UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

April 22, 2014 at 3:00 p.m.

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1. 09-41202-E-13 LAURA GARCIA
Rabin J. Pournazarian

ORDER TO SHOW CAUSE - FAILURE TO TENDER FEE FOR FILING TRANSFER OF CLAIM
4-1-14 [71]

Final Ruling: The court issued an order to show cause based on Bank of America, N.A.'s failure to pay the required fees to transfer a claim in this case ($25.00 due on March 18, 2014). The court docket reflects that on April 2, 2014, Bank of America, N.A. paid the fees upon which the Order to Show Cause was based.

The Order to Show Cause is discharged. No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

2. 14-20204-E-13 GARY HALL — OBJECTION TO CONFIRMATION OF PLAN BY HSBC MORTGAGE CORPORATION
KK-1 Pro Se — 3-20-14 [31]

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 Chapter 13 Trustee on March 20, 2014. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to sustain the Objection. No appearance at the April 22, 2014 hearing is required.

The court has dismissed the Chapter 13 case pursuant to separate order.

HSBC Mortgage Corporation ("Creditor") opposes confirmation of the Plan on the basis that Debtor does not provide for the full amount of the pre-petition default owed. Creditor claims that it holds a secured claim recorded against real property commonly known as 815 Deetz Rd., Mount Shasta, California ("Real Property"). Creditor argues that pursuant to 11 U.S.C. §§ 1322(b)(2) & (5), Debtor's plan should provide for the full amount of pre-petition default owed.

Creditor also alleges that Debtor's classifies Creditor as a Class 1, Class 2, and a Class 4 claim while Creditor should be classified in Class 1 only. According to Creditor, its claim is secured only by a security interest in Debtor's principal residence, the claim may not be modified pursuant to § 1322(b)(2) and should be classified in Class 1.

Moreover, Creditor claims that Debtor lists Creditor in Class 3 indicating that the property will be surrendered. However, because Debtor has classified Creditor's claim in multiple classes, Creditor is unable to discern Debtor's intentions as to the property.

Class 1, Class 2, Class 3 and Class 4 claims in a Chapter 13 plan are mutually exclusive. Class 1 includes delinquent secured claims that mature after the completion of the plan. Class 2 includes all secured claims that are modified by the plan, or that have matured or will mature before the plan is completed. Class 3 includes all secured claims satisfied by the surrender of collateral. And Class 4 includes all secured claims that are not in default, not modified by the plan, and mature after the

completion of the plan. Debtor erroneously lists Creditor in all four classes. This leads to a confusion and renders the plan unable to provide for treatment of Creditor's claim.

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.

3. 14-20204-E-13 GARY HALL — OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
NLE-1 Pro Se — 3-18-14 [23]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on March 18, 2014. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to sustain the Objection. No appearance at the April 22, 2014 hearing is required.

The court has dismissed the Chapter 13 case pursuant to separate order.

The Chapter 13 Trustee ("Trustee") opposes confirmation of the Plan on the basis that the debtor is $250.00 delinquent in plan payment to the Trustee to date. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each

month beginning the month after the order for relief under Chapter 13. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). Failure to provide tax return is a cause to dismiss case. 11 U.S.C. § 521(e)(2)(B).

The Trustee also argues that the plan is not Debtor's best effort. According to the Trustee, Debtor is under the median income and proposes plan payments of $250.00 for 60 months, with a 0% dividend to unsecured creditors. Debtor's monthly projected disposable income listed on Schedule J reflects $508.00, therefore Debtor is not paying all his disposable income into the plan.

Additionally, the Trustee argues that Beneficial Finance in Class 1 is not entitled to interest on arrears under 11 U.S.C. § 1322(e), unless the note provides for interest on late payments or applicable non-bankruptcy law requires it.

Lastly, the Trustee contends that the plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). According to the Trustee, Debtor's non-exempt equity totals $69,000.00 from his auto shop listed on Schedule A. But Debtor is proposing to pay a 0% dividend to unsecured creditors.

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.

4. 13-29408-E-13 JOSEPH/CYNTHIA COSTANZO
EJS-2 Eric John Schwab

OBJECTION TO CLAIM OF INVESTMENT RETRIEVERS, INC., CLAIM NUMBER 2
3-4-14 [33]

Final Ruling: No appearance at the April 22, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 49 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Claim of Investment Retrievers, Inc. sustained and the claim is a general unsecured claim.

Joseph Costanzo and Cynthia Costanzo, the Chapter 13 Debtors ("Objector") request that the court disallow the claim of Investment Retrievers, Inc. ("Creditor"), Proof of Claim No. 2 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $197,981.64. Objector asserts that the basis of the Creditor's security interest, a judgment, has not been perfected because as abstract of judgment has not been recorded with the county recorder, therefore, the claim should be classified as a general unsecured claim.

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).

State law controls the validity and effect of liens in the bankruptcy context. *Diamant v. Kasparian (In re S. California Plastics, Inc.)*, 165 F.3d 1243, 1247 (9th Cir. 1999). Under California law in order to create a judgment lien on real property, and thereby secure a previously unsecured debt, the judgment creditor must record an abstract of a judgment with the county recorder. Cal. Civ. Proc. Code § 697.310. To create a judgment lien on personal property, the judgment creditor must file a notice of judgment lien with the office of the Secretary of State. Cal. Civ. Proc. Code § 697.510. The court has not been presented with any evidence that either of these procedures has been followed by Creditor. Therefore, the Creditor's claim is not perfected under California law, and is a general unsecured claim.

Based on the evidence before the court, the creditor's claim is a general unsecured claim. 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 Investment Retrievers, Inc., Creditor filed in this case by Joseph Costanzo and Cynthia Costanzo, Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 2 of Investment Retrievers, Inc. is sustained, the claim is disallowed as a secured claim, and is a general unsecured claim in this bankruptcy case.

5. 09-22809-E-13 JON/TERRI HAJEK — CONTINUED MOTION TO APPROVE LOAN MODIFICATION
MBB-1 Scott A. CoBen — 2-21-14 [53]

CONT. FROM 4-8-14, 3-25-14

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

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

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

The Motion to Approve the Loan Modification is granted. No appearance at the April 22, 2014 hearing is required.

The hearing on the Motion was continued from the original March 25, 2014 hearing date to afford Movant the opportunity to provide the court with confirmation from Debtors' counsel that the Debtors were supporting approval of the loan modification and that Movant had not bypasses communicating with the counsel who represents the Debtors in this case.

On April 7, 2014, the parties filed a Stipulation Resolving the Loan Modification Motion. Dckt. 58.

U.S. Bank, N.A., Trustee for the Holders of the Sasco 2006-BC4 Trust Fund ("Movant"), 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 $3,021.90. The modification will capitalize the pre-petition arrears and provides for stepped increases in the interest rate from 2.0% to 4.375% over the next 22 years.

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 U.S. 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 Jon and Terri Hajek, Debtors, are authorized to amend the terms of their loan with U.S. Bank, N.A., which is secured by the real property commonly known as 927 Sterling Cir., Folsom, California, and such other terms as stated in the Modification Agreement filed as Exhibit "1," Docket Entry No. 55, in support of the Motion.

6. 14-20809-E-13 HENRY/LINDA GUISANDE — MOTION TO BORROW
SDB-1 W. Scott de Bie — 3-24-14 [22]

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

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

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

The court's tentative decision is to deny the Motion to Borrow 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:

The motion seeks permission to obtain credit in the amount of $80,000.00 to supplement their Chapter 13 plan, to aid in paying their tax liability. Debtors state they have arranged to borrow the money from their son and will repay the loan over a period exceeding the length of their 60 month plan. Debtors propose repayment terms of $410.00 per month for 240 months with an interest rate of 2.14% per annum.

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). In re Gonzales, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B).

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

Here, Debtors have not provided a copy of the loan agreement with their son to borrow $80,000.00. While some terms are included in the motion, Local Bankruptcy Rule 4001(c)(1)(a) requires that a copy of the agreement must be provided to the court.

The court is also unsure how this fits with the proposed Chapter 13 Plan. The Plan before the court requires $854.00 monthly payments from the Debtors for 60 months, in addition to the $80,000.00 loan from their son.

Also, in reviewing Schedules I and J (Exhibit A and B, Dckt. 25), it does not appear that the Debtors will be able to afford the payments. On Schedule I the Debtor lists Net Monthly Income from his business to be $4,869.65. This is generated from $44,678.82 monthly gross income, with $39,809.17 in expenses. However, the expenses listed on the attachment to Schedule I do not include any income taxes or self-employment taxes for the Debtor. While the expenses show a monthly payroll of $14,888.94, there is no expense for employee taxes (employer's portion), with only $139.96 listed monthly for taxes.

Schedule J (Exhibit B) does not include any expenses for the Debtor's income and self-employment taxes. It appears that the Chapter 13 Plan in this case is premised on there being future post-petition tax debt which is not being funded. The Debtors have provided the court with evidence that they can pay the loan being obtained.

Therefore, the motion is denied without prejudice.

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

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

7. 14-20909-E-13 TSB-1 — BERENYZE MENDOZA AND SERGIO VALDOVINOS, Michael O'Dowd Hays — OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK, 3-18-14 [33]

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 18, 2014. By the court's calculation, 35 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. Here, Debtor filed an opposition on April 8, 2014.

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

The Chapter 13 Trustee ("Trustee") opposes confirmation of the Plan on the basis that Debtors did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee's report of the continued meeting of creditors state that both Debtors appeared and the meeting was concluded. This resolves this portion of the Objection.

The Trustee also argues that the plan is not Debtors' best effort. According to the Trustee, Debtors are under the median income and propose plan payments of $143.00 for 36 months with a 1% dividend to unsecured creditors, which totals $344.15. According to Debtors' 2012 tax return provided to the Trustee, Debtors received a refund of $4,886.00. However Debtors do not propose to pay any future refunds into the Plan or change their income tax withholdings.

Debtor's Opposition

In their opposition, Debtors allege that they will attend the continued meeting of creditors on April 10, 2014.

In response to Trustee's allegation that the Plan is not their best effort, Debtors claim that they have incorporated the tax refunds into their Schedule I. Exhibit A, Dckt. 44 lines 8h-12. The opposition is accompanied by Debtor Berenyze Mendoza's Declaration, which claims that Debtors do not claim as many withholding exemptions as to eliminate the refund entirely. Debtors further claim that Debtor Sergio Valdovinos is seasonally employer as a plasterer in the construction industry and has no assurance of steady income.

The Debtors have addressed the tax refund issue by showing $4,800.00 of annual income on Schedule I. The Debtors have provided their testimony that with the assistance of counsel they intend to adjust their withholding so that rather than a refund they will more correctly have their taxes withheld. This will allow the budget as shown on Schedules I and J properly function.

The Objection to Confirmation is overruled.

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 overruled and the Chapter 13 Plan file on January 31, 2014 is confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

8. 14-20512-E-13 VIRAB/EVA ABRAMYAN — MOTION TO CONFIRM PLAN
PGM-1 Peter G. Macaluso — 3-3-14 [20]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 3, 2014. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee opposes the motion on the basis that the Debtors cannot make the payments under the plan or comply with the plan, 11 U.S.C. §1325(a)(6). Trustee states that Debtors fail to list all debts on Schedules D, E and F, with at least one debt that is not reported on their schedules of creditors. Trustee states that Debtor's counsel indicated at the First Meeting of Creditors that there is a 2nd Deed of Trust recorded against real property at 4201 California Ave, Carmichael, California, but this debt is not listed on the schedules and the creditor is not provided for in the plan nor is the expense on Schedule J. Trustee states that it appears in the prior two cases filed by the Debtors (Case Nos. 11-29032 filed April 11, 2011 and 10-47884 filed October 20, 2010) they did not list the 1st Deed of Trust held against the property. Debtors list in Class 3 of the current plan, Wilmington Trust Co/Saxon Mortgage and Bank of America, which are not listed on Schedules D, E or F. Class 3 also lists Sterling Jewelers/Kay Jewelers, however, this claim is listed on Schedule F as Kay Jewelers.

Trustee also argues that the Motion to Confirm the Plan has not been properly set for hearing on the notice required because Debtors list in Class 3 of the plan, Wilmington Trust Co/Saxon Mortgage and Bank of America these claims are not listed on Schedules D, E or F. Debtors also list in Class 3 Sterling Jewelers/Kay Jewelers, this claim is listed on Schedule F under Kays Jewelers, but no address is listed for the creditor. Trustee argues that none of these parties have been properly notice of the plan or of Debtors' bankruptcy filing.

Furthermore, the Trustee argues that Debtors no longer report interest in real property at 3537 Eisenhower Ave, Carmichael, California and 7909 Archer Ave, Sacramento, California, reporting on their Statement of Financial Affairs that the two properties were lost to foreclosure sale, transfer or return in the last year. Trustee states that based on the Schedule D filed in both prior cases, it appears that some of the debts listed as secured claims in those cases should now be listed as unsecured claims. Any remaining claims on these properties should be reported as unsecured claims. Trustee states that this would be applicable to at least the 1st and 2nd Deeds held on properties that were foreclosed.

The Trustee also states that the Debtors' Plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). Trustee states the Debtors have supplied insufficient information relating to the real property at 4201 California Ave, Carmichael, California, to assist the Trustee in determining the value of the property. Debtors fail to report the square footage, number of bedrooms, number of bathrooms, size of lot, when the home was purchased or when the home was built.

Debtors list the property with a value of $225,000.00 on Schedule A. The only debt listed on Schedule D is Bank of America, described as 1st Deed of Trust on residence, with a claim amount of $182,000.00. However, on Schedule D, the value of the collateral is listed at $320,000.00. The value of the collateral listed on Schedule D conflicts with the value of the collateral on Schedule A. The Trustee is unable to confirm that the appropriate debts have been listed in this case, or what the true estimated value of the real property is. Furthermore, on March 24, 2014, a representative of the Trustee's office visited the Sacramento County Assessor's Office online in an attempt to determine an approximate value of Debtors' residence, which resulted in a report of the assessor's estimated land value, improvement value and net assessed value as $487,425.00.

Lastly, Trustee states that it appears that the Debtor cannot make the payments required under 11 U.S.C. 1325(a)(6). Debtors' plan calls for payments of $175 per month beginning March, 2014 but Debtors' projected disposable monthly income listed on Schedule J is $150.00.

DEBTOR'S RESPONSE

Debtors respond, stating they have filed an Amendment to Schedules D, F, J and the Statement of Financial Affairs addressing some of the issues of the Trustee, namely the foreclosures and adding the creditors to Schedule F. Debtors argue that Amended Schedule D has not resolved the liquidation issue the Trustee brought forth and that the Debtors can now make the plan payments with the $25.00 decrease in their recreation budget.

However, it does not appear that this response address the notice issue on the creditors that were not listed or served on the schedules. Therefore, the plan cannot be confirmed.

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

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

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

9. 14-20315-E-13 MONTY MANTOVAN
Scott A. CoBen

OBJECTION TO CONFIRMATION OF PLAN BY RESOLUTION FUND MANAGEMENT, LLC AND REQUEST TO DISMISS CASE
3-13-14 [25]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's attorney, creditor's attorneys, Chapter 13 Trustee and the Office of United States Trustee on March 12, 2014. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

Tentative Ruling: This objection to Plan confirmation was not properly set for hearing pursuant to the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The court overrules the objection as sustained and the Plan is not confirmed. 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:

Creditor Resolution Fund Management LLC ("Creditor") filed an objection to confirmation of plan and a motion to dismiss, arguing that the court should not confirm the plan because (1) Debtor has grossly undervalued various assets; (2) Debtor is not eligible for Chapter 13 because the amount of unsecured debt exceeds the 11 U.S.C. § 109(e) $383,175.00 limit; (3) this case is effectively a two party dispute that is better left to the Superior Court where there is a pending Complaint.

Debtor's Response

In his response, Debtor claims that Creditor's objection was filed 14 days after the Creditors Meeting and is thus untimely. Objections filed more than seven (7) calendar days after the first meeting date should overruled.

Debtor also opposes to the objection on the ground that it is filed on March 12, 2014, 12 days before the hearing date of March 25, 2014 in violation of Local Rule 9014-1(f)(2).

Additionally, Debtor opposes to the objection on the ground that it contains inadmissible evidence. According to Debtor, the objection is accompanied by 16 exhibits but none of them are authenticated by declaration as required by Rule 901 of the Federal Rules of Evidence and Local Rule 9014-1(d)(6).

Debtor also opposes to the objection on the basis that the objection was not accompanied by a notice of the confirmation hearing as required by the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors & Deadlines, and Local Rule 3015-1(c)(4).

Debtor further opposes to the objection, alleging that the proof of service is attached to the exhibits in violation of Local Rule 9014-1(e)(3). The Debtor's attorney was also served at the wrong email address. Moreover, Debtor claims that Creditor combined motion and memorandum of points and authorities filed in violation of Rule 7(b) of the Federal Rules of Civil Procedure and Rule 9013 of the Federal Rules of Bankruptcy Procedure.

Debtor further opposes to Creditor's newly filed documents. According to Debtor, the notice of hearing was filed on March 27, 2014, 28 days after the first date of Creditors Meeting. The scheduled hearing date is also untimely because it is 28 days after the date set for the confirmation hearing. Moreover, Creditor still failed to authenticate evidence supporting the objection. The new notice of hearing still fails to include a document control number. Lastly, the new proof of service of the notice of hearing is attached to the notice and confirms that Debtor's attorney was served at the wrong email address.

DISCUSSION

Late Objection

Local Bankruptcy Rule 9014-1(c)(4), provides, "An objection [to a Plan] and a notice of hearing must be filed and served upon the debtor, the debtor's attorney, and the trustee within seven (7) days after the first date set for the meeting of creditors held pursuant to 11 U.S.C. § 341(a)." In this case the first date set for the Meeting of Creditors was February 25, 2014. The objection to the confirmation of the Plan was filed on March 13, 2014, more than 7 calendar days after the Meeting of Creditors & Deadlines. In filing the untimely objection, the creditor did not request authorization to file a late objection or provide any basis for the court extending the time for filing an objection. Because the objection is untimely, it is overruled on those grounds.

Notice

A review of the docket shows that the March 25 hearing was set for the Trustee's objection to confirmation of plan, which was later withdrawn. Dckt. 15. The hearing date for Creditor's objection to confirmation of plan was set on April 22, 2014. Dckt. 35. The objection was served on March 12, 41 days prior to the hearing. The notice of hearing was served on March 27, 2014, 26 days before the hearing. Therefore the 14-day rule is not violated.

Authentication

To satisfy the requirement of authenticating an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Fed. R. Evid. Rule 901(a). Rule 901(b) provides several examples to authenticate an item of evidence:

(1) Testimony of a witness with knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert opinion about handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an expert witness or the trier of fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Fed. R. Evid. Rule 901(b).

Here, Creditor provides no evidence supporting that the 16 exhibits are actually what they claim to be. Debtor's attorney alleges in the objection that the exhibits are true and correct copies of various agreements between the parties. But Debtor's attorney is not introducing these exhibits into evidence and a separate declaration by the creditor that identifies the exhibits is required.

Failure to Serve Notice of Hearing

Creditors may object to the confirmation of a Chapter 13 plan. Local Bankr. R. 3015-1(c)(4). An objection and notice of hearing must be filed and served upon the debtor, the debtor's attorney, and the trustee. *Id.* Absent a timely objection and a notice of hearing, the court may confirm the Chapter 13 plan without a hearing.

Here, Creditor initially failed to serve Debtor, Debtor's attorney and the Chapter 13 Trustee with a notice of hearing. The error was partially cured when Creditor filed and served a notice of hearing on March 27, 2014. However, the newly filed notice of hearing is still defective because it does not comply with Local Bankruptcy Rule 1001-1(g) and 9014-1(l) as discussed below.

Document

Instead of filing separate copies of proof of service, Creditor attached the proof of service to objection, notice of hearing, and exhibits, respectively. 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).

Additionally, Creditor is reminded that the Local Rules require the use of a new Docket Control Number with each Motion. Local Bankr. R. 9014-1(c). Here Creditor used the same Docket Control Number for its objection to confirmation of plan and motion to dismiss case. Not complying with the

Local Rule is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(1).

Motion

The pleading appears to be a motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Debtor are put to the challenge of de-constructing the Mothorities, diving what are the actual grounds upon which the relief is requested, restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for Creditor. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion or other contested matter pleading requesting relief without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rule of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiffs and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

Multiple Relief Requested

The pleading seeks two different types of relief:

1. That the court denies confirmation of Debtor's Chapter 13 plan.

2. The court enter an order dismissing the case with prejudice.

While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014 does not incorporate Civil Procedure Rule 18 for contested matters. Creditor have improperly attempted to join a motion to dismiss case with an objection to confirmation of plan. Further, the permissive joinder of parties provisions of Federal Rule of Civil Procedure 20 and Federal Rule of Bankruptcy Procedure 7020 are not incorporated into the contested matter practice pursuant to Federal Rule of Bankruptcy Procedure 9014.

As with the present objection, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate – proceedings which in state court could consume years. In the bankruptcy court, such matter may well be determined on 28 days notice. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice. This is a sufficient ground to overrule the objection.

REVIEW OF PLAN

The court has an independent duty to make certain that the requirements for confirmation have been met. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

Though allegations that the Debtor does not meet the debt limits have been raised, the only admissible evidence presented are the statements by the Debtor himself in his Schedules.

There appear to be serious problems with the Debtor's Schedules. Debtor has disclosed an interest in two businesses, 67% in Gary's Place, Inc. and 50% in Gary's Place Bar and Grill, Inc. on Schedule B, but Debtor has not explained how these businesses are worthless ($0.00 value listed on Schedule B). Dckt. 1 at 11. zero. Debtor's Schedule I lists monthly income of $5,500.00 a month for the Gary's Place, Inc. – which indicates that it is not "worthless." Schedule I indicates that the Debtor has worked at Gary's Place, Inc. For thirteen years. *Id.* at 24.

Though Gary's Place, Inc. is a corporation, the Debtor lists business expenses of $1,374.50 a month from operating his business. *Id.* at 25. There is no attached statement "showing the gross receipts, ordinary and necessary business expenses, and the total monthly net income," which is required to be provided as part of the Debtor's income information provided under penalty of perjury on Schedule I.

Furthermore, it appears these entities are being sued for approximately $650,000 based on a guarantee. *See* Response to Trustee's Objection to Confirmation, Dckt. 19. However, these obligations were not disclosed on the Debtor's Schedules. Additionally, Schedule I shows $5,500 in gross salary and $1,374.50 in net income from rent or business and the Statement of Financial Affairs reflects average monthly business income of $1,374.50 in 2013 and $1,491.33 in 2012. The gross income from employment shows $5,077.91 in 2013, but $7,538.75 in 2012.

On Schedule F the lists a number of "creditors" for which he asserts that $0.00 is owed. Others are listed for "notice only." For all of the names listed, the Debtor states under penalty of perjury that the only

creditor he has with a general unsecured claim is Sierra Nevada Memorial Hospital with an $800.00 claim. However, Tri Counties Bank has filed two general unsecured claims which total $61,633.20. It appears that these relate to the claim scheduled by the Debtor for Citizens Bank of Northern California at $0.00, stating that it is listed "Notice Only for Time Barred Debt."

For Tri Counties Bank Proof of Claim No. 1, the documentation includes a copy of a promissory note dated July 19, 2007. The original amount of the Note is $70,000.00. The Proof of Claim asserts that the balance owed on the note is $27,286.11, which is comprised of a $20,286.11 principal and $7,392.65 in interest. The post-petition interest accrual is computed by the Creditor to be $542 per day.

Proof of Claim No. 3 filed by Tri-Counties Bank is int eh amount of $33,854.44, consisting of a principal balance of $27,216.63 and accrued interest of $6,737.81. The Creditor computes the post-petition accrual of interest to be $4.47 per day.

Additionally, Schedule D lists Resolution Fund Management having a $576,000 claim secured by the 9th Street Property in Marysville, California. This Property is stated to have a value of $600,000.00. Schedule D states that the US SBA has a claim secured by a second deed of trust against the property, but the amount of this claim is "unknown." Finally, Doug and Jonnie Nicholson is listed as having a claim secured by the 9th Street Property, again with the amount of the claim "unknown."

The proposed Chapter 13 Plan provides that the 9th Street Property will be surrendered to the three creditors. Plan, Dckt. 5. Given that the Property, based on Debtor's statement under penalty of perjury on Schedules A and D is approximately equal to that of what is owed Resolution Fund Management, the claims of the U.S. Small Business Administration and Doug and Jonnie Nicholson appear to be general unsecured claims. The Debtor not "knowing" how much these claims are, the court cannot make the determination as to whether they have been proper provided for in this Plan. It may be, as the objecting creditor asserts, these unsecured claims are well in excess of the Chapter 13 debtor limits of 11 U.S.C. § 109(e). The Debtor has not given the court sufficient evidence to make that determination in that all but $800.00 of his unsecured debt is "unknown."

It appears that the Debtor lacks the basic financial ability to understand the nature of the debt he owes or the amount of the debt. It is unlikely that someone with such limited financial ability could feasibly perform a plan.

The proposed Chapter 13 Plan does not comply with the requirements of 11 U.S.C. §§ 1325 and 1322 and is not confirmed. The Debtor has failed to provide the court with the minimum evidence necessary to confirm a plan – including a good faith listing of his creditors and their claims on Schedules D and F.

Based on the foregoing, the Objection is overruled, but the proposed 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 Resolution Fund Management LLC having been presented to the court, the court having conducted its independent review of the plan and compliance with 11 U.S.C. §§ 1325 and 1322, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained and the plan is not confirmed.

10. 13-30919-E-13 PGM-4 — BUN AUYEUNG AND SOO TSE — Peter G. Macaluso — CONTINUED MOTION TO AVOID LIEN OF BARTON AND PAULA CHRISTENSEN — 1-29-14 [104]

CONT. FROM 3-4-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on January 29, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

APRIL 22, 22014 HEARING

The court continued the hearing to allow the parties to brief the specific issue of judicial estoppel.

On March 19, 2014, Barton and Paula Christensen ("Creditor") filed their supplemental brief. Creditor argues that Debtors are confusing the doctrines of equitable estoppel and judicial estoppel. Mr. Macaluso claimed that the element of "reliance" was missing, but this is not an element of judicial estoppel. Creditor argues that because the integrity of the judiciary would be threatened by allowing Debtors to proceed with its Motion on this third attempt and Second Bankruptcy, judicial estoppel is appropriate. Dckt. 129.

On April 1, 2014, Movant filed their supplemental brief, arguing that the particular facts and circumstances here are that the debtors have not adopted any inconsistent positions, no inconsistent statements, which were accepted by the court, or would provide the debtors with an unfair advantage if not estopped. Debtor argues that there are two separate and distinct bankruptcy estates, two filing dates, two case numbers, two exemptions allowances, two fair market values, and two entirely different cases and as such, judicial estoppel is not applicable. Dckt. 135.

PRIOR HEARING

Debtor moves to avoid the lien of Barton and Paula Christensen (collectively "Christensen"). A judgment was entered against the Debtor in favor of the Christensen for the sum of $300,000.00 to be disbursed as follows: $144,000 to the Christensen's, $30,000.00 to the Hatada's and $126,000.00 to Dance Hall Investors. The abstract of judgment was recorded with Sacramento County on September 12, 2008. That lien attached to the Debtor's residential real property commonly known as 6311 Point Pleasant Road, Elk Grove, California.

On October 1, 2013, Christensen filed a Proof of Claim with the court in the amount of $140,000.00. Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $185,000.00 as of the date of the petition. The unavoidable liens total $3,014.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(3) in the amount of $175,000.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. Debtor argues that the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing should be avoided in excess of $7,000.00 subject to 11 U.S.C. § 349(b)(1)(B).

CREDITOR'S OPPOSITION

Barton and Paula Christensen ("Creditor") oppose the motion on the basis that the claim has been merged into judgment, *res judicata* and collateral estoppel apply, double recovery applies and the Debtors acted in bad faith.

Creditor first argues that the Debtors cannot re-litigate this issue because their claims have been extinguished and replaced by the Judgment. However, it does not appear that the Debtors seek to re-litigate the claims that were litigated and resulted in the judgment. Rather, they seek to avoid the judgment pursuant to 11 U.S.C. § 522(f).

Second, the Creditor argues that *res judicata* and collateral estoppel apply. Creditor is argues that the Motion to Avoid Lien of Barton and Paula Christensen in Case No. 09-35065, Dckt. 108, should have preclusive effect.

Third, Creditor argues that double recovery is impermissible and Debtor should not be able to avoid this judgment lien because it would further reduce their lien. Creditor states they already received a prior order avoiding the judgment lien, now have adjusted their higher exemption and seek additional avoidance.

Lastly, Creditor argues that judicial estoppel should be applied because Debtors have acted in bad faith. Creditors state that this case was filed simply to re-file this motion to avoid lien, claim a higher homestead exemption, and reduce the creditor's claim for a second time.

LEGAL STANDARDS

Collateral Estoppel and Res Judicata

In describing the five elements for Collateral Estoppel (claim preclusion) under California law, the Ninth Circuit Court of Appeals stated,

> Under California law, collateral estoppel only applies if certain threshold requirements are met:
>
> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001).

Cal-Micro, Inc. v. Cantrell, 329 F.3d 1119, 1123 (9th Cir. 2003). The party asserting collateral estoppel bears the burden of establishing these requirements. *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001)

Additionally, the determination of value for purposes of 11 U.S.C. § 506(a) is made only for specific purposes and the value may be determined at different times depending on the purpose of the valuation. In *Gold Coast Asset Acquisition, L.P. v. 1221 Veteran Street Co. (In re Veteran Street Co.)*, 144 F.3d 1288 (9th Cir. 1998), the Ninth Circuit Court of Appeals concluded that a valuation of property pursuant to 11 U.S.C. § 506(a) was not binding between the parties when it was not being used for the purpose for which the valuation was made in that case (confirmation of plan).

> "In the present case, the bankruptcy court valued the Property in light of Veteran's proposed plan of reorganization. Since the bankruptcy court rejected the plan, the valuation of the Property served no purpose under

> the Bankruptcy Code. Therefore, the valuation should not affect Gold Coast's rights to post-petition rents under section 552. The rents generated by the Property constituted Gold Coast's collateral and, thus, were an improper source for L&E's award of attorneys' fees. See *In re Cascade Hydraulics and Utility Service, Inc.*, 815 F.2d 546, 548 (9th Cir. 1987) ("Administrative expenses or the general costs of reorganization may not generally be charged against secured collateral.")."

Id. at 1292. In the present case, Movant seeks to use a valuation of property for purposes of a bankruptcy plan in avoiding a lien in another case years ago to be binding in determining the Debtors' avoidance in this case.

The party "asserting collateral estoppel carries the burden of proving a record sufficient to reveal the **controlling facts** and pinpoint the exact issues litigated in the prior action." *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995)(emphasis added); cited by *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007). If the Court has a reasonable doubt as to what was actually decided by the prior judgment, it will refuse to apply preclusive effect. *Id.*

Collateral Estoppel is a variant of the fundamental *Res Judicata* Doctrine. The Ninth Circuit Court of Appeals addressed the modern application of this Doctrine in *Robertson v. Isomedix, Inc. (In re International Nutronics)*, 28 F.3d 965 (9th Cir. 1994). The court considers four factors in determining whether Res Judicata applies,

> "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Id. at 970, citing *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

In the Debtors first Chapter 13 case, which was converted to one under Chapter 7, the court granted the Debtor's motion to avoid Creditor's judgment lien on the Point Pleasant Property. In granting that motion, the court determined the value of the subject real property as of the date of the filing of the petition in order to apply the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A). The Order determined that the judgment lien of Barton and Paula Christensen against the real property commonly known as 6311 Point Pleasant Road, Elk Grove, California, was avoided pursuant to section 11 U.S.C. § 522(f)(1)(A) for all amounts of the judgment in excess of $140,000.00. Order Granting Motion to Avoid Lien that Impairs and Exemption Pursuant to Section 522(f)(1)(A); 09-35065 Dckt. 108. The exemption protected by this avoiding pursuant to 11 U.S.C. § 522(f) was in the amount of $150,000.00 claimed pursuant to California Code of Civil Procedure § 704.730(a)(3).

In the prior Chapter 7 case the Debtors filed a second motion to avoid the lien of creditors, seeking to assert a $150,000.00 exemption pursuant to California Code of Civil Procedure § 704.730(a)(3), based upon one of the Debtors having aged sufficiently during the four years of that case to qualify for a higher exemption. 09-35065 Dckt. 246. The court denied the second motion to avoid the lien, holding that the exemption amount and value of the property and the amount of the exemption were properly determined at the time the case was filed. Civil Minutes, *Id.* at 271.

The Debtors' prior Chapter 7 case was closed on August 19, 2013, four years after the Debtors commenced that case under Chapter 13. The present case was filed on August 9, 2013. In the present Chapter 13 case the Debtors have sought to have the court avoid the Creditor's lien based on the amount of the exemption and value of the Property as of August 19, 2013.

Through the Motion now before the court Debtors seek to have the judicial lien avoided a second time in the present Chapter 13 case. Beginning with the plain language of 11 U.S.C. § 522, the framework for this analysis is as follows:

1. The term "value" means "fair market value as of the date of the filing of the petition, or with respect to property that becomes property of the estate, as of the date such property becomes property of the estate. 11 U.S.C. § 522(a)(2).

2. The statutory exemption claimed by the Debtors arises under California law. 11 U.S.C. § 522(b)(2), California Code of Civil Procedure § 704.730(a)(3).

3. A debtor may avoid the fixing of any lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled to under 11 U.S.C. § 522(b), if such lien is –

    1. A judicial lien securing a debt (other than debt nondischargeable pursuant to § 523(a)(5). 11 U.S.C. § 522(f)(1)(A).

California Code of Civil Procedure § 703.140 states,

> (a) In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter, including the homestead exemption, other than the provisions of subdivision (b) are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:
>
> (1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of

subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

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

(3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):

(1) The debtor's aggregate interest, not to exceed twenty-four thousand sixty dollars ($24,060) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence.

Thus, Section 703.140 allows debtors to choose either the exemptions that state law already provides for judgment debtors or to choose the exemptions contained therein.

The Exemption claimed by Debtors arises under California Code of Civil Procedure § 704.730(a)(3) and is in the amount of $175,000.00. The Debtors value the Property at $185,000.00, based on the appraisal testimony of David LaBella.

California Code of Civil Procedure § 704.730(a)(3) provides that the "homestead exemption" is provided to be $175,000.00 if the judgment debtor or spouse who reside in the homestead, at the time of the attempted sale, are (1) 65 years of age or older, (2) physically or mentally disabled, or (3) at least 55 years of age and have a gross income of not more than $25,000.00 if single or not more than $35,000.00 if married.

The section in its entirety states,

§ 704.730. Amount of homestead exemption

(a) The amount of the homestead exemption is one of the following:

> (1) Seventy-five thousand dollars ($75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).
>
> (2) One hundred thousand dollars ($100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.
>
> (3) One hundred seventy-five thousand dollars ($175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:
>
> > (A) A person 65 years of age or older.
> >
> > (B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

Cal. Code Civ. Proc. § 704.730.

State law generally determines the existence and scope of the debtor's interest in property. *Butner v. United States*, 440 U.S. 48, 54 (1979). Absent some compelling federal interest requiring a different result, there is no reason why property interests should be analyzed differently simply because one of the parties is in bankruptcy. *Id.* Notwithstanding this general proposition, the role of § 522(f) in providing the debtor a fresh start constitutes such a compelling federal interest that it provides a debtor with greater rights in bankruptcy than generally available under state law. *In re Mulch*, 182 B.R. 569, 574 (Bankr. N.D. Cal. 1995).

It is well-settled that a debtor's exemption rights are determined as of the petition date. *In re Herman*, 120 B.R. 127, 130 (B.A.P. 9th Cir. Cal. 1990). Absent conversion from one chapter to another, the nature and extent of a debtor's exemption rights are determined as of the date of the petition. *Id.*, *see also In re Seyfert*, 97 Bankr. 590 (Bankr. S.D. Cal. 1989); *In re Magallanes*, 96 Bankr. 253, 255 (9th Cir. BAP 1988). As discussed in *In re Herman*, this reasoning is consistent with bankruptcy's fresh start purposes,

> A debtor undergoes the significant detriments inherent in filing bankruptcy in exchange for protection from certain creditors and a "fresh start." The ability to exempt property and avoid certain liens on exempt property is intended to facilitate the fresh start. See *Galvan*, 110 Bankr. at 449-51. If a judgment creditor were allowed to use post-petition events to defeat an exemption or defeat an attempt to avoid a judicial lien under section 522(f), the fresh start purposes of the Code would be significantly eroded. Furthermore, this reasoning does not conflict with the holding of prevailing Ninth Circuit authority such as In re Cole, supra, and In re Golden, 789 F.2d 698 (9th Cir. 1986), neither of which specifically discuss the relevant date for determining the existence of a homestead exemption.

Therefore, the nature and extent of debtor's exemption rights are determined under the applicable state law as of the date of the petition, August 19, 2013. Petition, Dckt. 1.

Equitable Doctrines

The key difference between the doctrines of claim and issue preclusion and equitable doctrines, such as equitable estoppel and judicial estoppel is that the equitable doctrines focus upon *conduct* and that claim and issue preclusion turn merely on the existence of an adjudication. *Alary Corp. v. Sims (In re Associated Vintage Group, Inc.)*, 283 B.R. 549, 565 (B.A.P. 9th Cir. 2002).

Equitable estoppel requires the following elements:

(1) The party to be estopped must know the facts;

(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

(3) The latter must be ignorant of the true facts; and

(4) He must rely on the former's conduct to his injury.

United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978). Since estoppel is an equitable doctrine, it should be applied "where justice and fair play require it." *Id.*

Judicial estoppel is an equitable doctrine that encompasses a variety of different situations that revolve around the concern for preserving the integrity of the judicial process. *In re Associated Vintage Group, Inc.*, 283 B.R. at 565. The doctrine extends to incompatible statements and positions in different cases. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996).

> Independent of unfair advantage from inconsistent positions, judicial estoppel may be imposed: out of "general consideration of the orderly administration of justice and

> regard for the dignity of judicial proceedings;" or to "protect against a litigant playing fast and loose with the courts." *Hamilton*, 270 F.3d 778 at 782; *Russell*, 893 F.2d at 1037. Moreover, it may be invoked "to protect the integrity of the bankruptcy process." *Hamilton*, 270 F.3d 778 at 785.

In re Associated Vintage Group, Inc., 283 B.R. at 556. The Ninth Circuit requires that the inconsistent position have been "accepted" by the first court. *Id.*

In addressing judicial estoppel, the Supreme Court has stated,

"Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (CA5 1993). See In re Cassidy, 892 F.2d 637, 641 (CA7 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (CA4 1982) (judicial estoppel "protects the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (CA3 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts'" (quoting Stretch v. Watson, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (CADC 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell v. Rolfs*, 893 F.2d 1033, 1037 (CA9 1990) (citation omitted)."

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001)

The Supreme Court identified several typical factors to be considered:

A. "[A] party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997)."

B. "[C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See Hook, 195

F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939."

C. "[W]hether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See Davis, 156 U.S. at 689; Philadelphia, W., & B. R. Co. v. Howard, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano*, 203 F.2d at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782."

D. "In enumerating these factors, [the Supreme Court does not] establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts."

Id. at 750-751.

In *Ah Quin v. County of Kauai DOT*, 733 F.3d 267 (9th Cir. 2013), the Ninth Circuit Court of Appeals addressed the application of judicial estoppel to bar a debtor from asserting claims in a subsequent law suit with the debtor failed to on the bankruptcy schedules. In deciding whether the debtor was barred from asserting the claims in the subsequent action, the Ninth Circuit determined that even though the debtor had subsequently amended her schedules to list the claim, three primary factors had been met: (1) misstatement which created an inconsistency, (2) bankruptcy court having accepted the contrary position (the schedules having been filed and relied upon), and (3) it was to the debtor's unfair advantage (attempting to get the claim by the bankruptcy trustee and creditors). The issue for remand to the district court was whether it was an inadvertent misrepresentation or intentional.

DISCUSSION

Prior Rulings and Bankruptcy Case

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

> "Rather than proceeding in good faith to timely comply with the confirmed bankruptcy plan, the Debtors have demonstrated that they are merely engaging in a gamble on the current real estate market. The Debtors are gambling with the creditors' money that the market will rise, allowing the Debtors to pocket more money from a sale. If the market goes down, then creditors can bear the risk (suffer the loss).

The Debtors have obtained two and one-half years of bankruptcy court protection, with all to show is that they will, sometime in the future, do what they have promised to do in the past if they determine that the real estate market has risen high enough for them to make more money by improperly delaying creditors.

The Debtors are not appearing, testifying, and making representations to this court in good faith. Rather, they have acted to mislead the court, creditors, the Chapter 13 Trustee, and other parties in interest.

No evidence is filed in opposition to the Motion to Dismiss, but merely short arguments of counsel. Such argument is not evidence of the facts alleged therein. The absence of such evidence causes the court to infer that such information is wholly unsupported. Even when afforded the opportunity to file supplemental pleadings, the Debtors merely had their attorney file a Supplemental Reply arguing why the case should not be dismissed. The Debtors have been careful not to make any statements under penalty of perjury to the court.

At the January 9, 2013 hearing the Debtors asked the court to continue the hearing to allow Debtors to sell the property. Such would allow them to profit from their misrepresentations to the court. Debtors' supplemental opposition states that Debtors have obtained a real estate agent and that the sale price is listed as $200,000 instead of the $250,000 initially stated by Debtors. Counsel for the Debtors argues that a modified plan will provide for all increases in value to go to creditors, with the Debtors reducing their exemption. However, the court's review of the docket indicates that a modified plan has not been filed.

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

The court harmonized the requirements for equal monthly payments specified in 11 U.S.C. § 1325(a)(5)(B)(iii)(1) with the rehabilitation aspect of Chapter 13 and the ability of a debtor to provide for the prompt orderly liquidation of assets through a plan to

provide for creditors and protect exempt interests in assets. Civil Minutes for October 14, 2011 Confirmation Hearing, Dckt. 180. The court expressed clear concern over the Debtors' continuing failure to address the issues raised in the prior confirmation hearing (confirmation denied) and unreasonable delay in the prosecution of a plan and liquidation thereunder.

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

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

...

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

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

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

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

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

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

Additional Arguments at the Hearing

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

When pressed as to why the court should not just convert the case, Debtors' counsel admitted that the reason was that the Debtors wanted to claim an even larger homestead exemption in that the state law exemption had

increased since they commenced this Chapter 13 case on July 21, 2009.

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

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

These Debtors committed as part of their Chapter 13 Plan to conduct an orderly liquidation sale of the property. See November 14, 2011 Order Confirming Plan, Dckt. 182. The court confirmed a plan which allowed the Debtors until September 2012 to complete a sale of the property. This case having been filed in 2009, the Debtors had effectively used the Chapter 13 case to forestall any payment to Christensen for more than 3 years before they had to complete the promised liquidation of the real property. The Debtors convinced the court that the delay in confirming the plan for two years, and then getting another year to sell the property was reasonable, even though they had not made any plan payments to Christensen.

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

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

> The court finds that the Debtors have prosecuted this Chapter 13 case and the confirmed plan in bad faith, abusing the bankruptcy process and creditors in this case. For the court to indulge the Debtors and dismiss the case is to give the Debtors a "bonus" for having mislead creditors and the court with the promise to liquidate the property by September 2012. Fraud committed on the parties and the court is not rewarded.
>
> Though Debtors counsel mounted a spirited and aggressive fight, he is betrayed by the actions, or lack of action by his clients.
>
> The court is also not impressed by the plea that the Debtors are 80 year old people living on retirement pensions. At one point counsel's arguments bordered on contending that his clients were and are incompetent. That cannot be true as they have actively sought and obtained orders from this court, in response to the Trustee's Motion they advanced a modified plan to let them serve as Debtors in a Chapter Plan for 2 more years while the "actively" liquidated the Property, and they successfully prosecuted litigation against Christensen for violating the automatic stay. If the Debtors were not competent or capable of performing a plan which provided for liquidation of the Property, counsel would not have proposed, obtained confirmation of, or seek to have the Debtors fulfill duties under a modified plan for another two years.
>
> Finally, conversion of the case is of little moment to the Debtors if their only concern is the exemption. They have a $150,000.00 exemption they have claim in this property. Amended Schedule C, Dckt. 46. If they are correct and the Christensen claim is $30,000, then the property would have to sell for in excess of $200,000 for there to be any money in excess of the Christensen claim and their homestead exemption. (Assumes a $200,000 sales price, 8% seller costs of sale, and prorated real property taxes.) If it is true that the property has a value in excess of $200,000, then it further highlights the Debtors bad faith in not proceeding with the required liquidation by September 2011."

09-35065, Civil Minutes, Dckt. 214.

The Debtors are attempting to pick the best from all worlds. They get their prior Chapter 13 case converted to Chapter 7 due to their misconduct. They file a new Chapter 13 case, providing a *di minimis* payment, premised on having obtained a discharge in the prior case. Then they seek to take away the lien of Christensen, paying them nothing as an unsecured claim. The Debtors failure of good faith has continued to the present case. Chapter 13 Plan, Dckt. 5.

Rulings on Motion to Avoid Lien in Prior Case

The court has also reviewed its ruling in the prior bankruptcy case when the Debtors sought to avoid this judgment lien. The court determined that it is the petition date for which the values are determined for the § 522(f) lien avoidance. Civil Minutes, 09-35065 Dckt. 271. It appears that after that ruling the Debtors and their attorney chose to "take a dive" and attempt to circumvent the rulings in that case by choosing not to avoid the lien in that case.

As the court recalls in that case, the Debtors pleaded with the court to allow them to dismiss the case so they could (after having improperly delayed and make affirmative misrepresentations to the court) file a new case and manufacture a larger exemption – apparently not satisfied with the substantial California homestead exemption already afforded them. Not being able to directly manufacture the exemption increase, they are now trying to do it indirectly, exhibiting the same disdain for the judicial process and their duties and obligations in federal court, including the provisions of Federal Rule of Bankruptcy Procedure 9011.

In ruling on the Debtors' attempts to manufacture a higher exemption in the prior case, the court expressly determined that they and Christensen were bound by the final order determining lien avoidance in that case. That ruling, of which the Debtors are fully aware, is equally applicable in this case.

> The issue of avoiding the judgment lien between the Debtors and Creditors has been determined by final order of this court in this bankruptcy case. Once a final order or judgment has been entered, relief may be sought by appeal or pursuant to Federal Rule of Civil Procedure 60. Moores Federal Practice Third Edition, § 132.20[2]. Here, the prior order avoiding the judgment lien of creditors was a final and appealable judgment. The Bankruptcy Code expressly provides that such order remains in full force and effect unless the bankruptcy case is dismissed. 11 U.S.C. § 349(b)(1)(B). No other provision exists under the Bankruptcy Code setting aside a final order avoiding a judgment lien, other than by appeal or relief under Rule 60.
>
> The court concludes that the provisions of 11 U.S.C. § 348(f)(1)(B) and (C) do not work to set aside the final order avoiding the Creditors lien in this case. The focus of these provisions are valuations of claims, for which property must be valued, for treatment of the claims in the bankruptcy case. Commonly, a creditors secured claim is valued pursuant to 11 U.S.C. § 506(a) to reduce the amount which has to be paid as a secured claim through a plan. This allows the debtor to obtain a lien strip and have the lien removed from his or her property upon payment of less than the full amount of the secured debt. See *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), affd., 469 B.R. 803 (ED Cal. 2012) (discussion of lien striping in Chapter 13 case), and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013). The

Debtors in this case did not seek to value Creditors secured claim pursuant to 11 U.S.C. § 506(a) or obtain a lien strip through a completed plan. Rather, the Debtors sought and obtained an order avoiding Creditors lien, irrespective of whether the Chapter 13 Plan was ever completed. A reading of 11 U.S.C. § 548(f)(1)(B) shows that it applies to situation where two conjunctive conditions are met, valuations of property and allowed secured claims. The valuation of property which secures a claim is a necessary determination of a secured claim pursuant to 11 U.S.C. § 506(a), which instructs the court the methodology for determining the value of a secured claim (emphasis added),

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

The Ninth Circuit Court of Appeals addressed the issue of the effect of a valuation of property and allowed secured claim pursuant to 11 U.S.C. § 506(a) in *Gold Coast Asset Acquisition, L.P. v. 1441 Veteran Street Co. (In re 1441 Veteran Street Co.)*, 144 F.3d 1288 (9th Cir. 1998). In holding that a § 506(a) valuation was binding only to the extent of the purpose for which it was made, the court stated,

> Section 506(a) operates to bifurcate a secured creditor's allowed claim into secured and unsecured interests based upon the bankruptcy court's valuation of the secured property. See *Dewsnup*, 112 S. Ct. at 777. A valuation under section 506(a), however, appears to be linked to its identified purpose - e.g., a plan of reorganization. Section 506(a) instructs the bankruptcy court to value the property "in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a); see *In re Madera Farms Partnership*, 66 B.R. 100, 104 (BAP 9th Cir. 1986) ("The need to look at the purpose of the valuation appears to have achieved virtually universal acceptance."). It follows that when the purpose behind a particular

> valuation no longer exists, that valuation becomes irrelevant.
> ...
> In the present case, the bankruptcy court valued the Property in light of Veteran's proposed plan of reorganization. Since the bankruptcy court rejected the plan, the valuation of the Property served no purpose under the Bankruptcy Code. Therefore, the valuation should not affect Gold Coast's rights to post-petition rents under section 552.

Id., 1291-1292. This is consistent with 11 U.S.C. § 548(f)(1) applying to the valuation of property and secured claims, as required by 11 U.S.C. § 506(a).

The order on the prior motion to avoid lien does not value the secured claim in the case, but limits the reach of the judgment lien in, during, and after this bankruptcy case. While such a determination may sound similar to a valuation under § 506(a), the relief granted and order avoid lien is a determination of the substantive real property rights of Creditors irrespective of what they are paid on their secured claim in the bankruptcy case.

A judgment FN.2., when rendered on the merits, constitutes an absolute bar to a subsequent attempting to re-litigate the matters determined by the judgment. *Cromwell v. County of Sacramento*, 94 U.S. 351 (1876).

Central to this claims preclusion doctrine or the concepts of merger and bar. The concept of merger holds that when a plaintiff succeeds in litigation and recovers a valid and final personal judgment, the plaintiffs claim is merged into the judgment, and the original claim and all defenses to it, whether asserted or not, are extinguished. The plaintiffs rights and the defendants liabilities are thereafter determined by the judgment. If the plaintiff loses the litigation, the resultant judgment acts as a bar to any further actions by the plaintiff on the same claim, with certain limited exceptions. By definition, merger and bar prohibit claim-splitting. All facts, allegations, and legal theories which support a particular claim, as well as all possible remedies and defenses, must be presented in one action or are lost (see §§ 131.20-131.24).

Moores Federal Practice, Third Edition, § 131.01. The Ninth Circuit Court of Appeals addressed the application of this principal to orders in bankruptcy court (an order approving the sale of property) in Robertson v. Isomedix, Inc. (In re International Nutronics), 28 F.3d 965 (9th Cir. 1993), cert. denied 513 U.S. 2016 (1994).

FN.2. Federal Rules of Bankruptcy Procedure 9001 and 9002 defines the term Judgment to mean any appealable order and

include any order appealable to an appellate court. The order avoiding the judgment lien issued by the court previously in this case could have been appealed to an appellate court.

The court having entered a final order avoiding Creditors judgment lien, it cannot now be relitigated by Debtors. There remains no case or controversy for this court to exercise federal court jurisdiction, all such claims having been merged into the prior final order.

Civil Minutes, Dckt. 271.

Judicial Estoppel

The court finds that the equitable doctrine of Judicial estoppel encompasses this very situation. The court must preserve the integrity of the judicial process, and Debtors clearly are attempting to abuse the process by filing a sham Chapter 13 plan and avoiding the lien of the Christensen. Debtors filed this bankruptcy after the dismissal of the prior bankruptcy, admitting that they would be able to reap the benefit of a higher homestead exemption if they were to refile. Bankr. E.D. No. 09-35065, Civil Minutes, Dckt. 214. The Debtors are not entitled to reap the benefits of an increased exemption and therefore avoiding more of the Creditor's lien based on their prior bad faith.

While the Debtor attempt to disengage the current bankruptcy filing from their prior case, and their conduct in that case, the federal courts are not so nearsighted. The Debtors intentionally and willfully misrepresented to this court the terms of their Chapter 13 Plan. The court relied on their statements under penalty of perjury in confirming the Chapter 13 Plan in the prior case. Through their misrepresentations, the Debtors management to confirm a plan and exhaust four years of judicial time and resources. This Chapter 13 case is one more step by the Debtors in their plan to delay, abuse (both the Creditors and the court), avoid performing, not following through with the obligations of a Chapter 13 debtor, and taking what they want, when they want it.

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

The Debtors' strategy was to not perform the Chapter 13 Plan in the prior case, going as far (or doing so little) as not engaging an active real estate broker to market and sell the property necessary to fund their

Chapter 13 Plan. When caught in their deception, the Debtor and their counsel feigned ignorance that they were required to hire a broker and sell the property – notwithstanding the express term stated in the order confirming the Plan which was prepared by Debtors' counsel.

The Debtors, now are not satisfied with the arguments they made, the positions they took, the rulings made by the court after an evidentiary hearing, and the relief they obtained in the prior evidentiary hearing and bankruptcy case. They want to relitigate the issues, putting the court and Creditor to more cost and expense. Quite likely, if they do not like the result from a new evidentiary hearing, the Debtors will just file another case and re-relitigate the matter.

It is proper for the court to apply judicial estoppel to the Debtors in their repeated quest to abuse the Bankruptcy Code and federal judicial process. The Debtors' strategy of repeatedly litigating the issue in a series of bankruptcy cases, changing what they want puts the Debtors at an unfair advantage to the Christensen.

CHAPTER 13 PLAN IN THIS CASE

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

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

Debtors Do Not Qualify as Chapter 13 Debtors

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

See also Tenney v. Terry, (In re Terry), 630 F.2d 634, 635 (8th Cir. 1980) (We think that § 101(24) contemplates that a debtor make payments, and

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

The Debtors admit that they have not regular monthly income sufficient to fund a plan. Rather, instead of a good faith plan being funded by the Debtors, some other family members appear to be pulling the strings, quite possibly for their own financial advantage. The Debtors appear to be the poor sacrificial lambs who are being deprived of their homestead exemption while other family members appear to be lining their pockets with future gain.

The Debtors will be able to fund only $3,600.00 of the required $16,600.00 require plan payments. First Amended Plan, Dckt. 102. Thus, 78% of the plan must be funded with gifts – not the Debtors' regular income. The Debtors are not individuals with regular monthly income to fund a plan. 11 U.S.C. § 109(e). Rather, they appear to be individuals who are being used for others to "buy" a Chapter 13 Plan through the Debtors.

The Debtors do not quality as Chapter 13 Debtors as required by 11 U.S.C. § 109(e).

The Chapter 13 Plan Was Not Proposed or Prosecuted in Good Faith

As addressed above, the Debtors do not meet the minimum qualifications to be Chapter 13 Debtors. They do not have regular monthly income with which to fund a Chapter 13 Plan. Instead others are funding a Plan solely for the purpose of stripping the judgment lien of Barton and Paula Christensen even more than was previously done in the Debtors' prior Chapter 13 case which was converted to Chapter 7.

This Chapter 13 Plan is not in good faith and is merely a disguised repeat Chapter 7 liquidation filed solely for the purposes of decreasing the lien claim of the Christensen.

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

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

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

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

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

Schedules, Dckt.1.

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

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

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

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

Third, in April 2012, the court granted judgment for the Debtors in the amount of $15,259.95 (of which $3,900.00 was for legal fees) against Christensen. Judgment, 10-2497 Dckt. 72. Though presumably collected, this $15,259.95 is not otherwise accounted for by these Debtors who present themselves as qualified Chapter 13 Debtors. Possibly these monies were

taken from the Debtors by those who are calling the financial shots and looking to invest $13,000.00 to take even more through the Debtors' homestead exemption.

This is a very sad state of affairs, which may very well warrant inquiry on many fronts concern the possible abuse of these Debtors. The court reviewed the photos of the home in the appraisal provided by the Debtors. It appears there are severe habitability issues.

RULING

The court finds that these issues have been fully and finally litigated between the parties. Creditor's claims have been merged into the final order, in which the court determined that the Christensen lien has been avoided for amounts of the judgment in excess of $140,000.00. Order, 09-35065 Dckt. 108. The Debtors' bona fide, then in good faith, homestead exemption was and is protected.

The court also finds that judicial estoppel is appropriate in this case, where the parties bad faith form the prior case has permeated this case and Debtors attempt to play "fast and loose with the court." *In re Associated Vintage Group, Inc.*, 283 B.R. at 556. Failure to apply judicial estoppel would be a green light to attorneys and parties (be they creditors or debtors) to lie, cheat, and steal because your conduct has no bearing on how much you can improperly take from others. In order to protect the integrity of the bankruptcy process, the court finds that judicial estoppel applies, and the Motion is denied.

The court further finds that the Debtors do not meet the requirements of a Chapter 13 debtor. They cannot prosecute this case.

The court also finds that the Chapter 13 case was not filed in good faith, the Plan has not been proposed in good faith, and the Chapter 13 Plan does not comply with the requirement of 11 U.S.C. §§ 1322 and 1325. Here, the Debtors are merely the Trojan horse for other people who are pulling the strings and funding the Chapter 13 Plan to further stip the judgment line of Barton and Paula Christensen.

The Debtors being unable to prosecute a Chapter 13 Plan in this case, there is no reason for the court to go through the exercise of further avoiding a judicial lien.

The Motion is denied.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Avoid Judicial Lien is denied.

11. 10-45522-E-13 DARWIN/KAREN GROENEWEG — MOTION TO MODIFY PLAN
BLG-2 Chad M. Johnson — 3-11-14 [44]

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 March 11, 2014. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the plan on the basis that the Debtor's modified plan proposes to reduce the commitment period from 48 months to 42 months. Trustee states that the Debtors are under median income and the commitment period is three years. However, Debtor's Motion and Declaration do not provide a reason for the reduction in plan terms. Trustee argues that Debtors' Schedule J indicates Debtor can pay $378.00 per month in plan payments.

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.

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

CONT. FROM 3-25-14, 2-25-14, 2-11-14, 1-14-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 3, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion to Approve the Loan Modification between Federal National Mortgage Association, Shmavon Mnatsakanyan, and Yermoniya Artushyan. 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 22, 2014 HEARING

The court continued the hearing to allow Green Tree Servicing, LLC to file supplemental pleadings.

On April 4, 2014, Green Tree Servicing, LLC filed a supplemental brief regarding its right to issue a loan modification as servicer of a loan. Green Tree Servicing, LLC provides a Limited Power of Attorney dated July 18, 2011. This differs from the Limited Power of Attorney filed previously, which was dated July 3, 2013, and discussed below. The Limited Power of Attorney states that Federal National Mortgage Association (Fannie Mae) appoints

> Green Tree Servicing, LLC as its true and lawful Attorney-in-Fact, **and in its name, place and stead** and for its use and benefits, to execute, endorse and acknowledge all documents customarily and reasonably necessary and appropriate for...

...4. The modification or extension of a mortgage or deed of trust.

Exhibit A, Dckt. 139. Wanda J. Lamb-Lindow, Assistant Secretary for Green Tree Servicing, LLC, testifies that Green Tree is the servicer of the loan secured by the deed of trust and that the current owner of the trust deed obligation is Federal National Mortgage Association (Fannie Mae). Declaration, Dckt. 141.

Green Tree Servicing, LLC also filed an excerpt from the Fannie Mae Single Family 2012 Servicing Guide. Green Tree Servicing, LLC states that section 202.06 of the servicing guide explicitly grants it the power to execute loan modification documents on Fannie Mae's behalf through a power of attorney.

MARCH 2014 HEARING

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

FEBRUARY 2014 HEARING

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

PRIOR HEARINGS

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

FN.1. In connection with other proceedings, the court has been provided with a Certificate of Merger filed with the Texas Secretary of State stating that BAC Home Loans Servicing, LP was merged into Bank of America, National Association. This Certificate is dated June 28, 2011, and is stated to be effective July 1, 2011. The California Secretary of State reports that BAC Home Loans Servicing, LP registration with California was cancelled. See, http://kepler.sos.ca.gov/cbs.aspx.

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

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

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

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

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

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

The court acknowledges that Green Tree Servicing, LLC has, and most likely will, in connection with this matter be responsive and address the court's concerns – as well as educating the court to the current practical business issues, and challenges, of maintaining a nationwide business providing these types of services. However, it appears that the impact of these changes is limited or fleeting.

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

GREEN TREE SERVICING LLC'S RESPONSE

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

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

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

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

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

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

C. Legal Points and Authorities

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

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

3. *Roth v. Schaaf*, 148 Cal. App. 2d 662, 666 (1957), holds that "the purpose and effect of a power of attorney of this kind [the points and authorities do not indicate what "kind" of power of attorney is referenced in the District Court of Appeal ruling] are to vest in the attorney full authority to transact any and all kinds of business for the principal."

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

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

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

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

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

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

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

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

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

   b. For judicial foreclosures, Green Tree Servicing, LLC is authorized to bid in the **name of Bank of America, N.A.**, but authorization is excluded if any additional documents are required for the entry of a judgment for foreclosure.

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

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

Exhibit A, Dckt. 125.

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

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

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

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

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

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

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

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

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

DISCUSSION

The court begins it review with the evidence which has been presented. Green Tree Servicing, LLC does not have any interest in the note, no interest (other than acting as a loan servicer) in the claim, and is not a creditor, as that term is defined in 11 U.S.C. § 101(10). The power of attorney provided states that Green Tree Servicing, LLC may act in the name of and on behalf of Federal National Mortgage Association (Fannie Mae) within the circumscribed scope specified in the Limited Power of Attorney. The Power of Attorney grants Green Tree Servicing, LLC the power to "in [Fannie Mae's] name, place, and stead and for its use and benefits, to execute. . . all documents customarily and reasonably necessary and appropriate for. . . the modification or extension of a mortgage or deed of trust." Exhibit A, Dckt 139.

The court does not read the Power of Attorney for Green Tree Servicing, LLC to act in its own name, place and stead, but that of Federal National Mortgage Association (Fannie Mae)'s. A Power of Attorney allows one party (here, Green Tree Servicing, LLC) to act in the name of another party (here, Fannie Mae), not in its own name. Furthermore, on its face, the Power of Attorney does not provide Green Tree Servicing, LLC the authority to modify promissory notes, but only the mortgage or deed of trust. Note that in Paragraph 8 of the Power of Attorney, Fannie Mae clearly distinguishes between mortgages, deeds of trust, and promissory notes.

Debtor has filed a response, seeking to have the loan modification granted. Dckt. 148.

However, given that Green Tree Servicing, LLC asserts it is not the creditor, but rather is acting as the servicing agent through a Limited Power of Attorney with Fannie Mae, the court grants the Motion to Approve Loan Modification as between Fannie Mae and the Debtors.

Federal National Mortgage Association (Fannie Mae) as serviced by Green Tree Servicing, LLC, acting through a Limited Power of Attorney, 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 $400.70. The modification will capitalize the pre-petition arrears and provides for an interest rate of 4.00%. The new Principal Balance of the note is $123,107.34 and $27,232.99 of the new Principal Balance will be deferred and no interest

will accrue or monthly payments be made on this amount. The Maturity Date will be August 1, 2053.

There being no objection from the Debtor, 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.

FURTHER HEARINGS

Though the court is approving the Loan Modification between Federal National Mortgage Association and the Debtors, it is clear that further hearings are required. The court refrained from issuing the order to appear for Green Tree Servicing, LLC, Federal National Mortgage Association, Bank of America, N.A.; OneWest Bank, FSB, and Zions First National Bank (several of these entities are involved in other cases through Green Tree Servicing, LLC), believing that Green Tree Servicing, LLC and Federal National Mortgage Association would choose the obvious, easiest, and most accurate path – having the loan modification agreement be between the actual parties and clearly identify Green Tree Servicing, LLC executing the agreement pursuant to a power of attorney.

That path was not chosen, and instead the court understands Green Tree Servicing, LLC and Federal National Mortgage Association to interpret the power of attorney in a way that Federal National Mortgage Association will not be disclosed as a party to the consumer. No good faith, bona fide business reason for hiding the identity of the principal has been given by Green Tree Servicing, LLC or Federal National Mortgage Association.

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 Shmavon Mnatsakanyan and Yermoniya Artushyan are authorized to amend the terms of their loan with Federal National Mortgage Association (Fannie Mae), as serviced by Green Tree Servicing, LLC, through Power of Attorney dated July 18, 2011, which is secured by the real property commonly known as 3417 Portsmouth Drive, Rancho Cordova, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 116, in support of the Motion, as required to be modified by this order.
>
> **IT IS FURTHER ORDERED** that Loan Modification Agreement shall identify Federal national Mortgage Association as the "Lender" who is entering into the contract with the Debtors, and Green Tree Servicing, LLC shall be

identified as the agent of Federal National Mortgage Association, with Green Tree Servicing, LLC executing the Modification Agreement in that expressly stated representative capacity.

13. 12-22824-E-13 MET-2 | **BENJAMIN ESPINOSA** / **Mary Ellen Terranella** | **MOTION TO VALUE COLLATERAL OF CITI BANK, N.A.** **3-23-14 [33]**

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 March 23, 2014. By the court's calculation, 30 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 141 Polaris Court, Vallejo, California. The Debtor seeks to value the property at a fair market value of $260,000.00 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 $506,270.00. Creditor CitiBank, N.A.'s second deed of trust secures a loan with a balance of approximately $72,897.00. 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 CitiBank, N.A. secured by a second deed of trust recorded against the real property commonly known as 141 Polaris Court, Vallejo, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $260,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

14. 13-34624-E-13 DEBRA RANDELL — MOTION TO CONFIRM PLAN
MWB-2 Mark W. Briden — 3-5-14 [36]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Trustee opposes confirmation offering evidence that the Debtor is $2,000.00 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Trustee also argues that no proof of loan modification or motion has been filed by the Debtors to date. The Additional Provisions of the Plan state "Debtor has a pending loan modification application with Flagstar Bank regarding First Trust Deed on personal residence. Schedule J provides for a mortgage payment of $1,661.00 once application is approved". Trustee states the Debtor has failed to provide the Trustee with proof of the loan modification and has failed to file a motion to approve the loan modification. Additionally, Schedule D, lists mortgage arrears of $11,627.00, which are not provided for in the Plan, and while treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment could indicate that the Debtor either cannot afford the payments called for under the Plan because they have additional debts, or that the Debtor wants to conceal the proposed treatment of a creditor.

Lastly, the Trustee argues that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). The Debtor's prior Schedule I filed on January 7, 2014 reflected $600.00 for payroll taxes and social security, however the Debtor amended Schedule I on March 5, 2014, and deleted this deduction without any explanation. The Debtor's prior Schedule I filed on January 7, 2014, reflected income from real property in the amount of $5,000.00 per month, however the Debtor amended Schedule I on March 5, 2014 and increased the income from real property to $5,875.00, without any explanation.

DEBTOR'S RESPONSE

Counsel for Debtor filed a response, stating he believes that Debtor will be current on or before the hearing on this motion. Further, Counsel states that Green Tree has acknowledged receipt of a request for a loan modification and that once this is approved, Counsel will file a motion to approve the loan modification.

Counsel also states that Debtor filed the Amended Schedule I increasing the rental income from $5,000 to $5,875 because the premises are now fully rented.

Unfortunately, argument from counsel is not considered evidence in which the court can consider. Furthermore, it does not appear the plan payments are current.

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

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

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

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

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

15. 10-37627-E-13 ERIC/AMBER BEASLEY — MOTION TO MODIFY PLAN
JLK-3 James L. Keenan — 3-7-14 [46]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 7, 2014. By the court's calculation, 46 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). Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to grant the Motion to Confirm the Modified Plan. No appearance at the April 22, 2014 hearing is required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee filed a limited opposition to the motion, stating that Debtors filed the proposed modified plan twice, once on February 11, 2014 and once on March 7, 2014. Trustee states that the two plans appear to be identical, both with signatures dated February 6, 2014. The Trustee does not oppose confirmation of the second plan, as that is the only one with a proof of service.

The court agrees that the plan filed on March 7, 2014, appears with a proof of service, naming the appropriate parties.

The modified 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 March 7, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

16. 13-34027-E-13 JMC-2 EILEEN MOFFITT Joseph M. Canning MOTION TO CONFIRM PLAN 3-4-14 [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 Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 49 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 March 4, 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.

17. 13-20028-E-13 EJS-15 GREGORY/ELISA WYATT Eric John Schwab

OBJECTION TO CLAIM OF CAVALRY PORTFOLIO SERVICES, LLC, CLAIM NUMBER 1
3-5-14 [156]

Final Ruling: No appearance at the April 22, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.) That requirement was met.

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed

material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim number 1 of Cavalry Portfolio Services, LLC is overruled without prejudice.

SERVICE OF PROCESS ISSUES

Service has not been effected as required by Fed. R. Bankr. P. 7004(b)(3). Federal Rule of Bankruptcy Procedure 7004(b)(3) and 9014 require that corporations, partnerships, and other fictitious entities need to be served on officers, partners, managing members, and other designated agents for service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

The respondent creditor in this case, Cavalry Portfolio Services, LLC is an unincorporated association. Thus, the service requirements of Federal Rule of Bankruptcy Procedure 7004(b)(3) apply. The certificate of service for this motion, Dckt. No. 160, shows that a variety of address were served with the moving papers, however, the court has not been able to verify any of the addresses.

The California Secretary of State lists an address for Cavalry Portfolio Services, LLC, and also lists CT Corporation Systems (Entity No. C0168406) as agent for service of process. The Proof of Service shows that the moving papers were sent to CT Corporation Systems at an address in Los Angeles, the court is unable to verify this address as it is not an addresses provided for by the California Secretary of State for CT Corporation Systems.

Debtor incorrectly assumes that by filing this claim, the Claimants have consented pursuant to Federal Rule of Bankruptcy Procedure 7004(h)(1) to service on the person signing the proof of claim or listed for receiving notices (Fed. R. Bankr. P. 2002). An address for "notice" in the Proof of Claim is not the designation of an agent for service of process. Fed. R. Civ. P. 7004, 9014.

The court previously addressed this exact issue in ruling on the prior Objection to Claim No. 1 (DCN EJS-3), filed by the Debtors. The Civil Minutes on the prior objection, Dckt. No. 126, specifically direct the Movant to the California and/or New York Secretary of State's databases for addresses on which the Claimant could be served.

On this basis and for the reasons detailed above, the Objection to Proof of Claim No. 1 is overruled without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Cavalry Portfolio Services, LLC, Creditor filed in this case by Gregory Keith Wyatt and

Elisa D Wyatt, Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim Number 1 of Cavalry Portfolio Services, LLC is overruled without prejudice.

18. 13-20028-E-13 EJS-16 GREGORY/ELISA WYATT Eric John Schwab

OBJECTION TO CLAIM OF PORTFOLIO INVESTMENTS II, LLC, CLAIM NUMBER 24
3-5-14 [161]

Final Ruling: No appearance at the April 22, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim number 24 of Portfolio Investments II, LLC is sustained and the claim is disallowed in its entirety.

Gregory Wyatt and Elisa Wyatt, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of Portfolio Investments II, LLC ("Creditor"), Proof of Claim No. 24 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $6,656.90. Objector asserts that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts that the date of the last payment was June 22, 2007, and that the account was charged off on October 13, 2007.

DISCUSSION

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

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

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is a consumer credit card, however, and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to be an open book account as defined in California Code of Civil Procedure § 337a.

It appears that the date of the last payment and transaction in the subject claim was June, 2007. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Portfolio Investments II, LLC, Creditor filed in this case by Gregory Wyatt and Elisa

Wyatt, Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim Number 24 of Portfolio Investments II, LLC is sustained and the claim is disallowed in its entirety.

19. 13-20028-E-13 EJS-17 GREGORY/ELISA WYATT Eric John Schwab — OBJECTION TO CLAIM OF LVNV FUNDING, LLC, CLAIM NUMBER 21 3-5-14 [166]

Final Ruling: No appearance at the April 22, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim number 21 of LVNV Funding, LLC is sustained and the claim is disallowed in its entirety.

Gregory Wyatt and Elisa Wyatt, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of LVNV Funding, LLC ("Creditor"), Proof of Claim No. 21 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $1,603.76. Objector asserts that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts that the date of the last payment was March 22, 2007, and that the account was charged off on October 31, 2007.

DISCUSSION

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

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

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is a consumer credit card, however, and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to be an open book account as defined in California Code of Civil Procedure § 337a.

It appears that the date of the last payment and transaction in the subject claim was March, 2007. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of LVNV Funding, LLC, Creditor filed in this case by Gregory Wyatt and Elisa Wyatt, Chapter 13 Debtor having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim Number 21 of LVNV Funding, LLC is sustained and the claim is disallowed in its entirety.

20. 13-20028-E-13 EJS-18 GREGORY/ELISA WYATT Eric John Schwab

OBJECTION TO CLAIM OF LVNV FUNDING, LLC, CLAIM NUMBER 22 3-5-14 [171]

Final Ruling: No appearance at the April 22, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim number 22 of LVNV Funding, LLC is sustained and the claim is disallowed in its entirety.

Gregory Wyatt and Elisa Wyatt, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of LVNV Funding, LLC ("Creditor"), Proof of Claim No. 22 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $2,635.59. Objector asserts that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts that the date of the last payment was March 22, 2007, and that the account was charged off on November 30, 2007.

DISCUSSION

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

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

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is a consumer credit card, however, and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to be an open book account as defined in California Code of Civil Procedure § 337a.

It appears that the date of the last payment and transaction in the subject claim was March, 2007. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of LVNV Funding, LLC, Creditor filed in this case by Gregory Wyatt and Elisa Wyatt, Chapter 13 Debtor having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim Number 22 of LVNV Funding, LLC is sustained and the claim is disallowed in its entirety.

21. 13-20028-E-13 EJS-19 GREGORY/ELISA WYATT Eric John Schwab — OBJECTION TO CLAIM OF LVNV FUNDING, LLC, CLAIM NUMBER 20 3-5-14 [176]

Final Ruling: No appearance at the April 22, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim number 20 of LVNV Funding, LLC is sustained and the claim is disallowed in its entirety.

Gregory Wyatt and Elisa Wyatt, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of LVNV Funding, LLC ("Creditor"), Proof of Claim No. 20 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $675.31. Objector asserts that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts that the date of the last payment was August 9, 2007, and that the account was charged off on March 14, 2008.

DISCUSSION

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

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

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is a consumer credit card, however, and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to be an open book account as defined in California Code of Civil Procedure § 337a.

It appears that the date of the last payment and transaction in the subject claim was August, 2007. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of LVNV Funding, LLC, Creditor filed in this case by Gregory Wyatt and Elisa Wyatt, Chapter 13 Debtor having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim Number 20 of LVNV Funding, LLC is sustained and the claim is disallowed in its entirety.

22. 13-20028-E-13 EJS-20 | **GREGORY/ELISA WYATT** | **Eric John Schwab** | **OBJECTION TO CLAIM OF QUANTUM3 GROUP, LLC, CLAIM NUMBER 12** | **3-5-14 [181]**

Final Ruling: No appearance at the April 22, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim number 12 of Quantum3 Group LLC, as agent for MOMA Funding, LLC is sustained and the claim is disallowed in its entirety.

Gregory Wyatt and Elisa Wyatt, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of Quantum3 Group LLC, as agent for MOMA Funding, LLC ("Creditor"), Proof of Claim No. 12 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $2,737.30. Objector asserts that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts that the date of the last payment was March 20, 2007, and that the account was charged off on October 31, 2007.

DISCUSSION

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

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

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is a consumer credit card, however, and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to be an open book account as defined in California Code of Civil Procedure § 337a.

It appears that the date of the last payment and transaction in the subject claim was March, 2007. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Quantum3 Group LLC, as agent for MOMA Funding, LLC, Creditor filed in this case by Gregory Wyatt and Elisa Wyatt, Chapter 13 Debtor having been

presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim Number of Quantum3 Group LLC, as agent for MOMA Funding, LLC is sustained and the claim is disallowed in its entirety.

23. 10-20031-E-13 TOMMY GARCIA — MOTION TO MODIFY PLAN
PGM-6 Peter G. Macaluso — 3-13-14 [126]

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

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

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

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

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on March 13, 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.

24. 14-20032-E-13 KULWINDER SINGH
TSB-1 Scott A. CoBen

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
2-13-14 [26]

CONT. FROM 3-11-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 13, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

PRIOR HEARING

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 liquidation analysis. Debtor's plan calls for payments of $295.00 for sixty months and no less than 2% to unsecured debts listed at $49,010.00, which amounts to $980.00 to unsecured claims. Trustee states that more than a year has passed since the

transfer of funds to the insider, but California Code Section 3439.09 allows that if this case was converted to a Chapter 7, a Chapter 7 Trustee could reach back four years to avoid the fraudulent transfer to the insider. The Trustee states that the plan will fail liquidation, since the Debtor is proposing to pay only $980.00 to unsecured claims rather than the $42,684.37 that was fraudulently transferred to the insider.

The Trustee also stats that the plan may not have been proposed in good faith. The prior case proposed plan payments of $295.00 for sixty months and no less than 10% to unsecured claims listed at $49,010.00, or $4,910.00. Debtor has now reduced the dividend to unsecured claims to 2% or $980.00. Trustee argues that based on the courts ruling in the prior case, Debtors allowed the case to be dismissed. Debtor then waited the requisite time for the one year period to pass under the Federal Code, and filed the instant case in an attempt to avoid the liquidation issue, and have avoided their obligation to list the transfer to the insider on Statement of Financial Affairs question #3(c), since it occurred more than one year prior to the filing of this case.

DEBTOR'S OPPOSITION

The Debtor opposes the Trustee's Objection on the basis that the Trustee wrongly presumes that the payment to his companion was a fraudulent conveyance, when the court decided it was a insider preference.

The Debtor also argues that the plan was proposed in good faith. Debtor states the percent to unsecured claims was reduced to two percent out of concern that the Class Two vehicle claim would have been substantially higher in the current case due to late fees and attorney fees. The Debtor also states that since the class two vehicle claim was less than expected, this plan actually pays the unsecured claims $9 more than in the prior case.

DISCUSSION

Here, the court must make a determination of whether the payment to Debtor's companion appears to be a possible fraudulent conveyance, which must be addressed, or an insider preference in order to determine whether the proposed plan meets the Chapter 7 Liquidation analysis.

However, the court has no evidence to consider. The Debtor provided a response to the Objection, with no declaration or exhibits attached. Debtors have failed to meet their burden of proving the requirements of confirmation. *See Amfac Distribution Corp. v. Wolff (In re Wolff)*, 22 B.R. 510, 512 (9th Cir. B.A.P. 1982) (holding that the proponent of a Chapter 13 plan has the burden of proof as to confirmation). Such evidence has not been provided and the court must sustain the Trustee's objection.

Additionally, the Trustee's Objection raises a serious good faith issue and whether the Debtor has affirmatively attempted to misuse and abuse the Bankruptcy Code, in violation of his fiduciary duty to the bankruptcy estate in the prior case. Further, it appears that the Trustee has raised the issue whether the transfer was not merely a preference, but a fraudulent conveyance to an insider. FN.1.

FN.1. In reviewing the court's ruling in the prior case, the judge determined that the asserted loan was not documented. Civil Minutes, 13-30204. There are no findings that a fraudulent conveyance did not occur. It appears that the Chapter 13 Trustee in that case was raising the simpler issue for that court, a payment made to an insider for an alleged antecedent debt within one year of the commencement of the bankruptcy case.

The court continued the hearing to allow the Trustee to file supplemental documents.

TRUSTEE'S SUPPLEMENTAL BRIEF

The Trustee argues that under California law a transfer made was fraudulent as to a creditor, where the creditor's claim arose before that transfer was made and the transfer was made: (1) with actual intent to hinder, delay, or defraud any creditor, which can be inferred of the transfer was to an insider, and (2) without receiving a reasonably equivalent value and the Debtor either was engaged on a transaction likely to render him insolvent or believed would render them insolvent. Trustee states that the Debtor has indicated that the Debtor agreed to a loan with Ms. Kaur who obtained a loan from Coleman Trust, (Response, DN # 30, Page 2, Line 6), the Debtor transferred money to a joint bank account in the Debtor and Ms. Kaur's name, (response, DN # 30, Page 2, Lines 18-20), and that someone wire transferred money from the account to Coleman Trust, (DN # 30, Page 2, Line 20.)

Trustee states that the court in a previous bankruptcy filing found that, "[t]he loan was not documented and was unsecured", a preference, (Civil Minutes, DN # 24, Page 1), and that, "Ms. Kaur withdrew the funds and used them to pay a debt that the debtor had no liability to pay." Where the Court has made these findings, and based on existing controlling law as to California preference law, (*Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, (9th Cir. 2005)), although contrary opinion exists, (*Haberbush v. Charles & Dorothy Cummins Family Limited Partnership*, 139 Cal. App. 4th 1630, (Cal. App. 2d Dist. 2006), Trustee states that California preference law has been preempted. The Trustee agrees that the current plan appears to pass the liquidation analysis required by 11 U.S.C. § 1325(a)(4).

The Trustee has also objected based on good faith grounds. Trustee states the plan has had the dividend reduced from 10% (approximately $4,901.00), to 2%, (or approximately $980.20), but the Debtor has proposed to increase the dividend to provide no less than 10% in his response, (DN # 30, Page 6, Lines 11-3.) The Trustee asks that the Court confirm the plan only if the minimum percent to unsecured is increased to 10%.

DISCUSSION

It does not appear the issue of whether this was a fraudulent conveyance was litigated in the prior bankruptcy case. The court cannot make a determination as to whether the transfer was a fraudulent conveyance based on the evidence provided. However, this plan cannot be confirmed if it does not provide or act on the determination of whether the transaction is a fraudulent conveyance or a preference. Although the Trustee seeks

confirmation of the plan with an increase of 10% to unsecured claims, this does not resolve the issue at hand.

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

25. 11-44540-E-13 DN-7 MERCEDES PEREZ Dan Nelson

MOTION TO VALUE COLLATERAL OF JOHN H. FREY, TESIBEL E. FREY, ELIZABETH KREUGER, LESLIE MERL FREY AND RUTH ELIZABETH FREY 3-17-14 [152]

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 creditors, and Office of the United States Trustee on March 17, 2014. An amended Notice of Hearing was served on the same parties on April 3, 2014. By the court's calculation, 19 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 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 6 Fourth Avenue, Isleton, California ("Real Property"). The Debtor seeks to value the property at a fair market value of $150,000.00 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 $161,000.00. The Real Property is further encumbered by a second deed of trust in the amount of $47,100.00 and state tax liabilities for $15,955.00. Creditors John H. Frey, Tesibel E. Frey, Elizabeth Kreuger, Leslie Merl Frey and Ruth Elizabeth Frey's ("Creditors") junior deed of trust secures a loan with a balance of approximately $109,000.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of John H. Frey, Tesibel E. Frey, Elizabeth Kreuger, Leslie Merl Frey and Ruth Elizabeth Frey secured by a junior deed of trust recorded against the real property commonly known as 6 Fourth Avenue , Isleton, 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 $150,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

26. 10-43441-E-13 CARL/CAROLYN FORE — CONTINUED MOTION TO MODIFY PLAN
TJW-3 Timothy J. Walsh — 2-19-14 [74]

CONT. FROM 4-8-14

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 19, 2014. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

PRIOR HEARING

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the motion on the basis that there is no current statement of income and statement of expenses on file. The Debtors' are proposing an increased plan payment from $1,000.00 to $1,160.00.

While the Trustee would normally support a payment increase, according to the Trustee's records, the last statement of income and expenses was filed on September 1, 2010. Trustee argues that the Debtor should not expect the Court to approve a modification when the Debtor is not disclosing their present income and expenses. The Trustee objected to the last proposed modification for this same reason. In the event that the Debtor does not file a current Schedule I & J, the Trustee may seek an Order Authorizing the Examination of each Debtor under Rule 2004.

The court continued the hearing to allow the Debtor to file supplemental Schedules I and J. Nothing has been filed to date.

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.

27. 14-21541-E-13 NLE-1 — STEPHANIE LEFORT — George T. Burke — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 3-26-14 [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 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the 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 will not be complete within 60 months. The Internal Revenue Service filed a claim indicating $32,934.12 of secured tax debt and $7,318.75 of priority tax debt. Debtor's plan proposes to pay only $18,000 in secured debt. According to the Trustee's calculations the plan will

complete in 118 month. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

The Trustee also claims that Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). According to the Trustee, Debtor has proposed a payment plan to pay court filing fees but failed to allow for this expense on Schedule J.

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

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

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

28. 14-21142-E-13 JHW-1 — THOMAS LISLE AND BARBARA TREAT — Lucas B. Garcia — OBJECTION TO CONFIRMATION OF PLAN BY DAIMLER TRUST — 3-20-14 [28]

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 20, 2014. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

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

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on April 11, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation of 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 is dismissed as moot and the proposed Chapter 13 Plan is not confirmed.

29. 14-21142-E-13 LBG-1 THOMAS LISLE AND BARBARA TREAT Lucas B. Garcia — MOTION TO VALUE COLLATERAL OF PNC BANK, N.A. 3-17-14 [17]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 17, 2014. By the court's calculation, 36 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 and broker Deborah Harris's declaration. The Debtor is the owner of the subject real property commonly known as 23805 Lakeview Ct., Auburn, California. The broker values the property at a fair market value of $882,640.00 as of the petition filing date.

The first deed of trust secures a loan with a balance of approximately $1,023,458.00. Creditor PNC Bank, N.A.'s second deed of trust secures a loan with a balance of approximately $123,400.00. 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 PNC Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 23805 Lakeview Ct., Auburn, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $882,640.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

30. 14-21142-E-13 NLE-1 | **THOMAS LISLE AND BARBARA TREAT** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK**
Lucas B. Garcia | **3-18-14 [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 Debtors and Debtors' Attorney on March 18, 2014. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

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

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on April 11, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is dismissed as moot.

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

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

The Objection to Confirmation of 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 is dismissed as moot and the proposed Chapter 13 Plan is not confirmed.

31. 14-21542-E-13 NLE-1 | **NATALIA RINKER** / **Scott D. Hughes** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** / **3-26-14 [20]**

Final Ruling: The Chapter 13 Trustee having filed a Withdrawal of the Objection to Confirmation of the Chapter 13 Plan, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Objection to Confirmation was dismissed without prejudice, and the matter is removed from the calendar.**

32. 14-21444-E-13 MET-1 | **JEFFREY/ANN BROONER** / **Mary Ellen Terranella** | **MOTION TO VALUE COLLATERAL OF FIRST TENNESSEE BANK** / **3-13-14 [16]**

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 March 13, 2014. By the court's calculation, 40 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 the Motion. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. 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 1538 West 7th Street, Benicia, California. The Debtor seeks to value the property at a fair market value of $325,000.00 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).

CREDITOR'S OPPOSITION

Creditor First Tennessee Bank, N.A. filed opposition to the motion based on its own Exterior Only Inspection Report which values the property at $391,000.00.

However, Creditor has not provided a copy of the Report or the declaration of the preparer of the report to substantiate it's argument as to the value of the subject property. Therefore, the court has no evidence to consider in opposition to the Motion and supporting pleadings.

The first deed of trust secures a loan with a balance of approximately $364,658.00. Creditor First Tennessee, N.A.'s second deed of trust secures a loan with a balance of approximately $49,766.00. 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 First Tennessee, N.A. secured by a second deed of trust recorded against the real property commonly known as 1538 West 7th Street, Benicia, 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 $325,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

33. 14-21444-E-13 JEFFREY/ANN BROONER — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
NLE-1 Mary Ellen Terranella — 3-26-14 [23]

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 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan is not Debtors' best effort. According to the Trustee, Form 22C shows that Debtors have a monthly net excess income of $927.91. Debtor is currently proposing a 36 month plan at 0% to general unsecured creditors. The Trustee suggests that the length of the plan should be 60 months to ensure that unsecured creditors receive what they are entitled.

The Trustee also objects to the plan on the ground that Debtor cannot afford to make the payments of comply with the plan. According to the Trustee, Debtors' plan relies on a Motion to Value Collateral which is set for hearing on April 22, 2014, the same day as the motion to confirm plan. If the Motion to Value is not granted, Debtors' plan does not have sufficient monies to pay the claim in full.

The Trustee also claims Debtors are not entitled to discharge. Section 6.1 of the plan states in part that "Upon the debtors obtaining a discharge in this case, ..." According to the Trustee, Debtors received a Chapter 7 discharge in case 2013-31557 on December 16, 2013. The language in Section 6.1 of the plan is not applicable as it appears that Debtor is not entitled to a discharge in this case under 11 U.S.C. § 1328(f).

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.

34. 08-36047-E-13 JOHN/CHARLENE JOHNSON **MOTION TO APPROVE LOAN MODIFICATION**
PGM-4 **3-12-14 [102]**

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 12, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The court's tentative decision is to 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:

The proof of service shows that Debtors served Nationstar Mortgage, the Lender of the subject loan modification, at a post office box. Service

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

If Debtors can show that proper notice was given, the court will issue the following ruling:

Debtors request permission to enter into a trial loan modification agreement with Lender, Nationstar Mortgage ("Lender"), which holds a deed of trust against the property located at 3350 La Cadena Way, Sacramento, California.

The modification provides that after all trial period payments are timely made, and Debtors have continued to meet all eligibility requirements of the modification program, the mortgage will be permanently modified. A copy of the Loan Modification Agreement was filed in support of the Motion, as Exhibit "A" on Dckt. No. 105. Debtors are to make three payments in the amount of $2,438.65 beginning pm March 2014, with the last payment under trial loan modification to be made by May 1, 2014. Any difference between the amount of the trial period payments and the regular mortgage payments will be added to the balance of the loan along with any other past due amounts.

Once the loan is modified, the interest rate and monthly principal and interest will be fixed for the life of the mortgage, unless the initial modified interest rate is below current market interest rates.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Debtors are authorized to amend the terms of their loan with Nationstar Mortgage, which is secured by the real property commonly known as 3350 La Cadena Way, Sacramento, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 105, in support of the Motion.

35. 10-39848-E-13 KELLY HENDERSON — MOTION TO INCUR DEBT
SAC-1 Scott A. CoBen — 3-25-14 [42]

APPEARANCE OF SCOTT COBEN, COUNSEL FOR DEBTOR REQUIRED AT APRIL 22, 2014 HEARING

Telephonic Appearance Permitted

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on March 25, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

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

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

Debtor seeks an order authorizing Debtor to incur debt in order to purchase real property commonly known as 12 Bonack Place, Sacramento, California, 95835.

On July 28, 2010, Debtor filed a Chapter 13 petition. 44 months have elapsed in the plan; the payment that is due on March 25, 2014 will be the 45th payment due under the plan. The Chapter 13 Plan that was initially proposed and confirmed is a 60 month plan which provides that unsecured creditors would receive a dividend of no less than 4.0 percent.

Debtor has attached a Residential Purchase Agreement and Joint Escrow Instructions to the Motion. However, Debtor has not addressed the reasonableness of incurring debt to purchase real property while seeking the extraordinary relief under Chapter 13 to discharge debts.

The Debtor's Motion states with particularity the following grounds upon which the requested relief is based (Fed. R. Bank. P. 9013):

A. Debtor has qualified for a home loan.

B. The amount of the loan is $250,000.00.

C. Interest Rate for the loan is 4.250 percent per annum.

D. The Loan Originator is Summit Funding, Inc.; 1430 Blue Oaks Blvd., Ste #290, Roseville, CA 95747; Telephone (916) 852- 9880.

E. The approximate payment will be $1,476.89 per month.

F. Debtor wants approval to borrow the money and purchase real property commonly known as 12 Bonack Place, Sacramento, California.

Motion, Dckt. 42.

In her Declaration the Debtor provides the following testimony under penalty of perjury,

A. Debtor and her husband have arranged to obtain a loan on the terms stated in the motion.

B. A copy of the purchase agreement is filed as Exhibit A.

C. A copy of the Good Faith Estimate is filed as Exhibit B.

Declaration, Dckt. 44.

REVIEW OF MOTION AND REQUESTED RELIEF

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

Debtor makes no allegation that they she is able to afford an estimated loan payment of $1,476.89. Debtor is making a monthly plan payment of $250 under the plan that was confirmed in July 28, 2010. Dckt. No. 5. Debtor has not modified the confirmed plan under 11 U.S.C. § 1329(a). Debtor has not alleged substantial changes in her financial condition in the post-confirmation period that might warrant a change in the level of payments. This monthly payment exceeds Debtor's current rental payment of $1,350, which is shown on Debtor's Schedule J filed on July 28, 2010. Although the debt is a single loan incurred to purchase a residence, the motion does not clearly state that the residence to be purchased with the new debt is reasonably necessary for the maintenance or support of the Debtor or her family.

In her Declaration the Debtor makes reference to *she and her husband* having obtained the loan and desiring to purchase the property. On Schedule I the Debtor stated that in 2010 that she was "separated" and did not list any income for her husband. Dckt. 1. It appears that the marital situation has changed and the Debtor's household income may well be greater than the court, Chapter 13 Trustee, and Creditors relied upon in confirming the present Chapter 13 Plan.

At the time of confirmation Schedule I listed Debtor's monthly gross income to be $6,123.00. After withholding and expenses, the Debtor has been able to fund the Chapter 13 Plan with $250.00 a month payments. The deductions for taxes and Social Security is listed to be $1,651.00. This represents 27% of the Debtor's gross income. In addition to the taxes, the Debtor has $595.83 a month withheld and invested in her 401K retirement plan ($7,149.96 annual contribution). In addition to the 401K retirement fund the Debtor states on Schedule B that she also has a PERS retirement benefit of "unknown" value.

No dependants are listed on Schedule I, but on Schedule J the Debtor lists a $300.00 monthly payment for "support of additional dependants not living at your home." Dckt. 1. At 32.

Based on the financial information available to the court, the Debtor does not have the ability to pay the requested loan. It may well be the Debtor and her spouse do have the ability to pay the loan because their household income is substantially greater than previously stated. It may be that the Debtor is not diverting $595.83 into her 401K investment, instead relying upon her PERS retirement benefit. (The court takes judicial notice that a PERS retirement benefit is a defined benefit plan for state and local government workers.)

The Motion is denied without prejudice.

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

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

36. 14-23248-E-13 JAMES BURKHALTER **MOTION TO VALUE COLLATERAL OF**
MRL-1 Mikalah R. Liviakis **WELLS FARGO BANK, N.A.**
4-7-14 [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 Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on April 8, 2014. By the court's calculation, 14 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 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 2867 Highgrade Street, Placerville, California. The Debtor seeks to value the property at a fair market value of $180,000 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately $183,000.00. Creditor Wells Fargo, N.A.'s second deed of trust secures a loan with a balance of approximately $96,474.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo, N.A., secured by a second deed of trust recorded against the real property commonly known as 2867 Highgrade Street, Placerville, 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 $180,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

37. 14-21349-E-13 AJP-1 **MARK/TRISHELE SWASEY** **Al J. Patrick** **CONTINUED MOTION TO VALUE COLLATERAL OF ROD FERRERIA AND SUSAN FERRERIA** **2-27-14 [17]**

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, respondent creditor's attorney, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 40 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 court continued this hearing from April 8, 2014, to allow the Chapter 13 Trustee to review supplemental documents. Dckt. No. 36.

The motion is accompanied by the Debtors' declaration. The Debtors are the owner of the subject real property commonly known as 547 Penstock Drive, Grass Valley, California ("Property 1") and 540 Fawcett St., Grass Valley, California ("Property 2"). The Debtors seek to value Property 1 at $232,052.00 and Property 2 at $226,200.00 as of the petition filing date. As the owner, the Debtors' opinion of value is evidence of the assets' value. *See* Fed. R. Evid. 701. *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

OPPOSITION BY CREDITOR

On April 8, 2014, Judgment Creditor Rodney E. Ferreira filed opposition to the Motion, stating that he believes that subject property value stated on Debtor's "list of assets" is unrealistic. Creditor offers a document labeled a "Comparative Market Analysis" that appears to have been prepared on Tuesday, April 1, 2014 by Terry Ann Ferguson of Mitchell Real Estate. Dckt. No. 34.

The Comparative Market Analysis attached to Creditor's opposition estimates the selling price of the property commonly known as 540 Fawcett St., Grass Valley, California, to be between $250,000 and $265,000. The analysis consists of a plat map, a comparison of similar properties in the Grass Valley area, and statistical charts with data on comparable listings. Additionally, Creditor files a zillow.com printout to "confirm" the estimates included in the Comparative Market Analysis document.

There are three problems with Creditor's opposition: first, Creditor filed the opposition 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).

The Local Bankruptcy Rules and Guidelines exist for a very practical reason. With the court operating in a near paperless environment, combining of pleadings into one massive document renders it all but unworkable electronic document. The court does not have a differential application of the rules by which some attorneys must comply with the rules and other attorneys may selectively chose which rules they accept as applying to them. The court has also observed that the more complex the combined document into which the grounds are hidden, the more likely it is that no proper grounds exist.

Second, Creditor did not provide admissible evidence for the court to consider. Creditor merely attaches an unauthenticated appraisal to the opposition. See Fed. R. Evid. 901. There is no testimony from the person who purportedly prepared the analysis and having first hand knowledge of the manner in which the report was crafted, Terry Ann Ferguson, showing that the analysis is what the proponent--the Creditor--purports it to be.

Third, Creditor attempts to present an estimate from the website Zillow.com as confirmation of the value of the subject property to the court. The attached printout is is not admissible evidence and cannot be relied upon by the court. Fed. R. Evid. 801, 802. There is no exception to the hearsay rule under which a Zillow report can come into evidence; the person who generated the values for a Zillow report is not available to be cross-examined as to either the underlying facts in the document, and the source for such facts. A Zillow estimate is merely hearsay and cannot be accepted by the court as a proper valuation of the property.

The appraisal not having been properly authenticated and no testimony having been provided by the person purporting to have an opinion as to the value of the property, the court does not have competing evidence to consider of the value of the property known as 540 Fawcett St., Grass Valley, California.

RULING

The court notes that Chapter 13 Trustee has not filed a supplemental response based on Creditor's late filed opposition and supporting evidence. The court will therefore consider the merits of Debtors' Motion on the basis of Debtors' original pleadings.

Debtors seek to value Property 1 at the fair market value of $232,052.00, and that of Property 2 for $226,200.00 as of the petition filing date. Debtors state that Property 1 is encumbered by a first deed of trust secures a loan with a balance of approximately $240,403.00. Property 1 is further encumbered by a second deed of trust securing a loan with a balance of approximately $53,003.00. Property 2 is encumbered by a first deed of trust securing a loan with a balance of approximately $247,356.00.

Respondent creditors Rod and Susan Ferreria hold a judgment lien with a balance of approximately $108,303.31. Given the amount of debt encumbering both Property 1 and Property 2, the respondent creditors' judgment lien is completely under-collateralized. The creditors' 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 Rod and Susan Ferreira secured by a judicial lien recorded against the real property commonly known as 547 Penstock Drive, Grass Valley, California and 540 Fawcett St., Grass Valley, 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 properties are $232,052.00 and $226,200.00, respectively. Both are encumbered by senior liens securing claims which exceed the value of the property.

38. 14-21349-E-13 NLE-1 MARK/TRISHELE SWASEY Al J. Patrick OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 3-26-14 [26]

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 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

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

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on April 10, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is dismissed as moot.

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

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

The Objection to Confirmation of 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 is dismissed as moot and the proposed Chapter 13 Plan is not confirmed.

39. 13-34152-E-13 ALLISON JOHNSON — MOTION TO CONFIRM PLAN
NUK-1 Najeeb U. Kudiya — 3-5-14 [45]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on March 5, 2014. By the court's calculation, 48 days' notice was provided. 42 days' notice is required. That requirement was met.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of Debtor's proposed plan on two grounds.

First, it appears that Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). This case was filed on November 1, 2013, and payments were to commence on December 25, 2013 under the plan. Debtor is delinquent $7,663.54. To date, Debtor has paid $3,207.58 into the plan. The next scheduled payment of $2,717.78 is due on April 25, 2014.

Second, Trustee argues that the plan may not have been proposed in good faith and may be causing unfair discrimination to the holders of unsecured claims under 11 U.S.C. § 1325(a)(3) and 11 U.S.C. § 1322(b)(1). *See In re Sperna*, 173 B.R. 654 (9th Cir. BAP 1994) Debtor has improperly scheduled her unsecured student loan as a Class 5 priority claim to be paid in full during the life of the plan, while other holders of general unsecured claims in Section 2.15 of the plan are to receive no less than a 10% dividend.

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

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

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

40. 14-21252-E-13 NLE-1 — EUGENE/LONNA SKIDMORE — Timothy J. Walsh — OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK — 3-18-14 [23]

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 18, 2014. By the court's calculation, 42 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors cannot make the payments under the plan or comply with the plan

under 11 U.S.C. § 1325(a)(6). Debtors propose to value the secured claim of Chase in Class 2, but have not filed a motion to value collateral.

Additionally, there appears to have been a preferential payment made by the Debtors. Debtor admitted at the First Meeting of Creditors on March 13, 2014, that he paid his uncle $2,500.00 approximately 90 days prior to filing the petition. Debtor has failed to list this payment on the Statement of Financial Affairs, Question #3(c). The plan proposes to pay no less than 0% to holders of unsecured claims with no priority debt, so the plan appears to pay unsecured creditors less than what they would receive in a Chapter 7 under 11 U.S.C. § 1325(a)(4).

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.

41. 10-48657-E-13 JAIME LEE **MOTION TO SELL**
GW-3 Gerald L. White **3-25-14 [81]**

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 25, 2014. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. That requirement was not met.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny the Motion to Permit Debtor to Sell Property 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:

INSUFFICIENT NOTICE PERIOD

Federal Rule of Bankruptcy Procedure 6004 requires that notices of proposed sales, use, or leases of property, other than cash collateral, not in the ordinary course of business be given pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(2), (c)(1), (i), and (k). Federal Rule of Bankruptcy Procedure 2002(a)(2) mandates that twenty-one days' notice be provided to parties in interest for motions proposing the sale of property.

Local Bankruptcy Rule 9014-1(f)(1), however, also requires that moving party setting motions for hearing under this rule provide at least fourteen days, preceding the date of the hearing, for potential respondents to file and serve written opposition to the motion. The bankruptcy courts of the Eastern District of California require that the moving party provide fourteen (14) days to permit that written opposition to be filed and served in advance of the hearing (pursuant to Local Bankruptcy Rule 9014-1(f)(1)), **in addition** to the twenty-one (21) days' notice of hearing mandated and opportunity to present an opposition (under Federal Rule of Bankruptcy Procedure 2002(a)(2)). Thus, Motions to Sell Property in this district must be filed and served at least **thirty-five (35) days** prior to the hearing date.

Here, Debtor filed and served the Motion to Sell on March 25, 2014, only 28 days before this hearing date. Debtors set the motion for hearing under Local Bankruptcy Rule 9014-1(f)(1). Because Debtors have not provided sufficient notice for potential respondents to file written opposition to the motion under Local Bankruptcy Rule 9014-1(f)(1), this motion is denied without prejudice.

The Notice of Hearing advises parties in interest that any opposition to the Motion must be filed and served by April 8, 2014. Notice, Dckt. 82. This was 14 days after it was served and 14 days prior to the hearing date.

If the parties agree to waive the defects in service, or the court grants a motion shortening time for service of the motion, the following alternative ruling will be issued:

The Bankruptcy Code permits the Debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b) and 1303.

Here, the Debtor proposes to sell the real property commonly known as 2128 University Park Drive, Sacramento, California. The sales price is $305,000.00 and the named buyers are Bob Marcelis and Raymond Marcelis. The terms are set forth in the Notice of Default Purchase Agreement and Addendum, filed as Exhibit A in support of the Motion. Dckt. No. 84.

Debtor states that at the time this case was filed, the property was subject to a loan secured by a first deed of trust in favor of Bank of America in the approximate amount of $405,986.00, and a second deed of trust in favor of United Guaranty in the approximate amount of $72,031.00, in addition to a property tax lien in favor of Sacramento County in the approximate amount of $3,786.00.

Pursuant to the Notice dated March 6, 2014 from Bank of America (Exhibit B, Dckt. No. 84), Bank of America has agreed to accept $276,061.56 to release their deed of trust. Pursuant to the letter dated February 19, 2014 from United Guaranty (Exhibit C, Dckt. No. 84), United Guaranty has agreed to accept $6,000.00 to release their deed of trust. The remaining proceeds of sale will pay the normal closing costs, property taxes and real estate commissions, as set forth in the Notice of Default Purchase Agreement and Addendum, and Debtor shall receive none of the proceeds.

The Chapter 13 Trustee filed a statement of non-opposition to the Motion on April 3, 2014.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Debtor to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to sell property filed by 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 Jamie Lee, the Debtor ("Debtor"), is authorized to sell pursuant to 11 U.S.C. § 363(b) to Bob Marcelis and Raymond Marcelis ("Buyers"), the residential real property commonly known as 2128 University Park Drive, Sacramento, California ("Real Property"), on the following terms:

1. The Real Property shall be sold to Buyer for $305,000.00, on the terms and conditions set forth in the Notice of Default Purchase Agreement and Addendum, filed as Exhibit A in support of the Motion. Dckt. 84.

2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

3. The $305,000 in sales proceeds will be distributed as follows: Bank of America will $276,061.56 to release their deed of trust on the subject property; United Guaranty will receive $6,000.00 to release their deed of trust; while the remaining balance of the proceeds will by applied to the normal closing costs, property taxes and real estate commissions for the property, as set forth in the Notice of Default Purchase Agreement and Addendum

4. The Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

5. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Debtor.

42. 13-27857-E-13 ERROL/ALITA MERCADO MOTION TO MODIFY PLAN
SJS-1 Scott J. Sagaria 3-17-14 [26]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 17, 2014. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 opposes confirmation of the proposed plan for two reasons. First, Trustee argues that according to his calculations, the Plan will complete in more than the 60 months proposed, possibly taking 66 months. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). It appears that this is due to claims filed being higher than expected and Debtors' current delinquency under the already confirmed plan.

Second, the Trustee is uncertain that Debtors are able to make the plan payments proposed. Plan payments under the confirmed plan are $700.00 for 60 months, and Debtors are currently $3,450.00 delinquent, which represent 4.93 in plan payments. A Notice of Default and Application to Dismiss was filed on February 14, 2014. Dckt. No. 24. Neither Debtors' Motion, Dckt. No. 26, or Declaration, Dckt. No. 28, provide any explanation for their delinquency under the confirmed plan.

Debtors' modified plan proposes plan payments of $2,850.00 total paid in through March, 2014, then $700.00 commencing on April 25, 2014 for the remainder of the plan. Debtors' Declaration indicates that their average monthly net income is $6,798.70, with average monthly expenses of $6,098.79, leaving $700.00 in disposable net income. These amounts are identical to those provided on Schedules I and J, filed on June 13, 2014, at the beginning of the case. At that time, Schedule I indicated that Joint Debtor Errol Mercado was receiving $1,616.00 in unemployment payments, and

had been for 11 months. Trustee is uncertain as to whether after some 10 months later, Debtor would still be able to receive unemployment benefits.

Additionally, the Trustee questions whether Debtors will be able to maintain a plan payment of $700.00 per month, when they could not do so in the past.

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

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

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

43. 14-21158-E-13 ANDRE WILLIAMS
KO-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY ONE SHOT MINING COMPANY, LLC AND SARA LYNNE WILDER
3-27-14 [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 Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on March 27, 2014. By the court's calculation, 26 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:

Creditors One Shot Mining Company, LLC ("One Shot") and Sara Lynne Wilder ("Wilder") together with One Shot (collectively referred to as "Creditors") opposes confirmation of the Debtor's proposed Chapter 13 Plan on multiple grounds. Debtor and Karen Wililams ("Borrowers") are indebted to Creditors under a loan originally made on September 17, 1996, by John Athnacio to Borrowers in the original principal amount of $122,383.00. The 1996 Loan is secured by a first deed of trust that encumbers real property located in Lake County, California, APN No. 40-182-35. The real property is owned by borrowers and is property of Debtor's bankruptcy estate.

Debtor is default on the 1996 Loan; as of March 18, 2014, Debtor is indebted to Creditors in the amount of $190,500.55 under the terms of the 1996 Loan. On August 16, 2013, One Shot obtained a Default Judgment of Foreclosure and Order of Sale ("Default Judgment") on a loan secured by a second deed of trust on the Real Property. The Default Judgment ordered the sale of the Real Property. The Default Judgment states that Borrowers are indebted to One Shot in the amount of $102,494.50. Exhibit 2, Dckt. 33. The APN for the property listed in the judgment is the same APN used by the Debtor on Schedule E for the claim of Lake County (Dckt. 11 at 13.)

The Creditors do not accept the Chapter 13 Plan or the Plan's Treatment of their claims under 11 U.S.C. § 1325(a)(5). Debtor's Schedule D does not list the Deed of Trust for the 1996 Loan. Debtor's Schedule D also does not properly list the Default Judgment issued on the Real Property. Rather, the Schedule refers to the Default Judgment by listing a "Levy lien" against the property with a claim value of $80,922.56, which Creditors argue is an incorrect amount.

Schedule D does not list the indebtedness in the amount of $102,494.50, which is listed on page 3 of the Default Judgment. The Plan also does not address Creditors' claim for the 1996 Loan and improperly lists the amount of Creditors' claim related to the Default Judgment as $80,922.56 as well.

Creditors also object to the Plan on the basis that the Chapter 13 Plan is not feasible under 11 U.S.C. § 1325(a)(6). Debtor has not properly listed Creditors' claims secured by the property on Schedule D, and has not addressed Creditor's claims in the Plan. Thus, Debtor will not make sufficient payments to address Creditors' claims secured by the real property.

The court notes that the Chapter 13 Trustee has also filed an objection to confirmation of the Debtor's Plan, NLE-1. Based on the Creditors' concerns with the treatment of its claim under the Plan, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

PRIOR BANKRUPTCY FILINGS

The Debtor filed a Chapter 13 case on January 7, 2009. Bankr. E.D. Cal. 09-2167. On January 28, 2009, the Debtor filed a request to have that case dismissed based on his stating dismissal was die to "agreement between lender and I." *Id.* Dckt. 14. No Schedules were filed in the 2009 case and the court cannot tell who is the "lender."

The Debtor filed his second Chapter 13 case on April 19, 2010. Bankr. E.D. Cal. 10-30028. The second Chapter 13 case was dismissed on May 7, 2010, due to the Debtor's failure to file the minimum necessary documents (including Schedules, Statement of Financial Affairs, and Plan) to prosecute a Chapter 13 case.

REVIEW OF PRESENT CASE AND OBJECTION TO CONFIRMATION

The current Chapter 13 case was filed on February 7, 2014. The proposed Chapter 13 Plan requires monthly plan payments by the Debtor of $1,802.00 for a period of 60 months. Dckt. 13. That is to fund a monthly plan payment of $1,349.00 for a $80,911.56 for the secured claim of One Shot Mining at 0% interest. In addition, Lake County is to be paid on its $22,932.08 secured claim for property taxes. However, this is not provided for as a Class 2 claim, but only a Class 5 priority unsecured claim. The Plan also provides for a 5% dividend to be paid on a projected $0.00 of general unsecured claims.

On Schedule A the Debtor lists only a "Multi-Space Commercial Property" on Lakeshore Drive in Clearlake, California, with a value of $185,000.00. Dckt. 11 at 3. The claim(s) secured by the property are listed to total $80,922.56. The Debtors states that this property is co-owned with spouse. On his Petition the Debtor lists his address as Farnham Avenue in Woodland, California. Dckt. 1.

On Schedule B the Debtor's assets include: $7,000.00 2013 tax refund, four vehicles, and one boat. Dckt. 11 at 4-6. The Debtor's bank account balances are listed at $1,500.00.

Schedule D lists a secured claim for One Shot Mining Company, LLC in the amount of $80,922.56. The collateral is the Lakeshore Drive Property. *Id.* at 9. On Schedule E the Debtor lists a $22,932.08 real property tax claim of Lake County, listing an APN for the property. This appears to actually be a secured claim.

On Schedule I the Debtor lists his gross business income to be $3,200.00 and his spouses gross income to be $6,500.00 a month. His wife has $1,300.00 deducted for taxes and Social Security (20% of the gross income). *Id.* at 18.

On Schedule J the Debtor lists $1,750.00 a month payment for rent or mortgage. *Id.* at 19. On Schedule G the Debtor does not list any leases of real property. *Id.* at 15. No business expenses are listed for the Debtor's business, no provision is made for self employment and income taxes for Debtor, and no expenses are listed for property taxes and homeowner's insurance, or for renter insurance. *Id.* at 20.

The Debtor's Statement of Financial Affairs lists the following income information in response to Questions 1 and 2:

A. Debtor

1. 2014.....$ 4,000 (one month)
2. 2013.....$ 70,000
3. 2012.....$200,000

B. Spouse

1. 2014.....$ 6,500 (one month)
2. 2013.....$80,000
3. 2012.....$80,000

The objecting Creditor is correct, the Plan does not properly provide for its claim. Further, the Plan does not provide for the secured claim on Lake County – providing for it only as an unsecured priority claim. The Debtor's Schedule I and J on their face do not appear to accurately reflect the Debtor's income and expenses. The financial information on those two Schedules reflects that the proposed plan is not feasible and the Debtor has failed to provide for business expenses, income taxes, and self employment taxes.

The proposed plan does not comply with the requirements of 11 U.S.C. §§ 1325 and 1322, the Objection is sustained, and the Chapter 13 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.

44. 14-21158-E-13 NLE-1 — ANDRE WILLIAMS, Pro Se — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK, 3-26-14 [23]

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 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that:

1. Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341 held on March 20, 2014. The Debtor's appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). Trustee does not have sufficient information to determine if the plan is suitable for confirmation under 11 U.S.C. § 1325. This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1). The meeting has been continued to May 15, 2014 at 10:30 am.

2. Debtor has not provided Trustee with a tax transcript or copy of her Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists under 11 U.S.C. § 521(e)(2)(A); FRBP 4002(b)(3). This is required seven days before the date first set for the meeting of creditors, 11 U.S.C. § 521(e)(2)(A)(1).

3. Debtor is $1,802.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $1,802.00 is due on April 25, 2014. The case was filed on February 7, 2014, and the Plan in § 1.01 calls for payments to be received by the Trustee no later than the 25th day of each month, beginning the month after the order for relief under Chapter 13. The Debtor has paid $0.00 into the plan to date.

4. Debtor cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor's Chapter 13 Documents are incomplete.

   a. Schedule I, line #8a lists business income in the amount of $3,200.00. It is not clear if this is gross or net income, as Debtor did not attach a business statement showing gross receipts, expenses, and total monthly net income.

   b. Debtor's name on his petition is Williams, Andre L. Debtor's prior case, #2009-20167 lists Debtor as "Sr." This petition does not list any suffix.

   c. Debtor's voluntary petition fails to include his prior case, #2009-20167. Debtor's voluntary petition lists case #10-10909, which is not one of Debtor's prior bankruptcy cases.

   d. Debtor lists Lake County in Class 5 of the plan. Schedule E lists this as property taxes owed. It appears that the creditor should be listed as secured in Class 2 on Schedule D, not Schedule E.

   e. Schedule F was marked that the Debtors as no creditors holding unsecured claims to report on Schedule F. It is not clear if the Debtor completed Schedule F properly.

   f. The Statement of Financial Affairs is incomplete. Question #18 does not list the nature of Debtor's business.

5. Debtor has claimed exemptions under California Code of Civil Procedure §703.140, and appears to be married based on the Statement of Current Monthly Income, Dckt. No. 14, despite the fact that Debtor's spouse has not joined in the petition. California Code of Civil Procedure §703.140(2)(2) requires Debtors to file a spousal wavier, signed by Debtor and Debotor's spouse, for the use of claimed exemptions.

California Code of Civil Procedure § 703.140, subd. (a)(2), provides:

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

The Trustee has had not found any such waiver failed with the court after reviewing the docket. The Trustee's Objection to Exemption, NLE-2, is set for hearing on April 29, 2014.

6. Debtor has failed to provide Trustee with the business documents requested, such as six months of bank statements and profit and loss statements, two years of business tax returns, sales tax returns, copies of licenses and insurance declarations.

Based on the foregoing, 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.

45. 14-21458-E-13 NLE-1 | **JIMMY/DENISE MOORE** | **Scott J. Sagaria** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** | **3-26-14 [20]**

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 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors may not be able to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6), which the Trustee alleges for two reasons.

First, Debtor Denise Moore testified at the First Meeting of Creditors held on March 20, 2014, that she has new employment as of February, and that her daughter is no longer living in the household and no longer contributing the $700.00 listed on Schedule I. Dckt. No. 1, pages 36-37, line 8h.

Second, Section 3.02 of Debtors' plan lists a residential lease for $1,500 monthly. Debtors' Schedule J indicates that the lease expense is $1,100.00 per month. Dckt. No. 1, pages 38-39. Debtors testified that a brother-in-law pays the remaining $400.00 of the lease payment. However, this $400 contribution is listed on Schedule I, Line 8h. The lease expense

in the budget should be listed as $1,500.00. Debtors may not have their net income listed on Schedule J.

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

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

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

46. 13-31661-E-13 SDH-6 CHARLES/CANDICE WORCH Scott D. Hughes

OBJECTION TO CLAIM OF THE LAW OFFICES OF KENOSIAN AND MIELE, CLAIM NUMBER 14
2-18-14 [47]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 18, 2014. By the court's calculation, 56 days' notice was provided. 44 days' notice is required. That requirement was met.

Tentative Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The Objection to Proof of Claim number 14 of Law Offices of Kenosian and Miele is overruled 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:

The Proof of Claim at issue, listed as claim number 14 on the court's official claims registry, asserts a $18,335.17 claim. The Debtors object to the Proof of Claim on the basis that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. The Proof of Claim was filed on December 20, 2013. The claim indicates that the date of the last payment was July 3, 2009, which was more than four years from the date of the filing of the claim.

DISCUSSION

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

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

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Claimant, the Law Offices of Kenosian and Miele, indicates that the basis for the claim is for "Money Owed," with no additional details on the nature of the claim. Claimant also attaches a printout from CitiBank N.A. and UniFund CCR, LLC, showing the address of Debtor Candice Worch and Worch's employer. The court cannot determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to hold an open book account as defined in California Code of Civil Procedure § 337(a).

From the attached printout on Creditor's Proof of Claim, the date of the last payment made was July 3, 2009. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

SERVICE ON CLAIMANT DOES NOT COMPLY WITH REQUIREMENTS OF FRBP 7004

Federal Rule of Bankruptcy Procedure 7004(b)(3) requires that corporations, partnerships, and other fictitious entities need to be served on officers, partners, managing members, and other designated agents for service of process by First Class Mail. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

The Certificate of Service shows that the Law Offices of Kenosian and Miele (which appears to be a Limited Liability Partnership based on a Google search conducted by the court on April 21, 2014, of the firm) does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process" pursuant to the requirements of Federal Rule of Bankruptcy Procedure 7004(b)(3).

The respondent claimant not having been properly served, the Objection to Claim is overruled without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of 14 filed in this case by the Law Offices of Kenosian and Miele 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 14 of the Law Offices of Kenosian and Miele is overruled without prejudice.

47. 10-39062-E-13 RODNEY/JENNY DECKER **MOTION TO APPROVE LOAN MODIFICATION**
MWB-1 Mark W. Briden **3-18-14 [49]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on March 18, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The Motion to Approve the Loan Modification is denied. 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 are the owners of real property located at 32223 Battle View Drive, Manton, California. Debtors state that prior to the filing of their Chapter 13 Bankruptcy, the Debtors obtained a mortgage from US Bank Home Mortgage, which mortgage is secured by a First Deed of Trustee on the subject property. On the date of filing, Debtors had pre-petition arrears of $5,463.00. Filed as Exhibit "A," Debtors attach a copy of the Loan Pre-Approval Proposal through an FHA streamline refinance from Patriot Home Mortgage to Debtors dated February 19, 2014.

The approval provides for the reduction of the mortgage payment from $1,484.00 to $1,297.00, with an interest rate of 5% with a 30 year fixed rate. The arrears would be deemed current. Once the loan modification is approved, it would be necessary for debtors to file a Motion to Modify their confirmed Plan, moving US Bank Home Mortgage from Class One to Class Four. Debtors then state that the Motion seeks an order approving the Loan Modification, which was issued by Patriot Home Mortgage, the terms for which are stated in Exhibit "A," dated February 19, 2014.

UNIDENTIFIABLE CREDITOR TO LOAN MODIFICATION

Debtor seeks to have the court approve a loan modification agreement with a creditor that has not been clearly identified in the Motion. In the Motion, Debtors simultaneously refer to the Lender as "US Bank Home Mortgage" and "Patriot Home Mortgage." These conflicting identifications make it impossible to ascertain as to which entity is the one with whom Debtor wants to enter into a Loan Modification. A search of both entities,

as they are listed on the Motion, on the California Secretary State's business search does not list either company. http://kepler.sos.ca.gov/.

The Letter of Pre-Approval filed as Exhibit "A" in support of the Motion bears the logo of an entity called Patriot Home Mortgage. Dckt. No. 52. Debtors make no reference to a possible servicing or trustee relationship between the entities known as Patriot Home Mortgage. The Certificate of Service, Dckt. No. 53, further reflects that Patriot Home Mortgage has not been served.

No Proof of Claim has been filed by Patriot Home Mortgage or US Bank Home Mortgage, although Proof of Claim No. 10 on the claims registry, asserting a $268,128.30 claim, was filed on October 19, 2010. The name US Bank Home Mortgage is not part of Proof of Claim No. 10. U.S. Bank, N.A. is listed as the creditor for that claim. It may well be that this is the debt which the Debtor seeks to modify. Debtors have not identified Patriot Home Mortgage as a servicer or authorized agent that can enter into modification agreements on behalf of US Bank, N.A.- for an agreement with U.S. Bank, N.A. The court will not issue an order approving a modification agreement affecting the rights of an unidentified lending entity.

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

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

48. 14-21465-E-13 THOMAS/DEBORAH LUPTON
NLE-1 Peter G. Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
3-26-14 [15]

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

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

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors' Plan is not Debtors' best effort under 11 U.S.C. § 1325(b). Debtors' Schedule J deducts $1,400.00 per month for mortgage and rent expenses. Dckt. No. 1, page 31, line 4. Debtors list two liens on residential real property located at 19965 W. Mitchell Mine Road, Pine Grove, California in Class 3 of the plan, proposing to surrender the property. Dckt. No. 5, Section 2.10. It appears that this is an anticipated rent expense which Debtors are not currently paying. Debtors testified at the First Meeting of Creditors held on March 20, 2014, that they have not yet moved out of their home, but expect to once they have saved enough money for rental deposits and moving costs.

Additionally, Debtors may not be able to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6) because not all debts have been reported. Debtors admit that they owe approximately $1,300 for income taxes incurred in 2013. This is not proposed to be paid in Debtors' plan, nor is the debt reported on Schedule E.

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.

49. 14-21066-E-13 DCR-1 | WALTER/PATTY KNOWLES, Darrel C. Rumley | MOTION TO VALUE COLLATERAL OF LITTON LOAN SERVICING, 2-25-14 [15]

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, 59 days' notice was provided. 28 days' notice is required. That requirement was met.

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

The court's tentative decision is to deny the Motion to Value the Secured Claim of Litton Loan Servicing 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:

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 6461 Tupelo Dr., Citrus Heights, California. The Debtor seeks to value the property at a fair market value of $130,000.00 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 $162,963.00. Creditor Litton Loan Servicing's second deed of trust secures a loan with a balance of approximately $60,234.00.

Debtors seeks to value the collateral of "Litton Loan Servicing." However, it has been repeatedly represented in this court that loan servicing companies including Litton Loan Servicing are not creditors (as that term is defined by 11 U.S.C. § 101(10)), but are mere loan servicing agents with no ownership of or in the secured claim. To state that the Second Deed of Trust is "held by Litton Loan Servicing," and that the first deed of trust in the subject property is held by "Ocwen Loan Servicing" indicates that Debtors have no knowledge of who the actual creditor in interest is who holds the claims secured by the first and second deeds of trust.

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. The Debtors provide no evidence for the court to determine who the proper creditor is on this loan. The Debtors do not testify that they borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred from a certain creditor to Litton Loan Servicing. The Debtors do not provide the court with any discovery conducted to identify the creditor holding the claim secured by the second deed of trust.

Debtors' exhibits only consist of their filed Schedule A, which doesn't list the name of the creditor holding a secured claim in Debtors' residence, and an email from a realtor pricing the subject property at $130,000, based on a sales comparison analysis conducted to draw up an estimation of value for Debtors' home. Dckt. No. 18.

No assignment or transfer of claim appears on the docket transferring any interest to Litton Loan Servicing. The court is not certain how Debtors can name Litton Loan Servicing as the actual lender for an obligation that appears to be owed to another originating entity. The court will not approve an loan modification that will not be effective against the actual owner of the obligation.

The court will not speculate and hope that it has named a real creditor and that it's order will have any legal effect. The Motion is denied without prejudice.

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

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

IT IS ORDERED that the Motion to Value is denied without prejudice.

50. 14-21066-E-13 DCR-2 | **WALTER/PATTY KNOWLES** | **Darrel C. Rumley** | **MOTION TO VALUE COLLATERAL OF GOLDEN ONE CREDIT UNION** | **2-25-14 [21]**

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, 56 days' notice was provided. 28 days' notice is required. That requirement was met.

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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

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

Debtors seek to value the secured claim of Golden One Credit Union. The motion is accompanied by the Debtors' declaration. The Debtors are the owners of a 2009 Chevrolet Malibu Hybrid. The Debtor seeks to value the property at a replacement value of $12,800.00 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)

Relief Requested and Grounds Stated

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

The Motion states with particularly, under Federal Rule of Bankruptcy Procedure 9013, the following:

1. Debtors move for a court order valuing the collateral of the petitioners, namely a 2009 Chevrolet Malibu Hybrid, with 41,000 miles.

2. The vehicle was purchased more than 910 days from the filing of "debtor's" (presumably referring to the collective Debtors') bankruptcy petition and Chapter 13 Plan.

3. The collateral securing the claim of Golden One Credit Union had a reasonable retail value of $12,800.00 on the date of the filing of Debtors' petition.

4. Petitioners base their opinion of value of the vehicle on the NADA guides, and their personal knowledge of the condition of the car.

5. Petitioners request a court order valuing their 2009 Chevrolet Malibu Hybrid, as of the date of filing, February 4, 2014, to be valued at $12,800.00.

The Motion makes no reference to any liens or encumbrances that are secured by the subject vehicle. The Motion does not describe the nature of the lien held by Golden One Credit Union, and the amount of the debt owed by Debtors to the respondent creditor, Golden One Creditor Union. The Motion provides no details about the claim that Debtors wish to bifurcate.

Some of these details appear to be included in Debtors' Memorandum of Points and Authorities. Joint Debtor Walter Knowles states in his declaration that the first payment on the first payment on the vehicle became due on August 17, 2009, showing that the vehicle was purchased more than 901 days from Debtors' filing of the bankruptcy petition and Chapter 13 Plan. ¶ 2, Declaration of Walter Knowles, Dckt. No. 24. It is not, however, for the court to canvas other pleadings, and wait until the hearing, to receive additional evidence to "draft the motion" for the Debtors.

Additionally, Debtors do not provide the court information as to how much Creditor Golden One Credit Union is owed. Merely asserting that the subject vehicle is valued at $12,800.00 is not sufficient for the court to value Creditor's claim. The Motion does not state the amount of underlying debt owed to Golden One Credit Union, that serves as the basis for Creditor's lien on the vehicle. Without knowing the amount of Creditor's claim, the court cannot determine whether the respondent creditor's claim secured by a lien on the asset's title is under-collateralized under 11 U.S.C. § 506(a).

The court notes that Golden One Credit Union has filed Proof of Claim No. 1 on the claims registry, asserting an amount of $15,469.48 for the amount of debt owed by Debtors on the car loan for the subject vehicle. This amount is not included in Debtors' pleadings. Based on the lack of information about Creditor's claim, the court denies the Motion to Value the Secured Claim of Golden Credit Union 11 U.S.C. § 506(a).

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

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

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

IT IS ORDERED that the Motion to Value is denied.

51. 14-21066-E-13 TSB-1 — WALTER/PATTY KNOWLES — Darrel C. Rumley — CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 3-13-14 [28]

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtor's Attorney on March 13, 2014. By the court's calculation, 26 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.

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 court decided to continue the hearing on this matter from April 8, 2014, so that the matter could be conjunction with the hearing on the motions to value secured claims. Civil Minutes, Dckt. No. 32.

The Chapter 13 Trustee initially opposed confirmation of the Plan on the basis that the Plan relies on the pending Motions to Value the Secured Claim of Golden One Credit Union and Litton Loan Servicing, which are set for hearing on April 22, 2014. If the motions to value the secured claims of those creditors are not granted, Debtors' plan does not have sufficient monies to pay the claims in full.

On this hearing date, the court is denying both the Motion to Value the Secured Claim of Litton Loan Servicing, DCR-1, and the Motion to Value the Secured Claim of Golden One Credit Union, DCR-2. 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 the Objection is sustained and the Chapter 13 Plan is not confirmed.

52. 10-49971-E-13 RAMON/KELLY YEE — CONTINUED MOTION TO APPROVE LOAN MODIFICATION
CYB-3 Candace Y. Brooks — 12-17-13 [51]

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

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

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

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

The hearing on the Motion has been continued several times from the original January 14, 2014 hearing date to afford Movant the opportunity to provide the court with a loan modification agreement which clearly identifies the creditor whose loan is being modified and such creditor is consistent with the Proof of Claim and other evidence presented in this case.

PRIOR HEARING

The court previously continued this Motion for several reasons. First, the Certificate of Service for this Motion, filed on December 17,

2013 (Dckt. No. 55), reflected that the Chapter 13 Trustee, David Cusick, was not served. The court noted that one of the primary responsibilities of the Trustee is to serve as a disbursing agent, collecting payments from Debtors and distributing funds to creditors pursuant to 11 U.S.C. § 1302, making the Chapter 13 Trustee an integral player in ensuring that the bankruptcy estate is efficiently and properly administered. The Chapter 13 Trustee must appear and be heard at any hearing that concerns the modification of a plan after confirmation, under 11 U.S.C. § 1302(b)(2). The court informed Movants that in attempting to reduce Debtors' monthly mortgage payment by seeking court approval of Debtors' Loan Modification, Debtors are pursuing a matter in which the Chapter 13 Trustee is a real party in interest, and thus the Chapter 13 Trustee had to be served.

Second, there were defects in service to one of the Debtors' Creditors, the Internal Revenue Service. The court stated that Local Bankruptcy Rule 2002-1 requires that notices in adversary proceedings and contested matters served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified.

The court has determined that the defect in serving the Internal Revenue Service is not fatal to Debtors' Motion (as the Internal Revenue Service is not involved with Debtor's loan modification, and the modification will result in the reduction of payment to Secured Creditor Green Tree Servicing), and therefore will waive the problems of service to the Internal Revenue Service.

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

SUPPLEMENTAL BRIEF FILED BY GREEN TREE SERVICING

On April 4, 2014, Counsel for Green Tree Servicing, LLC ("Green Tree"), filed a supplemental brief asserting its right to issue a loan modification as servicer of the loan.

The brief states that Debtors filed a motion to approve a loan modification agreement regarding a loan secured by the property located at 2613 Howland Ct., Fairfield, CA. Dckt. No. 51. The loan modification agreement is between Green Tree, Mortgage Electronic Registrations Systems, Inc., and Debtors. Green Tree is the servicer of the Loan. Federal National Mortgage Association ("Fannie Mae") is the owner of the loan and Green Tree services the loan on its behalf. Bank of America, N.A. was the previous servicer of the loan, until Green Tree purchased the servicing rights.

Green Tree attaches as Exhibit A to the brief, a the Limited Power of Attorney dated July 18th, 2011. Dckt. No. 68. Green Tree states that the power of attorney explicitly grants Green Tree the power to "in [Fannie Mae's] name, place, and stead and for its use and benefits, to execute. . . all documents customarily and reasonably necessary and appropriate for. . .

the modification or extension of a mortgage or deed of trust." The document grants Green Tree, as attorney-in-fact,

> full power and authority to execute such instruments and to do and perform all and every act and thing requisite, necessary, and proper to carry into effect the power or powers granted by or under this Limited Power of Attorney as fully, to all intents and purposes, as the undersigned might or could do, and hereby does ratify and confirm all said Attorney-in-Fact shall lawfully do or cause to be done by authority hereof.

"The purpose and effect of a power of attorney of this kind are to vest in the attorney full authority to transact any and all kinds of business for the principal." *Roth v. Schaaf*, 148 Cal. App. 2d 662, 666, 307 P.2d 421, 424 (Cal. Ct. App. 1957). Green Tree claims that the Power of Attorney explicitly provides Green Tree with the power to, in its own name, modify loans held by Fannie Mae.

Additionally, Green Tree attaches as Exhibit B to the brief, Dckt. No. 68, an excerpt from the Fannie Mae Single Family 2012 Servicing Guide. Green Tree states that Section 202.06 of the servicing guide grants Green Tree the power to execute loan modification documents on Fannie Mae's behalf through a power of attorney. Exhibit B, § 202.06 states that "[w]hen Fannie Mae is the owner of the record for a mortgage loan, it also permits a servicer that has Fannie Mae's limited power of attorney to execute these types of documents on Fannie Mae's behalf." Green Tree asserts that the loan modification agreement is not any less binding because it does not explicitly state that Fannie Mae is the investor of the loan. *Standard Oil Co. of Cal. v. Doneux*, 192 Cal. App. 2d 608, 611, 13 Cal. Rptr. 749, 751 (1961) ("The basic rule is that an undisclosed principal when discovered is liable for the authorized contracts of his agent"); *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 606, 176 Cal. Rptr. 824, 831 (Ct. App. 1981).

A review of the attached Exhibit A shows that the Federal National Mortgage Association, appointed Green Tree as its Attorney-in-Fact, which includes powers to modify or extend any mortgages or deeds of trust on behalf of the Association. Dckt. No. 68 at 3. The Limited Power of Attorney was signed by two officers of the Federal National Mortgage Association.

Section 202.06 of the Fannie Mae Single Family 2012 Servicing Guide attached as Exhibit B to the supplemental brief, Dckt. No. 68, grants Green Tree the power to:

> execute legal documents related to payoffs, foreclosures, releases of liability, releases of security, mortgage loan modifications, subordinations, assignments, and conveyances (or reconveyances) for any mortgage loan for which it (or the Mortgage Electronic Registration System, or MERS®) is the owner of record.

The Servicing Guide further states that while Fannie Mae is the owner of record for a mortgage loan, a servicer that has Fannie Mae's

limited power of attorney to execute these types of documents on Fannie Mae's behalf. To request a limited power of attorney, the guide instructs servicers to prepare and execute the form.

STATUS REPORT

Debtors and Green Tree Servicing, LLC also filed a status report in anticipation of this hearing, regarding the loan modification agreement. The report, filed with the court on April 15, 2014, states that Green Tree Servicing, LLC has filed a copy of a limited power of attorney. The parties state that Green Tree Servicing, LLC does not intend to submit any more documents or revise the loan modification agreement further. Dckt. No. 80.

Green Tree Servicing, LLC has filed a Limited Power of Attorney showing that it has been granted powers to execute documents as part of its responsibilities as a servicing agent for mortgage loans on behalf of Fannie Mae. The Power of Attorney reflects that Green Tree Servicing, LLC is empowered to execute, endorse, and acknowledge all documents reasonably necessary and appropriate for a number of tasks relating to the transfer, discharge, release, and modification or extension of a mortgage or deed of trust. The instrument purports to give Green Tree Servicing, LLC , the Attorney-in-Fact, the power and authority to execute such instruments and perform all acts necessary to carry into effect the powers granted by the Limited Power of Attorney. Exhibit A, Dckt. No. 68.

Green Tree asserts that the documents provided identifies Green Tree as the servicing agent, granted a broad range of responsibilities by the actual lender in interest, Fannie Mae, the power to enter into and execute all documents related to modifications of loan agreements on behalf of Fannie Mae. What the court understands, however, is that the Limited Power of Attorney grants Green Tree the ability to execute, endorse, and acknowledge all documents "customarily and reasonably appropriate" for modification or extension of a mortgage or Deed of Trust. Fannie Mae's identity as the actual lender and creditor in interest remains undisturbed.

Green Tree Servicing, LLC does not have any interest in the note, no interest (other than acting as a loan servicer) in the claim, and is not a creditor, as that term is defined in 11 U.S.C. § 101(10). The power of attorney provided states that Green Tree Servicing, LLC may act in the name of and on behalf of Federal National Mortgage Association (Fannie Mae) within the circumscribed scope specified in the Limited Power of Attorney. The Power of Attorney grants Green Tree Servicing, LLC the power to "in [Fannie Mae's] name, place, and stead and for its use and benefits, to execute. . . all documents customarily and reasonably necessary and appropriate for. . . the modification or extension of a mortgage or deed of trust." Exhibit A, Dckt. No. 68.

The court does not read the Power of Attorney for Green Tree Servicing, LLC to act in its own name, place and stead, but that of Federal National Mortgage Association (Fannie Mae)'s. A Power of Attorney allows one party (here, Green Tree Servicing, LLC) to act in the name of another party (here, Fannie Mae), not in its own name. Furthermore, on its face, the Power of Attorney does not provide Green Tree Servicing, LLC the authority to modify promissory notes, but only the mortgage or deed of

trust. Note that in Paragraph 8 of the Power of Attorney, Fannie Mae clearly distinguishes between mortgages, deeds of trust, and promissory notes. Exhibit A, Dckt. No. 68.

However, given that Green Tree Servicing, LLC asserts it is not the creditor, but rather is acting as the servicing agent through a Limited Power of Attorney with Fannie Mae, the court grants the Motion to Approve Loan Modification as between Fannie Mae and the Debtors.

Federal National Mortgage Association (Fannie Mae) as serviced by Green Tree Servicing, LLC, acting through a Limited Power of Attorney, has agreed to a loan modification which will reduce the Debtors' monthly mortgage payment from the current $3,108.61 to $1,220.80, for which payment will begin on December 1, 2013. The mortgage loan is secured by a first deed of trust against Debtors' real property commonly known as 2613 Howland Court, Fairfield, California. The yearly interest rate of 4.0000% will remain in effect until the Interest Bearing Principal Balance and all accrued interest thereon has been paid in full. $115,006.33 of the New Principal Balance shall be deferred and no interest will accrue or monthly payments be made on this amount. The new maturity date on the Note will be November 1, 2053.

There being no objection from the Debtor, 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.

FURTHER HEARINGS

Though the court is approving the Loan Modification between Federal National Mortgage Association and the Debtors, it is clear that further hearings are required. The court refrained from issuing the order to appear for Green Tree Servicing, LLC, Federal National Mortgage Association, Bank of America, N.A.; OneWest Bank, FSB, and Zions First National Bank (several of these entities are involved in other cases through Green Tree Servicing, LLC), believing that Green Tree Servicing, LLC and Federal National Mortgage Association would choose the obvious, easiest, and most accurate path – having the loan modification agreement be between the actual parties and clearly identify Green Tree Servicing, LLC executing the agreement pursuant to a power of attorney.

That path was not chosen, and instead the court understands Green Tree Servicing, LLC and Federal National Mortgage Association to interpret the power of attorney in a way that Federal National Mortgage Association will not be disclosed as a party to the consumer. No good faith, bona fide business reason for hiding the identity of the principal has been given by Green Tree Servicing, LLC or Federal National Mortgage Association.

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,

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

IT IS ORDERED that Debtors Ramon P. Yee and Kelly K. Yee are authorized to amend the terms of their loan with Federal National Mortgage Association (Fannie Mae), as serviced by Green Tree Servicing, LLC, through Power of Attorney dated July 18, 2011, which is secured by the real property commonly known as 2613 Howland Court, Fairfield, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 54, in support of the Motion, as required to be modified by this order.

IT IS FURTHER ORDERED that Loan Modification Agreement shall identify Federal National Mortgage Association as the "Lender" which is entering into the contract with the Debtors, and Green Tree Servicing, LLC shall be identified as the agent of Federal National Mortgage Association, with Green Tree Servicing, LLC executing the Modification Agreement in that expressly stated representative capacity.

53. 13-30273-E-13 ELIAS ORTIZ **MOTION TO MODIFY PLAN**
SJS-1 Scott J. Sagaria **3-14-14 [20]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 14, 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 filed evidence in support of confirmation. Trustee initially filed opposition to confirmation of the plan, based on Debtor not providing a copy of a stipulation that had been referenced in the Additional Provisions section of the Plan. Dckt. No. 26. On April 11, 2014, however, Trustee filed a withdrawal of Trustee's Objection to the Motion to Modify the Plan, noting that Debtor filed a Supplemental Declaration, Dckt. No. 29, and Exhibit: Stipulation as to Non-Dischargeability of Debtor, Dckt. No. 30, on April 10, 2014. Trustee acknowledges that the submission of these documents resolves Trustee's objection. Dckt. No. 32.

The Trustee's concerns regarding the Plan have been resolved, and no creditors have objected to confirmation of the proposed Plan. 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 March 14, 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.

54. 14-21473-E-13 ISIDRO RUIZ
APN-1 Peter G. Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY TOYOTA MOTOR CREDIT CORPORATION
4-4-14 [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, Debtor's Attorney, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on April 4, 2014. By the court's calculation, 18 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:

Toyota Motor Creditor Corporation is a Creditor under a written Retail Installment Sale Contract entered between Toyota ("Creditor") and Debtor, for the financed purchase of a 2011 Toyota Tacoma. Debtor agreed and became obligated to pay the sum of $22,198.01, with interest accruing at the contract rate of 5.94% per annum, for the financed purchase of the subject property.

MODIFYING LOAN WITH A THIRD-PARTY, NON-FILING OBLIGOR

Creditor contends that its secured collateral must be the $13,276.26 which was due and owing on Debtor and/or the non-filing Co-Debtor's account with Creditor at the time of the Debtor's filing of the case.

Creditor asserts that Debtor is unable to "cram down" the value of Secured Creditor's collateral; according to Debtor's schedules, the non-filing Co-Debtor is not the spouse of the Debtor and therefore the vehicle is not community property (which the Debtor and non-filing Co-Debtor might otherwise be able to "cram down" the value of Secured Creditor's collateral. *See In re Maynard*, 264 B.R. 209, 214 (B.A.P. 9th Cir. 2001)). Creditor also argues that Debtor is not permitted to "cram down" the value

of the property when there exists a third party co-owner/co-obligor. *In re Rodriguez*, 156 B.R. 659, 660 (E. D. Cal 1993).

Whether Debtor unilaterally is able to modify the loan on the vehicle, given a nonfiling co-debtor's interest in the property, is contingent on whether the Debtor's partial interest in the property, or the entire property (and no just Debtor's interest), is included in the bankruptcy estate. *In re Maynard*, 264 B.R. 209, 215 (B.A.P. 9th Cir. 2001)

The case of *In re Maynard* illustrates this point. In *Maynard*, the Ninth Circuit Bankruptcy Appellate Panel held that the trial court did not err in stripping the lien as to a non-filing co-debtor's interest in the property, because the non-filing co-debtor held a community interest in the property, the entirety of which became property of the Debtor's estate. The Debtor in the proceeding was the wife of the non-filing co-debtor on a piece of real property, which secured the repayment of a claim that the Debtor wife sought to value under 11 U.S.C. § 506(d). Debtor and her non-filing husband co-owned the property. The creditor in that action argued that the non-filing husband's interest prevented the bankruptcy court from avoiding its lien.

The court in Maynard, however, rejected the creditor's argument, incorporating an overview of 11 U.S.C. § 506(a), and how community property becomes property of the bankruptcy estate, in its discussion:

> "That value which the court is charged with determining under section 506 ... is the value of the creditor's secured claim against property of the estate." 9 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 3012.01 (15th ed. Rev.1997). Section 541(a) provides that property of the estate includes:
>
> > (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is— (
> >
> > A) under the sole, equal, or joint management and control of the debtor; or
> >
> > (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
>
> To the extent that the provisions of § 541(a)(2)(A) or (B) are met, the community property of both spouses becomes property of the estate when one spouse files a bankruptcy petition. *In re Miller*, 167 B.R. 202, 205 (Bankr.C.D.Cal.1994)...

With very limited exceptions not applicable here, California law provides that each spouse has an equal right to manage community property. Lawrence P. King et al., Collier Family Law ¶

> 4.03[3][c] (Rev.2000). As a result, the Property is included in Debtor's estate and Highland's entire lien was subject to valuation and avoidance under § 506.
>
> The only authority cited by [Creditor] Highland in support of its position is *In re Rodriguez,* 156 B.R. 659 (Bankr.E.D.Cal.1993). In *Rodriguez,* the debtor owned a 50% interest in an automobile. The other 50% was owned by a "third party co-owner/co-obligor." 156 B.R. at 660. The bankruptcy court stated that "section 506 permits valuation only of the estate's interest in the property[,]" and concluded that "a debtor holding only a fractional interest in property cannot utilize section 506 to value a secured claim." *Id.*
>
> The facts of *Rodriguez* are clearly distinguishable from those of this case. **In *Rodriguez*, only the debtor's fractional interest became property of the estate. Here, the entire Property, not just Debtor's interest, is included in the bankruptcy estate.**

[Emphasis added.] *In re Maynard*, 264 B.R. 209, 214-15 (B.A.P. 9th Cir. 2001).

The distinction is made between whether Debtor has only a fractional interest in the property, as opposed to an interest in community property (which becomes property of the estate under 11 U.S.C. § 541(a)(1) and California law (*See In re Mantle,* 153 F.3d 1082, 1085 (9th Cir. 1998)), which determines whether Debtor may modify and value the secured loan of Creditor where a third-party, non-filing co-obligor exists.

Here, Debtor has listed Kimberly Barocio as his nondebtor spouse in Schedule H of his petition. Dckt. No. 1. Debtor has not responded to the objection to state that Debtor owns the subject asset with Xochitl Ruiz, as the Buyer and Co-Debtor on the Retail Installment Sale Contract executed by Debtor and the Creditor, as community property that has become property of the bankruptcy estate. Debtor appears to hold a fractional interest in the subject 2011 Toyota Tacoma.

Pursuant to the court's holding in *In re Rodriguez*, 156 B.R. 659, 660 (Bankr. E.D. Cal. 1993), 11 U.S.C. § 506 only allows valuation of the estate's interest in the property. If the debtor has a 50% interest in the property, then the secured creditor has a secured claim as to the value of that 50% only—insofar as the debtor's interest is concerned—and an unsecured claim for the entire balance of the obligation. Id. at 660. A debtor holding only a fractional interest in property cannot utilize 11 U.S.C. § 506(a) to value a secured claim. Based on the information presented by Creditor, Debtor cannot value the entirety of the secured claim of Creditor through a valuation proceeding under 11 U.S.C. § 506.

VALUE OF ASSET

Notwithstanding the issue of whether Debtor may even value the claim of Creditor under 11 U.S.C. § 506, Creditor argues that Debtor's valuation of the subject vehicle at $10,736.00 is too low of a valuation, and does not provide adequate protection payments to its claim. Creditor offers a print

out of a Kelley Blue Book Auto Market Report, showing that the retail, replacement value of the vehicle is $13,195.00.

The court will *sua sponte* take notice that the *Kelley Blue Book* can be within the "Market reports, commercial publications" exception to the Hearsay Rule, Fed. R. Evid. 803(17), it does not resolve the authentication requirement, Fed. R. Evid. 901. In this case, and because no opposition has been asserted by the Debtor, the court will presume the Declaration of Mary Ibarra to be that she obtained the *Kelley Blue Book* valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

Creditor further objects to the $200.00 monthly adequate protection payments offered it under Debtor's proposed Plan. in that the value of Creditor's security will depreciate at a higher rate than that at which Creditor will receive adequate protection payments under the Plan.

INTEREST RATE CALCULATION

Creditor argues that the proposed interest rate of 4.00% is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. Of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. In view of the non-filing Co-Debtor, Creditor recommends the contract rate of 5.94%. Because the creditor has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 3.25%, plus a 1.5% risk adjustment, for a 4.75% interest rate. The court determines that Debtor's rate of 4.00% on the loan repayments on the subject vehicle is too low and outside of the parameters set by *Till*.

LACK OF INSURANCE COVERAGE

Additionally, Creditor states that Debtor has not provided valid, written proof of Debtor's insurance coverage for the property. Debtor's apparent failure to provide this coverage compels Creditor to purchase its own insurance coverage on the property, which violates the parties' contractual agreement that Debtor must provide the coverage. This lack of coverage is also in violation California Vehicle Code Section 16451, and Creditor argues that its provision of mandatory insurance coverage places an undue burden on Creditor. Debtor has not responded with a filing of admissible proof of insurance coverage, or a response stating that insurance

coverage has been provided for the vehicle and been properly maintained over the three years that Debtor has had possession of the subject vehicle.

The court notes that Trustee has also brought an Objection to Confirmation of the Plan, NLE-1. The Debtor has also brought a Motion to Value the Secured Claim of Creditor, PGM-1, which scheduled to be heard on April 29, 2014. Based on Creditor's arguments in the instant objection, and on the basis that confirmation of the Plan would be premature at this time (in light of Debtor's recently filed Motion to Value the Secured Claim), the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

55. 14-21473-E-13 ISIDRO RUIZ — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
NLE-1 Peter G. Macaluso — 3-26-14 [15]

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

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

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor proposes to value the secured claim of Toyota Financial, but has not filed a Motion to Value the Secured Claim of Toyota Financial to date.

Debtor filed a Motion to Value the Secured Claim on March 27, 2014, the day after Trustee filed his Objection, which is set for hearing by this court on April 29, 2014. Dckt. No. 19.

Additionally, Debtor has not listed his expenses properly. Trustee states that Debtor's Schedule I appears to list an insurance expenses twice under the non-filing spouse's expense column. Dckt. No. 1, pages 35-36. Line #5e reflects an expense in the amount of $444.48 and the continuation sheet lists Kaiser for $392.19, Dental for $44,94, and Vision for $2.00. These three deductions mirror the expenses listed on K Barocio's Direct Deposit Advice issued on January 31, 2014. While the Trustee has received and reviewed the Pay Advices, the Trustee has not filed them as Exhibits, and Trustee believes that they may not be necessary, but will submit the pay advices if requested or required.

Debtor's pay advice issued on January 1, 2014, reflects a $100.00 deduction for a "457 Plan" and a $100.00 deduction for a 401K Plan. Neither deduction was listed on Schedule I. According to Trustee's calculation and consideration of the errors and omissions, the Debtor's plan payment could be increased by as much as $249.13.

Based on the foregoing, 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.

56. 14-21379-E-13 CYNTHIA SILVERIA — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
NLE-1 Gary Ray Fraley — 3-26-14 [14]

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 26, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341 on March 20, 2014. Attendance is mandatory. 11 U.S.C. § 343. The Trustee does not have sufficient information to determine whether or not the case is suitable for confirmation under 11 U.S.C. § 1325. The Meeting has been continued to April 17, 2014, at 10:30 am.

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.

57. 12-32781-E-13 TIBERIO/LUCIA JORGE — MOTION TO MODIFY PLAN
SDB-2 W. Scott de Bie — 3-10-14 [34]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on March 10, 2014. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects to the Debtors' proposed plan on the following grounds:

1. It appears the Plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtors' Schedule C filed July 10, 2012, reflects $12,400.88 in non-exempt equity. The Debtors are proposing to pay approximately $4,795.17 to unsecured creditors ($2,500.00 in attorney's fees, $2,055.17 to Class 7 ($68,505.55 times 2%) plus approximately $240.00 in Trustee fees.

2. Debtors' Motion and Declaration do not support several of the changes depicted on Debtor's Supplemental Schedule J filed on March 10, 2014. When comparing the Debtor's Supplemental Schedule J to Debtor's prior Schedule J, the Trustee notes the following changes:

Description	November 1, 2012 Schedule J	March 10, 2014 Schedule J	Difference
Home Maintenance	$160.00	$60.00	($100.00)
Water, sewer, garage	$153.00	$287.00	$134.00
Telephone, cell, internet, cable	$234.00	$0.00	($234.00)
Food	$675.00	$445.00	($230.00)
Clothing, laundry, dry cleaning	$132.00	$55.00	($77.00)
Personal Care	$75.00	$55.00	($20.00)
Medical/Dental	$575.00	$75.00	($500.00)
Transportation	$340.00	$340.00	$0.00
Entertainment	$115.00	$15.00	($100.00)
Auto Registration	$29.32	$27.02	($2.30)
Pet expenses	$40.00	$0.00	($40.00)

Debtors' Motion and Declaration, Dckt. Nos. 34 and 37, state that Debtors have reduced their food budget by $230.00, transportation expenses by $100.00, clothing by $50.00, entertainment by $100.00, personal care by $20.00, pet expenses by $40.00, and medical expenses by $400.00.

Debtors' Supplemental Schedule J disagrees with Debtors' Motion and Declaration as it pertains to clothing, medical, and transportation costs. Schedule J represents a clothing decrease of $77.00, not $50.00; a decrease in medical expense of $500.00, not $400.00; and no change to transportation costs where Debtor's Motion and Declaration state this decreased by $100.00. Additionally, Debtor's Supplemental Schedule J reduces Debtors' Supplemental J reduces Debtors' telephone, cell, internet, and cable expense from $234.00 to $0.00, which does not appear reasonable.

3. Section 2.06 of Debtors' Modified Plan proposes attorney's fees of $500.00 to be paid through the plan and indicates a motion will be filed to approve such fees. Attorney's fees under the confirmed plan are $2,000 paid prior to filing and $2,000 paid through the plan. Trustee has disbursed $2,000.00 in attorney fees. Debtor's Motion and Declaration doe not address these additional attorney's fees, and no motion has to approve additional fees has been filed to date. However, an Order on Substitution of Attorney was filed on March 6, 2014.

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

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

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

58. 13-33583-E-13 SUE MARIANO — **CONTINUED MOTION TO CONFIRM PLAN**
Charnel J. James — **1-23-14 [47]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, and all creditors on January 23, 2014. By the court's calculation, 47 days' notice was provided. 42 days' notice is required. That requirement was met.

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

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

The court continued the hearing on this matter from April 8, 2014 to allow the Trustee to review supplemental documents.

REVIEW OF MOTION

The Chapter 13 Trustee initially opposed confirmation of the plan on the basis that the plan fails the Chapter 7 Liquidation Analysis, and because it appears that Debtor cannot make the plan payments.

First, the Trustee argues that the Debtor's Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4); Debtor's non-exempt assets total $49,625.00 on her Amended Schedule C, which was filed on December 20, 2013. Schedule A, filed on November 11, 2013, lists real property with a value of $91,838.00 and a secured debt on Schedule D of $84,202.00, or $7,636.00 in equity with no claim of exemption. Debtor's non-exempt assets total $57,261.00. Debtor is proposing a 10% dividend to unsecured creditors, which total $2,510.00.

Debtor has claimed exemptions under California Civil Code of Procedure § 703.140(b), and appears married, but separated based on Schedule I (although the spouse has not joined in the petition). California Civil Code of Procedure § 703.140(b) requires a Spousal Waiver, signed by the Debtor and Debtor's spouse, for use of the claimed exemptions. Trustee has not found any such waiver filed with the court after review of the record. The Trustee's Objection Exemptions, NLE-1, was heard and sustained on this basis on February 11, 2014.

Second, it appears that Debtor cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor's projected disposable income on Schedule J reflects $390.12 and Debtor is proposing plan payments of $1,064,45,.

TRUSTEE'S RESPONSE

Trustee filed an additional response on March 28, 2014, Dckt. No. 87, pointing out that Debtor has not filed any supplemental pleadings and amended Schedules I and J. Trustee states that his objection remains as to Debtor's failure to meet the liquidation analysis; Debtor's projected disposable income as stated on Schedule J reflects $390.12 and Debtor is proposing plan payments of $1,064.45. Debtor filed a second Amended Schedule C on March 11, 2014, the same day as the hearing on the motion to confirm. Trustee did not have a chance to review it prior to the hearing. After a review of the second Amended Schedule C, it appears that the Plan still fails the Chapter 7 liquidation analysis, as an objection to exemptions has been filed by Trustee on March 28, 2014.

Debtor's Amended Schedule C filed on March 11, 2014, changes Debtor's exemptions from California Civil Code of Procedure § 703 et seq. to California Civil Code of Procedure § 704 et seq. Debtor has exempted $7,636.00 of equity in her real property, which is described as property her ex-husband is living in and making payments for.

It appears that Debtor is not entitled to use this exemption as Debtor does not reside in this property. Debtor has not exempted all of the equity in her 2003 Harley Sporster, which is free and clear. Debtor values the Harley at $9250.00 and has only exempted $2,725.00 under California Civil Code of Procedure § 704.010, leaving $6,525.00 non exempt. Therefore, the total of non-exempt assets is $14,161.00 and Debtor is proposing a 10% dividend to unsecured creditors, which totals $2,510.00.

On March 28, 2014, the Trustee filed his Objection to Claim of Exemptions, including the real property in which it is alleged that the Debtor does not live. Dckt. 90.

Nothing further pertaining to this Motion or the proposed plan has been filed by the Debtor or Trustee, based on the court's review of the docket on April 17, 2014.

Based on the foregoing and Trustee's remaining concerns regarding the liquidation analysis of Debtor's Plan, her claims of exemptions and pending objection thereto, and the failure to file Amended Schedules I and J, the amended Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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

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

59. 11-41591-E-13 JAMES/ROBIN STEPP — MOTION TO MODIFY PLAN
RWH-2 Ronald W. Holland — 2-26-14 [81]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 26, 2014. By the court's calculation, 58 days' notice was provided. 35 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of the proposed Modified Plan on the basis that Trustee is uncertain of the Debtors' ability to make the payments required under 11 U.S.C. § 1325(a)(6). Debtors did not file a current Schedule I or Schedule J in support of the modified plan. The most recent Schedule I was filed on September 2, 2011. The Debtor's employer was listed as Stepp Circuit Design, Inc. The California Secretary of State reports the status of this corporation as suspended, according to the business entity profile listed on the Secretary of State's website. Exhibit 1, Dckt. No. 88. The spouse reported her income as unemployment of $1,200.00 monthly at the time of filing. Approximately 135 weeks have elapsed since filing. The most recent Schedule J was filed on July 9, 2012. Dckt. No. 70.

Additionally, it appears that proper notice was not given to the Internal Revenue Service pursuant to the requirements of Local Bankruptcy Rule 2002-1(c)(1). Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified:

> **(a) Listing the United States as a Creditor; Notice to the United States.** When listing an indebtedness to the United States for other than taxes and when giving notice, as required by FRBP 2002(j)(4), the debtor shall list both the U.S. Attorney and the federal agency through which the debtor became indebted. The address of the notice to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:
>
> > **For Cases filed in the Sacramento Division:**
> > United States Attorney
> > (For [insert name of agency])
> > 501 I Street, Suite 10-100
> > Sacramento, CA 95814
> >
> > **For Cases filed in the Modesto and Fresno Divisions:**
> > United States Attorney
> > (For [insert name of agency])
> > 2500 Tulare Street, Suite 4401
> > Fresno, CA 93721-1318
>
> **(c) Notice to the Internal Revenue Service.** In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:

(1) United States Department of Justice
Civil Trial Section, Western Region
Box 683, Ben Franklin Station
Washington, D.C. 20044

(2) United States Attorney as specified in LBR 2002-1(a) above; and,

(3) Internal Revenue Service at the addresses specified on the roster of governmental agencies maintained by the Clerk.

The proof of service lists the following addresses as those used for service on the Internal Revenue Service:

Internal Revenue Service
United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814

Internal Revenue Service
United States Attorney
2500 Tulare Street, Suite 4401
Fresno, CA 93721-1318

(p)INTERNAL REVENUE SERVICE
CENTRALIZED INSOLVENCY OPERATIONS
PO BOX 7348
PHILADELPHIA PA 19101-7346

Certificate of Service, Dckt. No. 85

A motion is a contested matter. *See* Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all addresses, and service was therefore inadequate. It appears that the Debtors did not serve the United States Department of Justice and United States Attorney, as required by Local Bankruptcy Rule 2002-1(c).

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

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

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

60. 11-36992-E-13 DANNIE/JARIS BLANTON
CAH-5 C. Anthony Hughes

MOTION TO APPROVE LOAN MODIFICATION
3-20-14 [118]

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

Final Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Approve the Loan Modification is granted. No appearance required.

Debtor moves for an order approving the loan modification offered by Wells Fargo Home Mortgage. Debtor has an interest in that real property commonly known as 11895 Giusti Road, Herald, CA 95638. Wells Fargo Bank, N.A. dba Wells Fargo Home Mortgage holds a claim secured by a recorded interest in the Real Property. Wells Fargo Bank, N.A. has filed a secured claim with the Court, Claim No. 5-1, in the amount of $395,705.22. On November 26, 2013, Debtors received a formal Loan Modification Offer, for which they seek court approval.

Under the terms of the offer, the new payments will become first due on January 1, 2014. The Debtor's monthly payment on the mortgage will change from $3,432.71 to $1,924.84. The rate of interest (APR) on the loan will change from 7.750% to 5.000%. The principle amount owed on the loan will change from $368,002.92 to $339,250.00. The arrearage, if any, in the mortgage payments will be cured. The Debtor will not receive any cash settlement. The other terms and conditions of the loan will remain unchanged. A copy of the letter from Wells Fargo Home Mortgage is attached as an Exhibit A. Dckt. No. 121.

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 Debtor authorized to amend the terms of their loan with Wells Fargo Bank, N.A. which is secured by the real property commonly known as 11895 Giusti Road, Herald, CA 95638, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 121, in support of the Motion.

61. 12-38294-E-13 DMR-1 DAMON/DEBRA DWORAK Michael S. Martin MOTION TO MODIFY PLAN 3-7-14 [22]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 6, 2014. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee has filed opposition to the Motion to Confirm.

Trustee first argues that the Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013, because it does not state with particularity the grounds upon which the requested relief is based. Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.*

The Motion to Confirm the Modified Plan filed by the Debtors states with particularity the following grounds to confirm the Modified Plan pursuant to 11 U.S.C. §§ 1329, 1325, and 1322:

> "Debtor(s), Damon & Debra Dworak, move the court herein to confirm their First Modified Chapter 13 Plan pursuant to 11 U.S.C. Sec. 1324, 1325, and 1322, filed and served concurrently herewith. This motion is based on the Notice of Motion and Debtors' Declaration filed concurrently herewith."

Debtors "Motion" merely instructs the court to read other pleadings and draft the motion for Debtors. Debtors are asking the court to read the other pleadings to divine the actual grounds upon which relief is requested, restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Debtors.

The court has declined the opportunity to provide those services to movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based.

As the Trustee highlights, the Motion does not include any descriptions of additional provisions of the plan that can differ from the form plan; whether the filing fees have been paid and the total of plan payments to date; the goal of the plan; the amount of non-exempt equity, if any; the nature and history of Debtors' income; what happened to the Debtor prior to filing that led to the bankruptcy; whether the Debtors owe a domestic support obligation; and whether Debtors have filed tax returns in the last four years.

Trustee also argues that the Declaration does not provide sufficient evidence to prove all components of the plan under 11 U.S.C. § 1325(a). The Declaration does not address that the plan complies with applicable law; any

fees are charges required by the court have been paid; the plan is proposed in good faith and not by any means forbidden by law; unsecured creditors will receive at least what they would in the event of a Chapter 7 liquidation; all secured creditors provided for have either accepted the plan, or the Debtor surrenders the property securing their claims, or the plan provides to pay the creditors pursuant to 11 U.S.C. § 1325(a)(5)(B); the Debtor will be able to make the plan payments; the petition was filed in good faith; Debtors have filed all applicable tax returns; or the Debtors have no domestic support obligations that are current or ongoing.

The months paid in stated in Debtors' proposed plan payments also differ from the Trustee's records. The additional provision of the Plan state: "Total payments received from the Debtors through February 2014, and dispersed by the Trustee amount to $14,490.06." Dckt. No. 25. According to Trustee's records, Debtor has paid in $22,750.00 through February 2014, where this case was filed on October 15, 2012, so the first payment was due on November 25, 2013.

There is no current statement of income. There was a change of address filed for primary Debtor; records now reflect an out of state address, while Co-Debtor's address remains the same. Trustee is unsure of Debtors' income and if it is sufficient to make the monthly plan payments of $1,750.00.

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

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

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

62. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2004
G & K HEAVEN'S BEST, INC. V. MCQUEEN ET AL

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

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

No Tentative Ruling. The hearing on the Order to Appear was continued from March 25, 2014.

MARCH 25, 2014 HEARING

At the hearing the parties addressed counsel's handling of monies of the estate and the courts order to provide an accounting. In addition, it appears that the Debtors have failed to pay the full $1,000.00 a month which is required under the proposed plan. The Debtors shall account for the $1,000.00 a month in monies to be deposited for attorneys fees, and the location of such monies if not paid to counsel. Civil Minutes, Dckt. No. 45.

REVIEW OF COUNSEL ASSERTING ESTATE CLAIMS AND DEBTOR DEFENSES

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

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

Review of Applicable Law Relating to Debtors' Attorneys' Fees

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

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

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

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

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

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

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

> Adhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a chapter [*539] 7 case, he must be employed by the trustee and approved by the court.

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

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

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

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

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

B. For a Chapter Debtor engaged in business, the power to operate the business, and subject to the limitations of 11

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

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

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

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

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

This Bankruptcy Code section further provides that,

A. The court shall not allow compensation for

1. Unnecessary duplication of Services; or

2. Services which were not -

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

b. Necessary to the administration of the case.

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

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

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

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

authorizing the fees and/or costs and specifically permitting direct payment of those fees and/or costs by the debtor.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

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

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

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

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

Until proper disclosure has been made, it is premature to award fees because employment is a prerequisite to compensation and until there is proper disclosure it cannot be known whether the professional was validly employed. *See First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 175 B.R. 52, 55-56 (B.A.P. 9th Cir. 1994)(§ 327(a) "clearly states that the court cannot approve the employment of a person who is not

disinterested" and "bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language"). Thus, professionals must disclose all connections with the debtor, no matter how irrelevant or trivial those connections seem. *Mehdipour v. Marcus & Millichap (In re Mehdipour)*, 202 B.R. 474, 480 (B.A.P. 9th Cir. 1996).

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

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

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

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

(2) the entity that made such payment.

11 U.S.C. § 329.

Additionally, in Adversary Proceedings, unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party in the Adversary Proceeding must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

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

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

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

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

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

STATUS CONFERENCE STATEMENT

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

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

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

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

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

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

63. 13-32494-E-13 THEODORE/MOLLY MCQUEEN
14-2027
MCQUEEN ET AL V. G & K
HEAVEN'S BEST, INC.

CONTINUED ORDER FOR COUNSEL FOR PLAINTIFFS TO APPEAR
3-20-14 [18]

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

No Tentative Ruling. The hearing on the Order to Appear was continued from March 25, 2014.

MARCH 25, 2014 HEARING

At the hearing, the parties addressed counsels handling of monies of the estate and the courts order to provide an accounting. In addition, it appears that the Debtors have failed to pay the full $1,000.00 a month which is required under the proposed plan. The Debtors shall account for the $1,000.00 a month in monies to be deposited for attorneys fees, and the location of such monies if not paid to counsel.

REVIEW OF COUNSEL ASSERTING ESTATE CLAIMS AND DEBTOR DEFENSES

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

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

Review of Debtors' Attorneys' Fees

The First Amended Chapter 13 Plan proposed in the Plaintiff-McQueens' Chapter 13 case appears to provide for the unlimited payments of

$1,000.00 a month to Hughes Financial Law for "the adversary proceedings," without regard to court authorization to employ or any fees being approved by the court. 11 U.S.C. §§ 327, 328, 329, 330 and 331.

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

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

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

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

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

authorizing the fees and/or costs and specifically permitting direct payment of those fees and/or costs by the debtor.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

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

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

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

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

Until proper disclosure has been made, it is premature to award fees because employment is a prerequisite to compensation and until there is proper disclosure it cannot be known whether the professional was validly employed. *See First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 175 B.R. 52, 55-56 (B.A.P. 9th Cir. 1994)(§ 327(a) "clearly states that the court cannot approve the employment of a person who is not

disinterested" and "bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language"). Thus, professionals must disclose all connections with the debtor, no matter how irrelevant or trivial those connections seem. *Mehdipour v. Marcus & Millichap (In re Mehdipour)*, 202 B.R. 474, 480 (B.A.P. 9th Cir. 1996).

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

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

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

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

(2) the entity that made such payment.

11 U.S.C. § 329.

Additionally, in Adversary Proceedings, unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party in the Adversary Proceeding must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

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

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

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

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

Lastly, the court ordered that the Chapter 13 Trustee hold and retain the monies received from the Hughes Financial Law and the Plaintiff-

McQueens pursuant to this order pending further order of the court. Any attorneys' lien which may exist on the monies held by Hughes Financial Law in its client trust account which are turned over to the Chapter 13 Trustee and the $1,000.00 a month payments received from the Plaintiff-McQueens are maintained on such monies held by the Chapter 13 Trustee.

STATUS CONFERENCE STATEMENT

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

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

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

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

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

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

64. 14-21396-E-13 NLE-1 TERRY/LINDSEY GIBSON Lucas B. Garcia — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 3-26-14 [16]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on March 26, 2014. By the court's calculation, 27 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 overrule the Objection. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

1. Debtors' Schedule I, Dckt. No. 1, shows that Debtor has no business income. Debtors' Plan, Dckt. No. 5, Rights and Responsibilities Statement, Dckt. No. 7, and Disclosure of Compensation of Attorney for Debtors, Dckt. No. 1 all indicate that $4,306.00 in attorney fees have been charged in this case (possibly because the amount of attorney fees has been combined with the filing fees of $306.00 for the Chapter 13). Section 2.06 of the plan indicates that Debtors' Counsel is seeking no look fees under Local Bankruptcy Rule 2016-1(c). Only $4,000.00 is allowed in a non-business case under the attorney fee guidelines. Because of the Student Loan issue described below, Trustee objects to the allowance of attorney fees under the "no look" procedure, so that under Local Bankruptcy Rule 2016-1(a), attorney compensation shall be determined under 11 U.S.C. §§ 329 and 330.

2. The Plan also fails to provide for all priority debts as required by 11 U.S.C. § 1322(a)(2). The Franchise Tax Board

has filed a Proof of Claim, Court Claim No. 3, for $1,831.63 priority, and $457.91 general unsecured. Debtor proposes to pay $125.00 for thirty-six months, and 6% to general unsecured creditors.

3. Debtor proposes to pay $125.00 for thirty-six months, and 6% to general unsecured creditors. The total unsecured debt is listed as $67,211.64, including a U.S. Department of Education claim scheduled for $38,153.00. Debtors will pay in a total of $4,500.00 over the 36 month life of the plan. According to Trustee's calculations, the plan will take sixty-seven months to pay the attorney fees due of $1,975.0, 6% to unsecured creditors, priority tax debt of $1,831.63, and Trustee compensation, totaling $8,251.92. This exceeds the maximum time allowed under 11 U.S.C. § 1322(d).

4. Trustee states that Debtors unfairly discriminate against the holders of unsecured claims under 11 U.S.C. § 1322(b)(1). Debtors' Schedule J, Dckt. No. 1, lists on line 17c monthly student loan payments of $418.00. Debtors' Schedule F, Dckt. No. 1 lists a student loan to the US Department of Education for $38,153.00. Debtors are proposing to pay the student loan creditor $15,048.00 or 39% of the debt, while paying only 6% to other holders of unsecured claims. In addition, Debtors disclosed at the meeting of creditors that these payments have not yet begun.

5. Debtors' Plan may not be the Debtors' best effort under 11 U.S.C. § 1325(b). Debtors testified at the First Meeting of Creditors held on March 20, 2014, that he is not currently paying the student loan payment. Debtor has an additional $418.00 per month which may be paid into the plan for the benefit of creditors.

RESPONSE BY DEBTORS

Debtors respond by stating that all of Trustee’s concerns have been resolved. Dckt. No. 22. First, the Trustee has raised in the objection is the fact of Attorney fees. The fee amount has been adjusted to reflect $4,000.00 and not the original $4,306.00.

Second Trustee has raised in the objection on the basis that a priority debt not provided for. Debtor’s have filed a notice of non-taxable income with IRS.

The Trustee has also raised concerns with the plan length and feasibility of the plan. Debtors claim that with the notice of non-taxable income this will no longer be an issue. On April 14, 2014, the Franchise Tax Board appears to have amended its claim, Claim No. 3, which now reflects that Debtor Terry J. Gibson now owes $0.00 for the 2011 tax year, and that the Board is in the process of determining Debtor's tax liability for the years of 2012 and 2013.

The Trustee has also objected to the Plan on the grounds that there is unfair discrimination based on the $418.00 listed to pay a student loan. Debtors had listed this payment based on the counseling course they were required to take. Debtors believed that the expenses on Schedule J had to match the budget numbers required by the online credit counseling course and therefore misstated many of their expenses by mistake. The Debtors having resolved Trustee's concerns with the proposed Plan, 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 April 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.

65. 09-44697-E-13 BAYO MONYE **MOTION TO MODIFY PLAN**
WW-3 Mark A. Wolff **3-10-14 [54]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on March 10, 2014. By the court's calculation, 43 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 Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on March 10, 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.

66. 13-21399-E-13 LARRY/MARIANNE HAVENS MOTION TO MODIFY PLAN
HDR-3 Harry D. Roth 2-28-14 [70]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 28, 2014. By the court's calculation, 56 days' notice was provided. 35 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on February 28, 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.

67. 09-30220-E-13 KURT KRAMER — CONTINUED MOTION TO DISMISS CASE
NLE-2 Peter G. Macaluso — 3-4-14 [135]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required. Opposition was stated at the March 19, 2014 Hearing.

Tentative Ruling: The Motion to Dismiss 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

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

PRIOR HEARING

The Chapter 13 Trustee filed the present motion to dismiss, asserting very serious grounds relating to the Debtor's post-petition conduct concerning property of the bankruptcy estate. In addition to being grounds to convert or dismiss the case, the post-petition diversion of assets raises serious issues relating to the Debtor's post-petition fiduciary duty to the estate.

Material default by Debtor with respect to a term of the confirmed plan

In his motion, the Chapter 13 Trustee ("Trustee") alleges that Debtor has sold a Link-Belt Excavator on September 11, 2012 for $36,000.00 without permission of the court. Debtor's Chapter 13 Plan specifically states in § VI. Miscellaneous Provisions, 6.02 that Debtor is prohibited from disposing any personal or real property with a value of $1,000.00 or more without first obtaining court authorization. Dckt. 71. This is material default by Debtor with respect to a term of a confirmed plan. 11 U.S.C. § 1307(c)(6).

CONTINUANCE

The court continued the hearing to allow the Debtor to file and serve Opposition and supporting evidence on or before April 4, 2014, and the Trustee shall file and serve a Reply, if any, on or before April 11, 2014.

DEBTOR'S OPPOSITION

Debtor opposes the Motion to Dismiss on the basis that he was mistaken in the belief that upon confirmation the property of the Debtor re-vests and that this sale was in the normal course of his business. Debtor states that the funds were used to continue earning a gross income sufficient to allow the monthly payments to be generated to the Trustee and to supply "seed" money for future projects.

Debtor offers a declaration in support of the opposition which states business was slow and the income he was receiving was not enough to continue to pay the Trustee. Debtor wold the piece of equipment, which was not being used regularly, to pay the Trustee the $4,000 payment.

Debtor states that over the last 58 months he has paid approximately $230,000.00 to the Trustee. Debtor has provided unauthenticated exhibits, including a Profit and Loss Statement and bank statement for an unidentified account number for Debtor.

TRUSTEE'S RESPONSE

Trustee argues that Debtor has provided unauthenticated exhibits, which may not have any evidentiary value. However, the Trustee provides an analysis of the profit and loss statement:

> "The Annual shows $72,541.20 on Total Income not including the sale of equipment, with expenses totaled at $94,386.28 including the $32,000.00 of bankruptcy payments made. According the Annual, the Debtor's business no longer made a profit of $4,925.00 as projected in the Debtor's business budget on file with the Court, (DN # 1, Page 36.), but only made $846.24 profit per month. The Quarterly shows a net loss of $15,166.10, but shows only one $4,000.00 bankruptcy payment rather than the $12,000.00 received. The Quarterly shows a loss of $6,388.70 per month when adjusted for the bankruptcy payments made; bankruptcy payments of $4,000.00 were posted by the Trustee on 10/2/2012, 10/3112012, 12/3/2012, and 1/3/2013.
>
> The monthly forms show that in September 2012, the Debtor sold the equipment, paid $4,000 to the Trustee, and put $5,788.87 into the business; in October 2012, the Debtor shows $8,129.55 put into the business, and does not show any bankruptcy plan payment; in November 2012, the Debtor shows paid $4,000.00 to the Trustee, and $2,416.91 was put into the business; and in December 2012, the Debtor does not show any bankruptcy plan payments, and $619.64 was put into the business."

Trustee argues that the Debtor has breached the plan and has put an asset forever out of reach in the event this matter were converted to a Chapter 7. Trustee argues this breach is significant because it has not been adequately addressed and that the evidence provided by the Debtor is not sufficient. The Trustee believes that dismissal is in the best interest of creditors.

DISCUSSION

The Debtor, safely ensconced in the protective cocoon of bankruptcy has only some very basic obligations. These include following the Bankruptcy Code and not violating his fiduciary duty with the property of the bankruptcy estate (when, as in this case, property is not revested in the debtor) and property of the plan estate (when property is revested in the debtor). Here, the Debtor has been alleged by the Trustee to have converted $36,000.00 of bankruptcy estate assets.

Post-petition diversion of assets raises serious civil and criminal issues for a fiduciary of the estate. These can run from simple tort claims which the estate has against the fiduciary, denial of discharge (11 U.S.C. § 727(a)(2)(A), (3)), to commission of a bankruptcy crime (18 U.S.C. §§ 152, 3284).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the general "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

Here, Debtor has not provided sufficient evidence to explain the sale of the property of the estate without court permission.

The Debtor's explanation is also very, very troubling. Under penalty of perjury the Debtor states that beginning in 2012 his income dropped and he was not generating sufficient monies to fund the Plan. However, rather than coming to court in good faith to modify the plan, he

began surreptitiously liquidating assets to create the illusion that he was performing the plan.

While the Debtor now, after the fact, caught red-handed states that "I did not try to hide it as I thought this was part of doing business," that testimony is not credible. Declaration, Dckt. 148. The Debtor is and has been represented by knowledgeable bankruptcy counsel. The court will not presume that the Debtor was not advised on his post-confirmation obligations and not to liquidate assets.

The Debtor also testifies that "paying the Trustee $4,000.00 every month has been a continuous struggle." *Id.* Thus, it appears that the Plan itself may have been ill-conceived and not based upon correct or accurate financial information.

Only when the Trustee ferreted out that assets were being liquidated to allegedly fund the plan, has the Debtor come forward. It is as if the Debtor and counsel treated the situation as "confirm and forget," with the Debtor being allowed to proceed and do whatever he wants, the Chapter 13 Plan being a "mere formality" which really doesn't mean anything.

It is also significant that upon discovering the liquidation of assets the Trustee contacted counsel for the Debtor. The Trustee sent a letter on January 14, 2014 to counsel requesting information about the liquidation of the asset and the proceeds of the sale. Exhibit B. Dckt. 137. As of the March 4, 2014 declaration of Jennifer Hand (Chapter 13 Trustee's office), the Debtor and his counsel had failed to respond to the letter. This is inconsistent with the Debtor's protestations that he didn't "intend" to do anything wrong.

In looking at the Debtor's plan, dismissal of this case has little negative economic consequences. The Plan payments by the Debtors have all gone to pay his nondischarageable taxes and personal property which he desires to keep. First Amended Chapter 13 Plan, Dckt. 71. He would have to pay these creditors even without a bankruptcy case to keep the personal property and prevent the taxing agencies from seizing his assets. Under the Plan, the Debtor has been able to lower the interest payments and actually retain possession for less than if he was not in the bankruptcy case.

Based on the totality of the circumstances, cause exists pursuant to 11 U.S.C. § 1307(c) to dismiss or convert this case to one under Chapter 7. In many respects it may be in the best interests of creditors for a Chapter 7 trustee to investigate what has really happened in this case and what other assets have been "disposed of" by the Debtor.

Further, it could well be in the best interests of creditors that a Chapter 7 Trustee and the U.S. Trustee's Office, and all creditors be afforded the opportunity to, review the conduct of the Debtor and consider whether he should be allowed to obtain a discharge, his discharge should be denied, the case should be dismissed, or the case should be dismissed with prejudice.

However, the court concludes that it is in the best interests of the estate, creditors, and the Debtor to dismiss this case rather than convert

it to one under Chapter 7. The Debtor has some type of business he is trying to protect – though he has testified that he cannot do that under the Plan which was confirmed in this case. Though the Debtor did not seek to modify the plan in this case so that it realistically could be performed, it could be possible that a plan, in a new case, might be presented and performed.

The court will give the Debtor that opportunity to proceed in a new case, rather than forcing the liquidation of his business.

Cause exists under 11 U.S.C. § 1307 to dismiss 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 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 the court determining that dismissal of the case is in the best interests of the creditors, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is granted and the case is dismissed.

68. 14-22483-E-12 CLG-1 | **MARILYN MOWRY AND PETER BOWLING** | **MOTION FOR RELIEF FROM AUTOMATIC STAY**
4-4-14 [27]

11905 BORDEN ROAD, LLC VS.

HEARD ON 1:30 CALENDAR IN CONJUNCTION WITH THE MOTION TO DISMISS, MOTION FOR EXTENSION OF TIME TO FILE DOCUMENTS AND STATUS CONFERENCE

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*), Trustee Jan Johnson, and Office of the United States Trustee on April 4, 2013. By the court's calculation, 18 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

Creditor, 11905 Borden Road, LLC ("Creditor"), seeks relief from the automatic stay with respect to the real property commonly known as 11905 Borden Road, Herald, California. The property consists of two parcels, each with their own APN, including 152-080-065 and 152-080-066. One parcel consists of the Debtors' residence, and the other is an adjacent piece of land which Creditor believes is used for business purposes. The moving party has provided the Declaration of Adham Sbeih to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Deed of Trust shows that the property was owned by Oasis Ranch, Inc., when the loan was given on March 2011, but was transferred via a grant deed from Oasis Ranch, Inc. to Marilyn Mowry, as a married woman on August 7, 2012. Creditor attaches a grant deed to the Declaration of Christina L.

Geraci, but Creditor advises that the filing of evidence attached to declarations, rather than separately on the court docket, is improper. The Revised Guidelines for Preparation of Documents of the Eastern District require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents.

On or about August 7, 2012, the day before the scheduled trustee's sale, Debtors filed for their first Chapter 13 bankruptcy, Case No. 12-34482, in which debtors filed multiple proposed Chapter 13 Plans, and Creditor objected to each one. Creditor filed opposition to each proposed plans, on the grounds that Debtors were asking for an additional 6 months to sell the property to fund the Plan (even though Debtors' first two proposed plans claimed that she would sell horses to fund the Plan, it remains unclear what came of those horses or the funds from the sale thereof), and Debtors had only made 1 post-petition mortgage payment.

At the hearing on the Debtors' Fourth Modified Chapter 13 Plan, the court held that Debtors had acted in bad faith, had not fully disclosed their financial statement and/or financials of the company, Oasis Ranch, and was not proposing a good faith plan to pay holders of secured claims. On or about September 16, 2013, the Court issued an order granting Debtors' Motion to Confirm the Modified Chapter 13 Plan, provided that Debtors complete the sale of the subject property on or before January 31, 2014, and that the automatic stay provisions of 11 U.S.C. § 362 are vacated effective February 2014. Order, Bankr. E.D. Cal. No. 12-34482, Dckt. No. 217. On or about October 16, 2013, the court executed an order incorporating the same language. Order, Bankr. E.D. Cal. No. 12-34482, Dckt. No. 220.

Creditor states that it waited 18 months, from the date the bankruptcy matter was filed on August 8, 2012, to the date the court lifted the automatic stay on February 1, 2014. During this period, the Creditor only received on post-petition mortgage payment, and four "$100/month Plan Payments." Creditor scheduled the foreclosure sale for March 18, 2014, but the sale was halted by this subsequent Chapter 12 filing by Debtors on March 12, 2014, which Creditor states was not filed in good faith because the prior bankruptcy remains pending and the stay has been lifted by the court.

The Declaration of Adham Sbeih states that the Debtors defaulted under the terms of the Promissory Note, and a Notice if Default was recorded on April 11, 2012. A Notice of Sale was recorded, setting the Trustee's sale for August 8, 2012. During the 18 months that Debtors' Chapter 13 bankruptcy case was pending, Creditor only received one post-petition payment, and four "$100/month Plan payments." The Promissory Note matured on March 31, 2014, and the entire balance of $524,689.22 is now fully due and payable. According to Debtors' Schedules, Debtors value the property at $780,000.00.

The automatic stay was lifted on February 1, 2014, and the foreclosure sale was rescheduled for March 18, 2014. Order, Bankr. E.D. Cal. No. 12-34482, Dckt. No. 217. The rescheduled sale was halted by the Debtors' subsequent bankruptcy filing. This court has already noted that Debtors' current Chapter 12 case appears to be improper in considering the Trustee's Motion to Dismiss the previously filed Chapter 13 Case, Case No. 2012-34482. Debtors filed a Chapter 12 petition, before receiving a

discharge under their Chapter 13 case, and before their Chapter 13 Plan has been substantially consummated. *See* Case No. 14-22483.

A comparison of Debtors' petitions, Schedules, Plan, in their Chapter 12 and Chapter 13 cases shows that Debtors are attempting to discharge the same debts, and that the proceedings cover the same property and assets claimed by Debtors as part of the bankruptcy estate. The court recognizes that Debtors cannot have two pending bankruptcy proceedings in which they are seeking discharge of the same obligations. *Freshman v. Atkins*, 269 U.S. 121 (1925).

Creditor has also raised the issues that Debtors filed this Chapter 12 case in bad faith. A subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The court notes that Debtors are delinquent under their confirmed Chapter 13 Plan, and that Debtors have not effected the sale of the subject property as called for by the order confirming the Plan in the Chapter 13 Case. Debtors have not attempted to amend the current Chapter 13 Plan, which calls for the prompt sale of the Borden Road Property.

Additionally, another creditor in Debtors' Chapter 13 case has alleged that Debtors made a fraudulent conveyance of property to their corporation, Oasis Ranch, Inc., which is the potential subject of further litigation, and adds complications to Debtors' prosecution of their bankruptcy cases. Debtors have failed to perform the terms of their confirmed plan, in addition to committing other missteps in pursuing bankruptcy relief, that indicate that Debtors may have filed for bankruptcy to evade and hide assets from their creditors.

With respect to the current Motion for Relief, the court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the Debtors have not made post-petition payments on the property. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court shall issue a minute order terminating and vacating the automatic stay to allow 11905 Borden Road, LLC, and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

Creditor has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not 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 Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow 11905 Borden Road, LLC, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 11905 Borden Road, Herald, California.

69. 12-34482-E-13 NLE-1 **PETER BOWLING AND MARILYN MOWRY** **CONTINUED MOTION TO DISMISS CASE**
3-26-14 [241]

HEARD ON 1:30 CALENDAR IN CONJUNCTION WITH THE MOTION TO DISMISS, MOTION FOR EXTENSION OF TIME TO FILE DOCUMENTS AND STATUS CONFERENCE

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 Debtors, Debtors' Attorney, and Office of the United States Trustee on March 26, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Dismiss 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.

The court's tentative decision is to grant the Motion to Dismiss and dismiss the case. 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 16, 2014 HEARING

The court continued the hearing on the Trustee's Motion to Dismiss the Chapter 13 case from April 16, 2014, so that the instant matter may be heard in conjunction with the hearing on Debtors' Motion to Dismiss. Dckt. No. 253.

REVIEW OF THE MOTION

Trustee moves the court for an order dismissing this case pursuant to 11 U.S.C. § 1307 on multiple grounds.

First, Debtors are currently delinquent more than $6,000.00 under the terms of the confirmed plan. Debtor has paid a total of $22,250.00 to the Trustee, with the last payment received on December 9, 2013. The confirmed Plan, Dckt. No. 164, in Section 1.02, called for the proposed sale of real property located at 11905 Borden Road, Herald, California, by January 31, 2014, with the sales proceeds paid to the Trustee. No monies have been received. Debtors will be delinquent $7,500.00 if the April, 2014 scheduled payment is not received, based on the monthly payment alone. Debtor is in material default with respect to the terms of the confirmed plan pursuant to 11 U.S.C. § 1307(c)(6).

Debtors must be current under all payments called for by any pending Plan, Amended Plan, or Modified Plan as of the date of the hearing on this motion or the case may be dismissed. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Second, the Trustee reports that Debtors have also filed a subsequent Chapter 12 case, assigned to the Honorable Robert Bardwil, Bankr. E.D. Cal. Case No. 14-22483. It appears that the Debtors filed a Chapter 12 petition, before receiving a discharge under their Chapter 13 case, and before their Chapter 13 Plan has been substantially consummated. Case No. 14-22483. That case has been transferred to Department E, this court, as having the first filed case by these Debtors.

A comparison of Debtors' petitions, Schedules, Plan, in their Chapter 12 and Chapter 13 cases shows that Debtors are attempting to discharge the same debts, and that the proceedings cover the same property and assets claimed by Debtors as part of the bankruptcy estate. This is improper; the Debtors cannot have two pending bankruptcy proceedings in which they are seeking discharge of the same obligations. *Freshman v. Atkins*, 269 U.S. 121 (1925). The pendency of an application for discharge in prior bankruptcy proceedings will preclude discharge in a second voluntary proceeding, with respect to the same debts as listed in first proceeding. *Id.* at 123.

The Trustee also notes that "one other significant transfer to Debtor was identified previously in the case." Dckt. No. 237. The Trustee is referring to an opposition entered against Debtors' Objection to Claim, LRR-11. Debtors filed this Objection to a Proof of Claim on the grounds that Debtors' corporation, Oasis Ranch, Inc., is liable for the claim asserted and that the claim is not as personal debt of the Debtors. Dckt.

No 231. The Creditor opposed the objection, on the grounds that Oasis Ranch, Inc., is a corporation solely owned by the Debtors, and that a transfer of real estate effected by Debtor Marilyn Mowry (who transferred real property from Oasis Ranch, Inc. to herself) constituted a fraudulent conveyance of the property of the corporation. Dckt. No. 237.

The Trustee asks that the court grant an order dismissing this proceeding, unless the court finds cause to convert the matter to a Chapter 7 under 11 U.S.C. § 1307(c) to convert the case and finds that 11 U.S.C. § 1328(f) does not prevent such a conversion.

ORDER SETTING HEARING ON DEBTORS' MOTION TO DISMISS

On March 31, 2014, the Debtors filed an *ex parte* Motion to Dismiss their Chapter 13 Case. Dckt. No. 247. Upon reviewing the Motion, the court issued an Order Setting Hearing on Request for Dismissal of the Chapter 13 Petition, Dckt. No. 249. The court recognized that the Debtors's confirmed Chapter 13 Plan requires that the 11905 Borden Road Property shall be sold, with a motion to approve the sale and escrow to be opened within 180 days of the confirmed plan (order confirming filed on September 17, 2013). That 180-period expired in March 2014, without a motion to approve sale having been filed.

The court also noted that Debtors have filed a Chapter 12 case, Bankr. E.D. Cal. 14-22483, filed in *pro se.* The court has set a status conference and a hearing on the Debtors' motion to extend time for the filing of the Schedules and Statement of Financial Affairs in the Chapter 12 case for April 22, 2014. The Debtors have not attempted to amend the current Chapter 13 Plan which calls for the prompt sale of the Borden Road Property. The court set a hearing on Debtors' Motion to Dismiss on April 22, 2014, and ordered that the Chapter 13 Trustee, U.S. Trustee, Creditors, the Debtors, and any other parties in interest may file pleadings addressing whether it is proper and in the best interests of the Estate to dismiss this Chapter 13 case or if it should be converted to one under Chapter 7 to allow a Trustee to fulfill the substance of the obligations of the Debtor under the Chapter 13 Plan for the orderly marketing and sale of the Borden Road Property. Order, Dckt. No. 249.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.