer, California. The Debtor seeks to value the property at a fair market value of $168,000.00 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 Debtor contends that after deducting the value of the First Deed of Trust held by Bank of Amador, which has an approximate balance of

$141,777.62, and a lien created by the recording of an Abstract of Judgment by Wells Fargo Bank, N.A. on February 9, 2009, with a balance of $33,085.13, that there is insufficient equity to secure the lien of Susquehanna Commercial Finance, Inc.

CREDITOR'S OPPOSITION

Creditor Susquehanna Commercial Finance, Inc. ("Creditor") argued that the the Debtor's "Motion to Avoid Judicial Lien" is invalid, since the Debtor claimed a $0.00 exemption on the real property. Creditor further alleged that the Debtor undervalued the Real Property.

Following the court's continuance of the hearing on the Motion to Value the Secured Claim, Creditor submitted the declaration of Amanda Ferns, who purports to be the "Attorney of Record for Creditor, SUSQUEHANNA COMMERCIAL FINANCE, INC." ¶ 1, Declaration of Amanda N. Ferns, Dckt. No. 100. The document consists of Fern's Declaration, and an Exhibit "1," which states to be a "Property Comparative Analysis." FN.1.

FN.1. The Creditor filed its declaration and exhibit in support of the opposition as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Creditor is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). .

The Declaration of Amanda Ferns suffers from two defects. First, Amanda Ferns ("Ferns") attempts to offer an appraisal of the real property known as 23714 State Hwy 88, Pioneer, California, without an authentication from the individual who prepared the apprisal, pursuant to Federal Rule of Evidence 901. Federal Rule of Evidence 901 requires that the proponent seeking to introduce evidence "authenticate" the item by producing evidence to support a finding that the item is what the proponent claims it to be, such as testimony of a witness with knowledge of what the item is purported to be. Fed. R. Evid. 901(b)(1).

Here, Ferns attempts to present Exhibit 1, an appraisal that she states was "prepared in conjunction with this litigation." Specifically, Ferns provides that,

> My office retained and hired Robin Clarke, of Town and County Properties, in order to conduct an appraisal on real property commonly known as 23714 State Hwy 88, Pioneer, CA 95666. Robin Clarke inspected the real property and based upon the comparable determined that the real property's value is at least $273,000.00. My office spoke with Robin Clarke in depth about her appraisal.

¶ 2, Declaration of Amanda Ferns, Dckt. No. 100.

Fern's statements are merely hearsay for which no grounds for admissibility has been shown. Fed. R. Evid. 801, 802, 803, 804. Creditor attempts to present an appraisal supporting their valuation of the property, that is not properly authenticated by an individual who can attest, according to their personal knowledge, where, when, and how the appraisal was prepared, to show that the report is what it is claimed to be under Federal Rules of Evidence 901.

The Declaration of Amanda Ferns is riddled with statements that are defined as hearsay under the Federal Rules of Evidence. Fern offers the out-of-court statements of Robin Clarke, the individual (it is unclear whether Robin Clarke is an appraiser or other type of certified professional) who supposedly prepared the attached appraisal, to prove the truth of Creditor's assertion that Robin Clarke prepared the appraisal on the subject property filed along with Fern's declaration. Creditor has not offered the statement of Clarke, and Clarke is not available for cross-examination by this court to verify that the report provided is indeed, an appraisal that was performed by Clarke. Fed. R. Evid. 801.

The Declaration merely asserts that Clarke conducted the appraisal, with no information indicating that the declarant, Ferns, possesses personal knowledge of Clarke's methodology, and or that Ferns assisted Clarke in arriving at the valuation of the property. Ferns also states that her office, and not Ferns herself, spoke with Clarke, raising the possibility that the information provided regarding the appraisal was relayed to Ferns by members of her office staff. If this is the case, the information attested by Ferns constitutes "hearsay within hearsay" under the definition set forth by Federal Rule of Evidence 805. As Creditor's attorney, Ferns has no personal knowledge of the way in which the appraisal was prepared, and admits that another individual prepared the appraisal for this matter. Ferns cannot certify that the contents of her declaration were drawn from her own personal knowledge.

Second, the declaration offered by the Ferns states that it made is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and believe [sic]." Lines 7-9, Declaration of Amanda Ferns, Dckt. No. 100. This could be read two ways. The first is that "whatever I have said is true, to the extent that I have any knowledge about what I am talking about." The second interpretation is that "I am telling you the truth to the best of my ability to testify in this proceeding."

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a

deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief. Counsel is advised that her firm should update its declaration forms to be in unqualified compliance with § 1746 as the next time this court, or other judges sitting in this District may well find the declaration to be insufficient and deny the motion without prejudice and without a hearing.

DEBTOR'S OBJECTION TO DECLARATION AND EXHIBIT FILED

Debtor objects to the Declaration of Amanda N. Ferns and the exhibit filed therewith, on the basis that the declaration is hearsay, and that the Exhibit is hearsay and was not authenticated. Dckt. No. 103.

INADEQUACY OF "EXPERT TESTIMONY"

The Creditor's attorney attempts to present her testimony as an opinion as to the value of the property. Even if she qualified as an expert, the "testimony" consists of little more than showing three "comparable" properties, gross adjustments and "adjusted values." There is no basis for the court determining that Creditor's counsel, or the hearsay statements of another, are those of an expert as defined by Federal Rule of Evidence 702. Second, other than providing an opinion as to value, there is nothing to show that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;..." Fed. R. Evid. 702(a). Rather, the court would be left just abdicating the responsibility to make the necessary findings of fact to Creidtor's attorney.

[2] Experts May Testify to Background Information or Specific Opinions, Which Need Not Be Based on Personal Knowledge

> Under Rule 702, parties may use expert witnesses to provide the trier of fact with an explanation of scientific or other principles that are relevant to the case and leave it to the trier of fact to apply those principles to the facts of the case. In one case, moreover, the trial court acted within its discretion in allowing an expert witness to provide an opinion that had a weak basis in the record evidence, since it was accompanied by a reliable and useful exposition of the theory underlying the opinion, so the trier of fact could use the exposition in making its own determination of the facts in issue.

Weinstein's Federal Evidence § 702.02.

DISCUSSION

Debtor's Declaration states that at the date of the filing of the petition, the value of the subject property was $168,000.00. ¶ 6, Declaration of Ellen Gay MacDonald, Dckt. No. 50. 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 court has not received any competent, credible evidence from Creditor supporting a differing valuation of the subject property. Thus, the court will proceed to consider the Motion on the premise that the fair market value of the property known as 23714 Hwy 88, Pioneer, California is $168,000.00.

Moreover, contrary to Creditor's assertions, Debtor does not appear to be attempting to avoid a judicial lien pursuant to 11 U.S.C. § 522(f). Rather, the motion seeks to value the claim of Pennsylvania Corporation at $0.00, based on the assertion that the equity in the real property securing the lien has been exhausted. Dckt. 48. Debtor therefore is not required to claim an exemption in the property under 11 U.S.C. § 506.

The first deed of trust secures a loan with a balance of approximately $141,777.62. Creditor Wells Fargo, N.A.'s second deed of trust secures a loan with a balance of approximately $33,085.13. The secured claim of Creditor Susquehanna Commercial Finance, Inc., a Pennsylvania Corporation has a remaining balance of $89,920.78. Therefore, the respondent creditor, Susquehanna Commercial Finance, Inc., a Pennsylvania Corporation'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 the Secured Claim of Susquehanna Commercial Finance, Inc. ("Creditor") filed by Ellen MacDonald 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 Susquehanna Commercial Finance, Inc., a Pennsylvania Corporation secured by a third deed of trust recorded against the real property commonly known as 23714 Hwy 88, Pioneer, 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 $168,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

14. 13-32258-E-13 ELLEN MACDONALD **CONTINUED OBJECTION TO**
TSB-1 Charles L. Hastings **CONFIRMATION OF PLAN BY DAVID CUSICK**
10-30-13 [60]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 30, 2013. By the court's calculation, 20 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 to Confirmation of Plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The court continued the hearing on this matter, so that the Trustee's Objection to Plan could be considered after the resolution of total of eight Motions to Avoid Liens and Motions to Value the Secured Claim of various creditors, the success on which the feasibility of Debtor's Plan relies.

The Chapter 13 Trustee opposed confirmation of the Plan on the basis that Debtor's Plan relies on a total of eight Motion to Avoid Lien or Motions to Value, and cannot make the payments under the Plan or comply with the Plan under 11 U.S.C. § 1325(a)(6).

Debtor proposed to value the secured claim of Wells Fargo Bank, N.A., CLH-1, which is set for hearing on November 19, 2013, the same date as this hearing. Debtor also proposed to avoid the liens of the following creditors, which are listed along with their Docket Control Numbers: Holt of California, CLH-2; Stephen Stoelk, CLH-3; Pape Machinery, Inc, CLH-4; Commercial Equipment Lease Corp, CLH-5; Ray Klein, Inc., CLH-6; Susquehanna Commercial Finance, Inc. CLH-7; Zach Taylor dba Taylor Timber CLH-8. All eight matters were set for hearing on November 19, 2013.

Seven out of the above-listed eight Motions were granted. Dckt. Nos 83, 84, 85, 86, 87, 88, 91.

One of the Motions, however, was continued to this hearing date. The court continued the Motion to Value the Secured Claim of Susquehanna Commercial Finance, Inc., CLH-7 to permit the Creditor in that matter to obtain an appraisal of the Debtor's property, and to file any supplemental pleadings incorporating its valuation if necessary. Civil Minutes, Dckt. No. 89. The court continued the hearing on this matter to consider the Objection in conjunction with the Continued Motion to Value the Secured Claim, CLH-7.

The court is granting the Motion to Value the Secured Claim, CLH-7, resolving the remaining issue in the Trustee's Objection to Confirm the Plan. 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 19, 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.

15. 14-20565-E-13 RYAN/BRENDA COBOS
TSB-1 Aaron C. Koenig

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
3-3-14 [16]

CASE DISMISSED 3/17/14 As to Co-Debtor

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 March 3, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to sustain the Objection to Conformation of 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:

APRIL 1, 2014 HEARING

At the hearing, Trustee confirmed that Joint Debtor [has become current] / [remains delinquent] in her plan payments.

The Chapter 13 Trustee opposes confirmation of the Plan for the following reasons:

1. Trustee states that Debtors have not filed certain tax returns. On February 11, 2014, the Internal Revenue Service filed Proof of Claim No. 2, which indicated that Debtors have not filed tax returns during the 4-year period preceding the filing of the Petition, specifically for the years of 2011 and 2012. 11 U.S.C. §§ 1308 and 1325(a)(9). The claim also indicates that Debtors have an outstanding return for 2008.

2. All sums required by the Plan have not been paid under 11 U.S.C. § 1325(a)(2). Debtors are delinquent in $650.787 in plan payments

to the Trustee to date, and the next scheduled payment of $650.77 is due on March 2014. Debtors have paid $0.00 into the plan to date.

3. Debtors' Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtors are proposing a 0% dividend to unsecured creditors. At their 341 Meeting of Creditors held on February 27, 2014, Debtors admitted to having a wrongful termination lawsuit filed in 2012. Debtors estimated the value of the lawsuit to be at least $50,000.

   This asset is not listed on Schedule B, nor is it exempt on Schedule C. Debtors also indicated that they have an attorney representing them, which may be working on a contingency basis, but have not filed a motion to employ counsel.

The court notes that on March 17, 2014, the court granted Joint Debtor Ryan Ross Cobos's request to be dismissed from the Chapter 13 bankruptcy. Order, Dckt. No. 22.

RESPONSE TO TRUSTEE'S OBJECTION TO CONFIRMATION

Joint Debtor Brenda Marie Cobos responds to Trustee’s grounds for Objection by stating the following:

1. Debtor acknowledges that Trustee’s objection regarding Debtor’s failure to file tax returns is accurate. Debtor states that the original debtor, Ryan Ross Cobos, did not file all of the required tax returns prior to the filing of the bankruptcy. The Response states that Debtor Ryan Ross Cobos attempted to file the returns, but realized he would not be able to because of the filing costs involved. For this reason, Debtor Ryan Ross Cobos was dismissed from the case on March 17, 2014. Dckt. No. 22. Debtor states that the dismissal should render the Trustee’s Objection moot since the Joint Debtor has filed her tax returns.

2. Debtor states that Trustee’s objection regarding her delinquency in payments is accurate. Debtor plans on being current with her plan payments by the date of confirmation.

3. Debtor has amended her Schedules B and C to add the lawsuit and exempt the suit in the amount of $22,270.00 under Civ. Proc. Code § 703.140(b)(5). Debtor states that she is also willing to stipulate that if she receives any funds that she must notify the trustee. The joint debtor is unsure as to whether a wrongful termination lawsuit would be a community property asset, or whether the now dismissed Debtors’ suit would constitute separate property. California Family Code §781 and §2603. Debtor speculates that it is possible that the joint debtor could get divorced from the dismissed debtor and the property would be the dismissed debtor’s sole and separate property.

   Therefore, Debtor has filed as part of the Exhibits in support of the Motion, a proposed order confirming that contains language stating that any settlement received would require the Debtors notify the Trustee, so that a determination can be made as to

whether the excess funds should be paid out to the Joint Debtor's creditors.

FORMER JOINT DEBTOR'S LAWSUIT AS PROPERTY OF THE ESTATE

The Debtor states that she is uncertain whether her husband's wrongful termination lawsuit, which is now listed on her Schedules B and C, exempted in the amount of $22,270.00 under Civ. Proc. Code § 703.140(b)(5), is a community property asset or the sole and separate property of her husband (previously a Joint Debtor in the bankruptcy case).

The filing by spouse of individual bankruptcy petition creates a bankruptcy estate that encompasses community property, which is under spouse's joint management and control as of date of petition. 11 U.S.C. § 541(a)(2)(A). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." Characterization of property as separate or community as of date of one spouse's bankruptcy filing is determined by applicable state law. *In re McCoy*, 9th Cir. BAP (Cal.) 1990, 111 B.R. 276.

Under California community property law, property acquired during marriage is generally community property and treated as the property of both spouses; debts incurred during marriage are generally the liability of both spouses. Calif. Fam. C. §§ 760, 910. For purposes of § 541(a)(2), all community property in California that is not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate. *In re Mantle,* 153 F.3d 1082, 1085 (9th Cir. 1998). Under California law, division of property is the event that will sever the liability of community property for community debts, and, until division, all community property of the divorcing couple is property of one spouse's bankruptcy estate. 11 U.S.C. § 541(a)(2). *Id.* at 1083. For purposes of § 541(a)(2), all community property in California that is not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate. *In re Mantle,* 153 F.3d 1082, 1085 (9th Cir. 1998).

There is no indication that the remaining Debtor, Brenda Marie Cobos, and her spouse, Ryan Ross Cobos, have entered marital dissolution proceedings and that a division of property has been effected. Thus, all property that was community property at the time of the bankruptcy filing is property of the bankruptcy estate. Debtor discusses the possibility of divorcing from the dismissed Debtor, and community assets being divided as a result of the termination of the community property. However, the court must first examine whether the wrongful termination lawsuit of the dismissed Debtor constituted was a community asset in the first place, and whether the lawsuit was necessarily considered the property of the estate upon Debtor and dismissed Debtor's filing of the bankruptcy petition.

Not all suits are considered community property, and by extension, property of the joint debtors' bankruptcy estate. Whether the suit is considered a community asset depends on the nature of the suit, and whether the Debtor's community is liable for the injury caused by offending spouse. This depends on the nature of the activity that led to the tort.

As California Civil Practice Family Law Litigation § 6:16 states:

> A married person does not bear liability for injury caused by his or her spouse except in the case where the person would be liable if the marriage did not exist (for example, liability under Veh. Code § 17150 for vicarious liability for permissive use of a person's vehicle). Accordingly, one spouse's separate property is not liable for the tort caused by the other spouse.
>
> California Family Code § 1000, subd.(b) sets forth the order of liability of property for a tort caused by a spouse as follows:
>
> (1) If the tort occurs while a married person is performing an activity for the benefit of the community, the liability is first satisfied from community property, and then from the separate property of the person causing the tort if community property is insufficient to satisfy the obligation.
>
> (2) If the liability is based on an act that is not for the benefit of the community, the liability must be first satisfied from the separate property of the married person, and then from the community estate if the separate property is not sufficient to satisfy the liability.
>
> Where there is an intentional tort and/or crime and there is evidence of benefit to the community, the tortfeasor is liable for the attorney fees required for the defense in the civil and the criminal actions, and is liable for any fines, including interest and penalties, but to the extent that the community has shared in the benefit, the community will share in the cost. *In re Marriage of Bell*, 49 Cal. App. 4th 300, 56 Cal. Rptr. 2d 623 (4th Dist. 1996).

In this case, it is unclear whether the lawsuit claimed by the dismissed Debtor was based on an act that advanced the interests of the community, and whether the Debtors' community property was liable for recovery for the damages alleged in the lawsuit, or whether the liability was incurred by dismissed Debtor as an individual. The court has no information on whether the dismissed Debtor was a tortfeasor, or the exact contours of the wrongful termination suit (whether both Debtors were named in the suit, whether Debtors hired separate counsel to prosecute the case, the status of the case, whether the parties expect to resolve the suit by settlement, when the suit was filed, etc). It appears, based on the listing of the lawsuit on Debtors' Amended Schedule B, that the wrongful termination suit was filed against the dismissed Debtor. Amended Schedule B states,

> Wrongful Termination Lawsuit against debtor
> Incident occurred 12/2/2012
> Amount of money to be received to unknown as this point.
> Could be up to $50,000.

Exhibit A, Dckt. No. 26. The court cannot determine, based on the scant information provided to the court, whether the harm alleged occurred within the context of the dismissed debtor acting for the benefit of the

community (i.e., operating the Debtors' business, and handling an employee hired by a joint business maintained by the Debtors as a married couple), renders Debtors' community property liable for a recovery by the individual claiming to be wrongfully terminated.

Further, the proposes amendment to provide for the "community claim" is merely that if the Debtor should choose to assert a community, then such assets will be "deemed" community property. In reality, it merely says that it is the Debtor who determines what is property of the estate.

The court recognizes that the remaining Debtor has presented an order confirming that requires the Debtor to notify the Trustee when the case has reached settlement. Debtor will be expected to pay out any funds that are not exempted and determined to be the Debtor's community property. Debtor has claimed the maximum exemption on the potential proceeds of the suit, and proposes to notify Trustee of the settlement of the suit.

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 Chapter 13 Plan is not confirmed.

16. 11-37366-E-13 HELEN ALEXANDER
DMA-4 David M. Alden

MOTION FOR COMPENSATION FOR DAVID M. ALDEN, DEBTOR'S ATTORNEY(S), FEES: $993.75, EXPENSES: $0.00
3-7-14 [62]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 7, 2014. By the court's calculation, 24 days' notice was provided. 21 days' notice is required. That requirement was met.

Tentative Ruling: The Application for Additional Fees 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 Application for Additional Fees. 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

The Motion is made pursuant to 11 U.S.C. § 330 and Federal Rule of Bankruptcy Procedure 2016(a). The Applicant in this matter, Counsel for Debtor ("Counsel"), requests that the court grant $993.75 in additional fees and $0.00 in expenses in this Chapter 13 Case.

Description of Services for Which Fees Are Requested

Counsel has served as attorney for the Debtor since July 14, 2011. On June 14, 2011 applicant received a retainer of $1,226.00. An executed copy of this court's "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" was filed on July 14, 2011. As reflected in that document and in the Bankruptcy Rule 2016(b) disclosure statement, Counsel and the Debtor agreed that the initial fee for legal services and expenses in connection with this Chapter 13 case would be $2,625.00. The Chapter 13 Trustee has filed a statement of non-opposition to this application.

To date, fees in the amount of $1,399.00 have been paid by the Chapter 13 Trustee through the Debtors' Chapter 13 plan. Counsel states that the initial agreed-upon fee, as well as additional fees previously allowed, are not sufficient to fully compensate the attorney for the legal services rendered. The Motion states that the time sheets attached as Exhibit "A," filed in support of the Motion, Dckt. No. 64, covers all services rendered to the debtor in connection with this Chapter 13 case.

Counsel states that substantial and unanticipated post-confirmation work arose when Debtor negotiated the modification of her first deed of trust. Attorney brought a motion to approve the loan modification, and a subsequent motion to confirm Debtor's resulting, Amended Chapter 13 plan.

Counsel's customary hourly rate for services of this nature is $250.00, which was reduced by 25% (to an effective rate of $187.50 per hour) in accordance with Debtor's legal services plan membership. Counsel instructs the court to reviewing his billing statements and costs details, filed as Exhibits A and B. Dckt. No. 63. Counsel files an Exhibit "A" – Time Log Detail; Invoice for Professional Services; and an Exhibit "B" – Costs Detail, in support of his Motion for Compensation.

Counsel requests that the Court allow additional fees of $993.75 (which Counsel claims is the lodestar amount less initial agreed-upon fee plus any additional fees previously allowed) and $0.00 in additional expenses to be paid through the Chapter 13 plan. Counsel calculates the fees requested as follows:

Total fees for services rendered from June 14, 2011 to March 5, 2014:	$4,825.00
Less 25% discount per Debtor's legal plan contract:	$1,206.25
Less initial fees previously approved and paid:	$2,265.00
Requested Fees:	$993.75 FN.1.

FN.1. While some judges in the District look to the total fees charged, the "No Look" set fee and then the additional amount for substantial and unanticipated legal service to determine if the total amount is "reasonable," this judge separates the two. The "No Look" set fee is just that, a set fee for doing all of the reasonably anticipated work in the Chapter 13 case. In some cases everything goes reasonably smoothly and the attorney's effective hourly rate is a little higher than what would be billed hourly. However, in some cases it appears that the attorneys end up spending significantly more time, so their effect hourly rate is lower than their normal hourly billing rate.

While the analysis required by other judges may be included as part of an application in this Department, this judge just wants to know (1) what substantial and unanticipated work the attorney did, (2) the outcome of the work (while an attorney does not guaranty an outcome, what the legal work produced, or did not produce, can be instructive as to whether the legal

work was reasonably undertaken, (3) the time and expenses relating to the substantial and unanticipated work, and (4) the hours or other method of computing the requested fees. Local Bankruptcy Rule 2016-1(c)(3). It is immaterial whether the "No Look" fees in the particular case gave the attorney a little higher or little lower than the attorney's normal hourly billing rate.

The Motion asserts that Counsel performed substantial and unanticipated post-confirmation work in Debtor's case. In the "Invoice for Professional Services" that is filed in support of this Motion as Exhibit "A," the time entries reflect that Counsel prepared a Motion to Approve Modification of the 1st Deed of Trust, and the attendant Notice of Hearing, Declaration, Proof of Service, and supporting documents. Counsel also prepared a Motion to Confirm the Amended Plan and supporting pleadings, and drafted a response to the Trustee's Objection to the Motion to Confirm the Amended Plan. Counsel appeared at the Hearing on the Motion to Confirm the Amended Plan, DMA-3, and prepared the order confirming the Amended Plan.

The "Application and Declaration Re: Additional Fees and Expenses in Chapter 13 Cases," also includes a brief statement that is signed by Debtor in this case. The portion of Debtor's signed declaration declares,

> If the debtor agrees that the requested compensation is reasonable and should be paid, the debtor should sign in the space provided below.
>
> If the debtor does not agree that the additional compensation requested in this application is reasonable or is due and owing, the debtor should not sign below and instead should file a brief, written explanation of any objection the debtor may have to the requested compensation. Dckt. No. 62 at 2.

Unfortunately, this Declaration does little by way of illuminating the grounds for an award of fees and costs to Counsel for post-confirmation work under 11 U.S.C. § 330. Debtor certifies that the work performed by Counsel is "reasonable and should be paid," which are legal conclusions for which Debtor provides no basis to make. Moreover, Counsel assumes that combining two declarations in one document–-embedded within the Motion itself--will be acceptable for the court's review.

This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1).

Though there is no separate declaration, the court waives the defect in this case for this Motion. The additional fees of $993.75 are not unreasonable for obtaining authorization for a loan modification and then

the Modified Plan confirmed to provide for the Class 4 treatment of the creditor whose loan has been modified. There is little to be served by making counsel redo this Motion, the defect does not appear to be one that plagues counsel and the court is confident that future pleadings, even for a "simple" motion will comply with the Federal and Local Rules.

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 rendered a successful Motion to Confirm the Modified Plan. Civil Minutes, Dckt. No. 57. An order confirming the Modified Plan was signed and filed on September 16, 2013. Counsel was successful in fling a Motion to Approve the Debtor's Loan Modification with Bank of America, N.A., which the court granted on May 14, 2013. The court approved the Debtor's loan modification agreement with Bank of America, N.A., modifying the principal balance of the loan to $202,929.01, with an interest rate of 3.75% and monthly payment of $1,275.23. Dckt. No. 42.

This prompted Counsel to file a Motion to Confirm the Modified Plan, which reclassified Creditor Bank of America, N.A. from Class 1 to Class 3, ratifying Trustee's disbursements of $28,231.54 in principal and $7,279.52 in arrears. Amended Order, Dckt. No. 61. Counsel's efforts have led to the successful modification of Debtor's loan with Bank of America, N.A., and confirmation of the Chapter 13 Modified Plan.

FEES ALLOWED

The hourly rates for the fees billed in this case are $187.50/hour for counsel for 6.4 hours for the relevant time period. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $993.75 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

Attorneys' Fees	$ 993.75
Costs and Expenses	$ 0.00

For a total final allowance of $993.75 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 David M. Alden is allowed the following fees and expenses as a professional of the Estate:
>
> David M. Alden, Counsel for the Estate
> Applicant's Fees Allowed in the amount of $ 993.75
> Applicants Expenses Allowed in the amount of $ 0.00,
>
> **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.

17. 09-33871-E-13 WILLIAM/SUSAN SAMUELSON MOTION TO INCUR DEBT
JE-1 Steele Lanphier 3-10-14 [34]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on March 10, 2014. By the court's calculation, 22 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(2). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

Debtors seek an order approving their request to incur post-petition debt by purchasing a new 2014 Ford Escape. Debtors state that the exact terms of the purchase are as follows; $36,989.38 purchase price, 4.79% interest rate, payments of $520.19 per month for 83 months.

The purported reason for this purchase is that Debtors have "no other vehicles to transport them to work or any where else for the necessities of life." Debtors state that they are current in their plan, and that their last payment is in July of 2014. Their first payment on this vehicle is to be April 3, 2014. Debtors believe that this purchase will not impair their ability to continue making payments on their confirmed Chapter 13 Plan.

Debtors vaguely assert that their "plan is 4.79%" and that Debtors will pay $520.19 (without stating what this payment amount refers to).

Chapter 13 Trustee's Opposition

The Chapter 13 Trustee opposes to the motion on several grounds:

1. The subject of the motion is unclear. The Notice of Hearing, Dckt. No. 35 at 2, indicates that the motion seeks an order for the US Trustee to "abandon Debtors' business."

2. There is insufficient evidence supporting Debtors' Motion to Incur Debt. Debtors did not file a Declaration in support of their purchase, but rather, attached a Verification to the Motion. Debtor's verification does not include any facts regarding the purchase, but rather states under the penalty of perjury that paragraphs 1 through 7 of the motion have been reviewed, and that the information is true and correct. A copy of the proposed purchase contract is filed as part of the motion.

3. Debtor's Proof of Service, Dckt. No. 36, shows that the Notice, Motion, and Proposed Order were served on March 10, 2014, and the only parties served were the Office of the United States Trustee, and the Chapter 13 Trustee by electronic mail. Federal Rule of Bankruptcy Procedure 2002(a)(2) requires that all creditors be served.

4. Debtors cannot make payments on the vehicle. Debtors seek to purchase a used 2014 Ford Escape or similar vehicle at a purchase price of $36,989.48 at 4.79% interest, and monthly payments of $520.19 for 83 months. Debtors' Schedules I and J, filed July 3, 2009 (Dckt. No. 1, pages 27-29), indicate that Debtors have a combined average monthly income on Schedule I, line 16 of $6,537.66. Schedule J, line 20c indicates net income of $2,000.00. Debtors' plan payment is $2,000.00. There is no provision in Debtors' budget for any vehicle payment.

   Trustee is not aware of any Amended Schedules I and J to date. If Debtors have additional income, and the Trustee has not been notified of this income, Debtor may be in violation of the Order Confirming Plan entered on September 15, 2009, Dckt. No. 15, or Federal Rule of Bankruptcy Procedure 1007(h). If Debtor cannot afford the payment, the court has no reason to authorize the purchase.

5. Additionally, Debtors do not provide good reason for purchase. In the Motion, Debtors allege that they have no means of transport and must purchase a vehicle for regular use. Debtors' Schedule B, filed on July 3, 2009, shows that Debtors own a 1996 Ford Explorer, a 2004 Toyota Highlander, and a 2006 Harley Davidson motorcycle. The purchase contract also shows a trade in vehicle, a 2004 Toyota. The purchase contract attached to the Amended Motion, Dckt. No. 37, page 4, shows a trade in vehicle, a 2004 Toyota.

6. Finally, the Debtors do not proffer a reason why they, Chapter 13 Debtors "need" to purchase a new 2014 vehicle. While the court does not expect the Debtors to do without the reasonable and necessary things they need to live and earn a living. However, that does not mean that because the Debtors want to pay a huge premium to purchase a new vehicle, instead of a two or three year old vehicle for which a significant amount of depreciation has already been suffered, is not reasonable.

DISCUSSION

Trustee correctly states that Local Bankruptcy Rule 9014-1(d)(6) provides that every motion must be accompanied by evidence establishing its factual allegations, and demonstrating that the movant is entitled to the relief requested.

Here, no evidence is offered by Debtors supporting the contention that they have no other means of transportation. Debtors only offer three pages out of what appears to be the purchase contract for the 2014 Ford Escape, entered between Debtors and the Dealership "Future Ford Lincoln" that indicates that the total purchase price is $36,989.38, after calculating the cash price, public official fees, insurance costs, the downpayment, and other costs. Dckt. No. 37. The retail installment contract also indicates that a 2004 Toyota was traded-in, with a listed trade-in value of $6000. *Id.* at 4. This contradicts Debtors' statement that they had no other vehicles with which to travel to work and fulfill other daily transit needs.

Debtors filed the motion and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a).

Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1), and that attorneys practicing in federal court comply with the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. Failure to comply with the *Guidelines* and filing pleading which do not comply with the Federal Rules of Civil Procedure shall result in a motion being summarily dismissed without prejudice.

Reasonableness of incurring debt

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).

Debtors have not provided an explanation of why Debtors, who are in grave financial distress and have been driven to seek the extraordinary relief of the Bankruptcy Code, are compelled to purchase a brand new, 2014 model year car that would add payments of $520.19 of a $2,000.00 per month plan. There is no provision in Debtors' budget that provides for a vehicle payment.

Moreover, Debtors offer no explanation of why it is necessary for Debtors to purchase a vehicle that will suffer rapid depreciation after a purchase or lease. It is commonly known that during the first three years a car suffers the greatest depreciation. It is likely that if Debtor were to buy or lease a 2010 or 2011 vehicle, instead of leasing a new or almost new 2013 vehicle, or purchasing a brand new 2014 vehicle, Debtors' monthly payments would be significantly less. Debtors have not filed revised budgets and schedules showing that their combined income has changed, and that they are able to afford the down payment and subsequent monthly payments for the vehicle.

Lastly, Debtors claim to be in need of a vehicle, because they "have no other vehicles to transport them to work or any where else for the necessities of life." Debtors' Schedule B shows otherwise. Debtors' Schedule B, signed under the penalty of perjury, shows that Debtors own a 1996 Ford Explorer, a 2004 Toyota Highlander, and a 2006 Harley Davidson motorcycle. This directly contradicts the information provided by Debtors in their Motion. No explanation is given as to whether Debtors still own the vehicles listed on Schedule B, or if the vehicles have been disposed of since the commencement of the case. On the inconsistent information provided, the court does not buy Debtors' arguments that the vehicle purchase is vital to Debtors' daily needs, and that the request to incur further post-petition debt is reasonable and justified.

Based on the foregoing, the Motion to Incur Debt is denied.

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

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

18. 12-31671-E-13 CHRISTIAN NEWMAN — MOTION TO CONFIRM PLAN
PGM-6 Peter G. Macaluso — 2-13-14 [149]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 46 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 set an evidentiary hearing on the Motion at ------ , on -------, 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:

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 on the basis that Debtor's Plan does not represent his best efforts under 11 U.S.C. § 1325(2)(3), and that the Plan may not be proposed in good faith under 11 U.S.C. § 1325(a)(3).

This case was filed on June 21, 2012. From the commencement of the case until February 13, 2014, Debtor's sole source of income were contributions from his girlfriend, Georgia Blackmer. ¶ 11, Declaration of Christian L. Newman in Support of the Chapter 13 Plan, Dckt. No. 120. Trustee has objected to each of Debtor's previous plans, and has inquired as to why Debtor is not reporting all of his income.

Trustee believes that the Debtor has been working as a handyman throughout the life of the plan. Trustee has objected to Debtor's reporting of his income because on July 11, 2012, the Trustee was provided Debtor's profit and loss statements, Dckt. No. 18, for the time period prior to the filing. The statements reflect that Debtor received earnings of $2,300 each month, from December 2011 to May 2012. Declaration of Corey Crom, Dckt. No. 17. Until Debtor filed his supplemental declaration on October 28, 2013, Dckt. No 138, in response to Trustee's Opposition, the Debtor had not addressed the Trustee's Objection concerning Debtor not accurately reporting his income.

In the supplemental declaration in support of the Debtor's Fourth Amended Plan, filed on August 8, 2013, that Debtor states that he is self-employed, but was not making any money when the case was filed. Debtor

also states that he relied on the income of his girlfriend, which was represented as $2,200 per month in net income. Debtor also declared that his girlfriend only incurs $250 to $300 per month in personal expenses, and that their combined income would allow for plan payments. Dckt. No. 138.

In the Debtor's Declaration in support of the latest Fifth Amended Plan, Debtor shifts his representation of the source of his income as derived from his girlfriend's contributions, to his income from self-employment as a handyman. ¶ 11, Declaration of Debtor in Support of Fifth Amended Plan, Dckt. No. 151. Debtor attests that he can make all payments called for by the Plan, stating that,

> The primary source of my income for my household is from self employment handyman service and I anticipate this income source for the remainder of the plan. I had previously required the assistance of friends and family to make plan payments, but my business has increased and I am not able to make my plans without assistance.

Id. Trustee argues that Debtor's inconsistent testimony lacks credibility, and that Debtor has not supplied documents to support his reported household income, or the expenses listed on his Schedule J. Debtor has not explained what happened to the income Debtor received from his previous work, if Debtor had received any income at all. Trustee states that he believes that Debtor's household has additional income, and that he is still not reporting his income accurately.

Debtor's girlfriend has declared on two separate occasions that she is willing and able to contribute toward the Debtor's Plan. Dckt. No. 12 and Dckt. No. 131. Debtor has not addressed why his girlfriend is now unable or unwilling to contribute. In his most recent declaration in support of the Plan, filed on March 7, 2014, Debtor lists his current household expenses and indicates that his girlfriend pays his auto insurance of $200.00 per month. If the Debtor is receiving the income, it should be contributed. *In re Short*, 232 F.3d 1018, 9th Cir 2000. Trustee argues that Debtor's Plan is not being proposed in good faith, and that the court should consider factors #4 and #10 as set forth by In Re Warren, which are included in the list below:

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

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

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

3) The probable or expected duration of the plan;

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

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

6) The extent to which secured claims are modified;

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

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

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

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

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

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

Here, the court is asked to consider factors: (1) The amount of the proposed payments and the amounts of the debtor's surplus; and (4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court.

Trustee cites to multiple instances where Debtor has filed multiple versions of his Schedule I and J, over what appears to be a relatively short span of time:

1. Filed 6/21/, Dckt. No. 1, pages 29-30. Income: $2,200; Expenses: $740.

2. Filed 9/9/12, Dckt. No. 27. Expenses: $715.

3. Filed 2/13/13, Dckt. No. 57. Income: $2,300; Expenses: $710.

4. Filed 5/3/13, Dckt. No. 101. Income: $2750.

5. Filed 8/9/13, Dckt. No. 122. Income: $2750.

6. Filed 2/13/14, Dckt. No. 154. Income: $3000; Expenses: $625.

7. Filed 3/7/13, Dckt. No. 156. Expenses: $953.34-$200=$753.34.

Trustee requests that the court deny confirmation of the plan, and grant Trustee's Motion to Dismiss, TSB-4, which was heard on February 19, 2014, and continued to April 1, 2014, to be heard in conjunction with Debtor's Motion to Confirm. This case has been pending for 21 months, and has not yet been confirmed. Trustee has filed four separate motions to dismiss, for Debtor's delay of the case in failing to amend the plan and to

make plan payments. Trustee has filed the following motions to dismiss thusfar:

1. Motion to Dismiss Based on Failure to File Plan, TSB-1, Dckt. No. 44

2. Motion to Dismiss Based on Failure to File Plan, TSB-2, Dckt. No. 88

3. Motion to Dismiss Based on Failure to File Plan and Delinquency, TSB-3, Dckt. No. 111

4. Motion to Dismiss Based on Failure to File Plan, TSB-4, Dckt. No. 143, Failure to File Plan

REPLY OF DEBTOR TO TRUSTEE'S OBJECTION TO DEBTOR'S MOTION TO CONFIRM

Debtor responds by stating that he is proposing the plan in good faith. While it is admittedly unstable, Debtor states that the Plan is still feasible. Dckt. No. 161. Debtor wishes to testify as to the material disputed issues raised by the Trustee, which includes:

1. Whether the Debtor has reported all of his "income," or whether Debtor was failing to disclose his income; and

2. Debtor's good faith, pursuant to the factors set out by *In re Warren*.

Debtor states that he has established a factual record, and thereby requests an evidentiary hearing based on the record before the court. Federal Rule of Bankruptcy Procedure 9014(d) provides that evidence relating to disputed material facts in a contested matter shall be taken in the same manner as testimony in an adversary proceeding. Thus, under this rule, to the extent that there are disputed material facts, if the parties request, the court shall conduct an evidentiary hearing. Evidentiary hearings are conducted in this District with the use of direct testimony statements, L.B.R. 9017-1, as part of the live testimony.

In light of Trustee's and the court's serious concerns regarding Debtor's candor regarding his employment, income, and household expenses, the court grants Debtor's request for an evidentiary hearing. Debtor's inconsistent testimony; delinquency in plan payments; and repeated failure to address the grounds for Trustee's objections to confirmation of Debtor's plans is causing delay which is prejudicial to Debtor's creditors and constitutes cause to dismiss the case. 11 U.S.C. § 1307(c)(1). Debtor filed his case in June 21, 2012. No plan has yet been confirmed in the almost two years that have passed since the commencement of this case. Debtor's inconsistent declarations regarding his income and contributions from family members calls into question Debtor's credibility and prosecution of the case in good faith. Debtor's inability to confirm a plan and resolve previous issues with the Plan is testing the Trustee and court's patience, and casts doubt on whether a Plan can be confirmed in this case.

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

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

B. ----------, the ----------, shall lodge with the court and serve their Testimony Statements and Exhibits on or before , 2013.

C. ----------, the ----------, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 2013.

D. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 2013.

E. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before —----------, 2013

F. The Evidentiary Hearing shall be conducted at -------.m. on ----------, 2013.

19. 12-31671-E-13 CHRISTIAN NEWMAN
TSB-4 Peter G. Macaluso

CONTINUED MOTION TO DISMISS CASE
1-22-14 [143]

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's Attorney, and Office of the United States Trustee on January 22, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to continue the Motion to Dismiss to [time] on [date]. 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:

Trustee's original Motion to Dismiss advanced the below arguments in favor of dismissal of the Debtor's bankruptcy case.

Failure to File Amended Plan

Trustee originally stated that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on November 19, 2013. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1). A review of the docket shows that Debtor filed an Amended Plan on February 13, 2014. Dckt. No. 152. The Motion to Confirm the Amended Plan was filed on the same day, Dckt. No. 149.

Debtor's Response

Debtor filed a response on February 4, 2014, stating that he will file, set and serve a motion to confirm prior to the hearing on this matter. No reasonable explanation to the delay was given.

Amended Plan

On February 13, 2014, the Debtor filed an Amended Plan, Motion to Confirm, and supporting pleadings. Dckts. 152, 149, 151. On February 14, 2014, the Debtor also filed Amended Schedules I and J to correct errors in the original Schedules I and J filed in 2012. Dckt. 154. This Income and Expense information is now almost 2 years old and of little relevance to the court in connection with confirmation of a Fifth Amended Plan.

If Amended Schedules I and J are taken as true (having stated under penalty of perjury that they truthfully state the Debtor's income and expenses as of June 2012),

A. The Debtor had income of $3,000.00 a month from his business.

B. From this the Debtor had expenses of only ($625.00) a month. To achieve only ($625.00) in monthly expenses, excluding mortgage, insurance and property taxes, the Debtor states under penalty of perjury,

1. Food and household supply expenses were $200.00 a month.

2. Clothing, Laundry, and Dry Cleaning were only $10.00 a month.

3. Personal care products and services were $0.00 a month.

4. Medical and dental expenses were only $10.00 a month.

5. Transportation expenses (excluding car payment and insurance) were only $120.00 a month.

6. Vehicle insurance expense was $0.00.

7. Health insurance expense was $0.00.

8. Income and Self-Employment taxes were $0.00.

9. Repair and maintenance expenses for home were $0.00.

Amended Schedules I and J, Dckt. 154.

Previously, the court had noted that in addition to providing no current income and expense information, Debtor's declaration provides no testimony as to how he could achieve the prior payments in this case with such expenses. Declaration, Dckt. 151. The court found that such statements under penalty of perjury in the Amended Schedules and in the Declaration to be "incredible" (as in not credible, rather than amazing). The Declaration told the court that during this case, the Debtor depended on the assistance of friends and family, while not providing testimony as to the Debtor's actual expenses. The court suggested that such cryptic and incomplete statements are indicative of the Debtor actually having greater income and expenses, and making such statements may have been an effort to hide that information from the court, Chapter 13 Trustee, U.S. Trustee, and other parties in interest.

SUPPLEMENTAL DECLARATION OF DEBTOR

Debtor submitted a supplemental declaration, presumably in response to the Trustee and court's concerns that Debtor's inconsistent testimony indicates a lack of candor in the prosecution of his bankruptcy case. Debtor attributes his "income" to the following sources:

1. First Call Handyman Services, Inc,;
2. Inc. Fred Fix It;
3. Scottland Yard Fence Company.

Debtor further estates that these are his "present expenses:"

Expense	**Amount of Expense**	**Description**
Food	$100.00	Weekly
Clothing, Laundry	$10.00	I shop at Ross and only wear motorcyle shirts
Personal Care	$10.00	
Gym Membership	$80.00	
Transport	$120.00	
Car Ins.	$200.00	Girlfriend pays
Electric	$100.00	SMUD and PG&E

Debtor states that he will comply with the plan and remit payments. Debtor states that he "dispatch for the most part and take care of daily jobs like people in my family have done for almost 400 years in the history of American Mormon Carpenters." Debtor also states that he has "several subcontractors" that he works with, and that they help each other out in "challenging times," and that he is usually paid upon completion of his contracting jobs. ¶ 4, Declaration of Debtor, Dckt. No. 156. Debtor provides the invoice of Fred Fix It, Inc. for the date of March 6, 2014.

As stated in the court's ruling for Debtor's Motion to Confirm the Fifth Amended Plan, PGM-6, the court and Trustee have identified serious concerns with Debtor's inconsistent testimony regarding his income and expenses, in addition to his failure to file a confirmable plan within the last almost two years, spanning from the commencement of the case to the present. The court's decision is to continue the Motion to Dismiss to [time] at [date], to be heard in conjunction with the evidentiary hearing on Debtor's Motion to Confirm the Fifth Amended Plan, Dckt. N0. 159.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is continued to [time] on [date] to be heard concurrently with the evidentiary hearing set on Debtor's Motion to Confirm the Fifth Amended Plan, PGM-6.

20. 13-32480-E-13 CHRISTINE CHRISMAN MOTION TO MODIFY PLAN
SJS-1 Scott J. Sagaria 2-20-14 [23]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 39 days' notice was provided. 35 days' notice is required. That requirement was met.

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

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

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

21. 10-23787-E-13 RICHARD RUYBALID
SAC-9 Scott A. CoBen

OBJECTION TO CLAIM OF FLORENTINE ABBOTT AND RODNEY ABBOTT, CLAIM NUMBER 15
2-13-14 [131]

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

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

Final Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(1) and (d)(4). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim number 15 of Florentine and Rodney Abbot is sustained and the claim is disallowed in its entirety. No appearance required.

The Proof of Claim at issue, listed as claim number 15 on the court's official claims registry, asserts an unsecured $259,620.00 claim. The Debtor objects to the Proof of Claim on the basis that Debtor never incurred debt with the creditor.

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).

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).

Here, the face of the Proof of Claim form, filed on March 30, 2010 indicates that Debtor owes creditors Florentine and Rodney Abbott the amount of $259,620.00. The basis for claim is listed as "see attached," referring to a one-page addendum to form, which states as follows:

> Creditors Florentine and Rodney Abbot are plaintiffs against debtor Richard Ruybalid individually and doing business as CA Construction in Abbott v. Britschgi, et. al., Sacramento County case no. 07AS04450. The Abbotts seek over $500,000 as against debtor Ruybalid in the action, which damages are covered by insurance. Those $500,000 in damages that are covered by insurance are *not* set forth herein this proof of claim.
>
> The principal on the claim herein is $53,206, the sum creditors Florentine and Rodney Abbott are seeking from debtor Ruybalid as a refund of the sum said creditors paid debtor Ruybalid under a construction contract. Creditors seek this principal sum as against Ruybalid individually for his violations of California Business & Professions Code section 7109, 7026, 7028, 7031, and 7160.
>
> Additionally, creditors seek treble damages on said sum (a total of $159,618) under California Code of Civil Procedure section 1029.8, as well as interest on said $53,206 at 10$ per annum from January 2006 to the present (approximately $21,500) plus approximately $78,500 in attorney fees, for a total of $259,620.
>
> This claim does not include the sums creditors are owed from debtor on those claims that are covered by debtor's liability insurance, which sum is approximately $500,000.

Attachment to Paragraph 2, Claims Registry, Proof of Claim No. 15.

Creditors seem to assert that Debtor owes them $259,620.00, based on a contingent, unrealized request for damages in a state court case, relating to services provided by Debtor under a construction contract. This contract was the subject of a state court action entitled *Abbott v. Britschgi, et. al,* that was then pending in Sacramento County Superior Court (Case No. 07-04450).

Debtor states that on February 3, 2011, the Sacramento County Superior Court entered judgment in favor of Debtor and others, and against the Creditors. Debtor attaches a "Judgment on Verdict," Exhibit B, Dckt. No. 123, issued by the Honorable Brian R. Van Camp, Judge of the Sacramento County Superior Court.

The Judgment is the state court's approval of a special verdict rendered by the jury in the state court case, finding that among other

things, Creditors were not excused from having to perform their construction contract; that the construction work performed by Debtor and others was not negligent, and that their negligence was not a substantial factor in causing harm to Creditors' home; and that Debtor did not perform work as a concrete contractor without a valid California license, and did not knowingly make false or fraudulent representations to Creditors about his ability to properly perform the services he was required to perform under his contract with Creditors. The state court ordered that Creditors, plaintiffs in the action, take nothing against Debtor and Debtor's construction company. Dckt. No. 123 at 12.

The Creditors then appealed the judgment with the Third District Court of Appeals. On December 1, 2011, the appeal filed by the Creditors was dismissed. Exhibit C, Remittitur and Order Dismissing Appeal, Dckt. No. 123 at 14, Thus, the ruling of the Sacramento County Superior Court, refusing to award Creditors the damages requested, stands and Debtor does not owe Claimants the amount claimed.

The Debtor has met the burden of providing substantial factual basis to overcome the prima facie validity of a proof of claim, with evidence exerting probative force equal and superior to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991). Based on the evidence before the court, the creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Florentine and Rodney Abbott filed in this case 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 objection to Proof of Claim number 15 of Florentine Abbott and Rodney Abbott is sustained and the claim is disallowed in its entirety.

22. 14-21252-E-13 EUGENE/LONNA SKIDMORE MOTION TO VALUE COLLATERAL OF
TJW-1 Timothy J. Walsh JPMORGAN CHASE BANK N.A.
3-14-14 [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 Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 14, 2014. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

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 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 Value Collateral and determine creditor's secured claim to be $0.00. 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 motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 1651 Lemon Street, Vallejo, California. The Debtor seeks to value the property at a fair market value of $120,000.00 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 $156,393.00. JPMorgan Chase Bank, N.A.'s second deed of trust secures a loan with a balance of approximately $40,444.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of JPMorgan Chase Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 1651 Lemon Street, 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 $120,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.