UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

May 3, 2016 at 3:00 p.m.

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1. 16-20700-E-13 KECIA LAWSON — **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-2 Pro Se — **4-6-16 [24]**

Final Ruling: No appearance at the May 3, 2016 hearing is required.

The case having previously been dismissed, 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 having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is dismissed as moot, the case having been dismissed.

2. 14-28302-E-13 SHEILA RAY — **ORDER TO APPEAR**
Mohammad Mokarram — **3-25-16 [50]**

Final Ruling: No appearance at the May 3, 2016 hearing is required.

The matter having accidently docketed as a separate matter and the Order to Appear being addressed on the Debtor's Motion to Approve Loan Modification (Dckt. 36), **the Order to Appear is removed from calendar.**

3. 14-28302-E-13 SHEILA RAY **CONTINUED MOTION TO APPROVE**
MMM-2 Mohammad Mokarram **LOAN MODIFICATION**
1-28-16 [36]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 28, 2016. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Motion to Approve Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2).

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Sheila Ray ("Debtor") seeks court approval for Debtor to incur post-petition credit. Bank of America, N.A. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $1,100.19, which includes the principal, interest, and estimated escrow payments. The modified principal balance is $288,534.03.

The Motion is supported by the Declaration of Debtor. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

David Cusick, the Chapter 13 Trustee, filed a response to the instant

Motion on February 9, 2016. Dckt. 41. The Trustee states that he does not oppose the modification since it appears to be in the best interest of the Debtor. However, the Trustee notes that the loan modification is offered by Bank of America, N.A.

The Trustee states that Proof of Claim No. 1, filed on October 14, 2015, reports the creditor to be Deutsche Bank National Trust Company, as Trustee Under the Pooling and Servicing Agreement Relating to Impac Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2007-1. The Proof of Claim indicates that Bank of America, N.A. is the servicer.

A review of the information and the Proof of Claim shows that Bank of America, N.A. is not, in fact, the creditor but rather that "Deutsche Bank National Trust Company, as Trustee Under the Pooling and Servicing Agreement Relating to Impac Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2007-1" is the actual creditor. Even as of July 14, 2015, with the Notice of Mortgage Payment Change, Bank of America, N.A. indicates that it is the authorized agent of the actual creditor, here being Deutsche Bank National Trust Company as Trustee. Nothing in the Proof of Claim nor the Motion provides the grounds for Bank of America, N.A. to offer a loan modification on behalf of the real creditor.

The court will not authorize a loan modification when the real creditor is not named or when the agent of the creditor does not provide evidence that they are authorized to enter into loan modification on behalf of the real creditor.

While the court agrees with the Trustee and the Debtor that it appears that the loan modification would be in the best interest of the Debtor, the court will not authorize a "maybe effective" loan modification without the real creditor or a party with authority to do so, is presented.

FAILURE TO PROVIDE A BASIS FOR EXERCISE OF FEDERAL JUDICIAL POWER

The requirement to have the actual parties, with the actual rights, and the actual interests before the federal court is a long standing federal principle – dating back to the enactment of the Constitution itself. U.S. Const. Article III, Sec. 2. The federal courts are not a forum for the theoretical or one in which parties who do not have rights attempt to litigate on behalf of others who are not before the court (with limited exceptions to this rule, such as class action and other special representative proceedings authorized by Congress). Standing must be determined to exist before the court can proceed with the case. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771. (9th Cir. 2006); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055 (1997).

The standing requirement is not merely a "procedural issue," but a fundamental requirement arising under the Constitution.

Though this court has clearly addressed this issue for more than five years, it is still presented with motions such as this which seek relief against mere "place holder opponents," and not the real party in interest whose rights and interests are the subject of the action. This can lead to horrific events for a debtor (and the debtor's counsel and professional liability insurer) in this type of setting when no relief is obtained with respect to the

real party in interest. At best, after tens (if not hundreds) of thousands of dollars of litigation, the debtor (and debtor's counsel and professional liability insurer) might be able to prove that the relief was obtained for purposes of an undisclosed principal, and that such determination should be binding on good faith purchasers of the note years later. FN.1.

FN.1. This risk and liability of litigating against a "place holder opponent" becomes even more stark when one considers the misidentification occurring in connection to motions to value secured claims (11 U.S.C. § 506(a)) for purposes of a "lien strip" or an objection to claim.

Here, in reviewing the Proof of Service, it is clear that Deutsche Bank National Trust Company has not even been effectively served with the Motion and supporting pleadings. Dckt. 40. Debtor purports to have served a Richard Bauer in Santa Anna, California as being effective service on the actual creditor who is to be the party to the Motion. While Mr. Bauer is an attorney who represents Deutsche Bank National Trust Company in this bankruptcy case, there is no showing that he is the authorized agent for Deutsche Bank National Trust Company.

As noted by the Chapter 13 Trustee, Proof of Claim No. 1 clearly identifies Deutsche Bank National Trust Company, as Trustee, is the creditor having the claim in this case. That Proof of Claim was filed on October 14, 2014, well in advance of the filing of the present Motion on January 28, 2016.

Additionally, Deutsche Bank National Trust Company or its counsel has appeared in this case on several occasions: (1) August 20, 2014, request for special notice (by counsel Richard Bauer); (2) October 13, 2014, request for special notice (by counsel Alan Wolf, whose law firm appears to have replaced that of Mr. Bauer's); (3) December 10, 2014, Notice of Mortgage Payment Change (executed by an AVP of Bank of America, N.A. as the agent for Deutsche Bank National Trust Company, as Trustee; and (4) April 28, 2015, Notice of Mortgage Payment Change (executed by an AVP of Bank of America, N.A. as the agent for Deutsche Bank National Trust Company, as Trustee.

MISIDENTIFICATION OF CREDITOR IN ORIGINAL LOAN MODIFICATION AGREEMENT

However, the Loan Modification Agreement filed in support of the Motion does not purport to modify a loan with Deutsche Bank National Trust Company, as Trustee, but only modify some loan with Bank of America, N.A. Exhibit "Unnumbered," Dckt. 39. This Agreement appears to have been prepared by Bank of America, N.A. on Bank of America forms.

The cover page (Page 1 of 12) is titled "Modification Agreement (Servicer Copy)." On the first page of the Agreement (Page 2 of 12), in the upper left hand corner it is stated that "This document was prepared by Home Retention Service, Inc."

The only parties to and the terms of this Agreement are summarized as:

A. Borrowers.....Sheila D. Ray

B. Lender.....Bank of America, N.A.

C. Bank of America, N.A. modifies the obligation to.....$308,410.91

D. Bank of America, N.A. modifies the interest to be paid for the obligation to.....2%, which increases to 4%.

E. The Agreement supercedes prior agreement with Bank of America, N.A. concerning modification of the obligation.

F. Sheila D. Ray agrees to pay Bank of America, N.A. all of the amounts due as amended by the Agreement.

G. Agreement is signed by Sheila D. Ray.

H. Agreement is signed by Bank of America, N.A., as a principal without disclosure of any authority to act as an agent.

On multiple prior occasions Bank of America, N.A. has executed Notices of Mortgage Payment Change stating that it is merely an agent and not the creditor. Proof of Claim No. 1 has not been amended and there is no assignment of Proof of Claim No. 1 to Bank of America, N.A.

While most likely there has been an "innocent" preparation of a document which purports to have the less sophisticated consumer debtor enter into a loan modification agreement with a bank which is not a creditor, proper loan modification documentation is required. On a more ominous note, such misidentifications could lead a secondary or tertiary debt buyer to deny that there has been any modification of the loan (or such misidentification is intentional to spring the ineffective modification on the less sophisticated consumer debtor after years of payment and the debtor creating a significant equity in the property of the bank).

FEBRUARY 23, 2015 HEARING

At the hearing, the court noted that it would not deny the Motion, which might be mis-perceived as an excuse for Deutsche Bank National Trust Company, as Trustee, and Bank of America, N.A. as an excuse to revoke the loan modification.

Therefore, the court continued the hearing on the Motion to 3:00 p.m. on March 22, 2016.

MARCH 22, 2016 HEARING

To date, no supplemental papers had been filed by the Debtor nor any other party in interest.

As addressed above, purported Loan Modification Agreement states that a loan obligation owing by Debtor to ***Bank of America, N.A.*** is modified.

At the hearing, Debtor's counsel reported that no further information has been obtained. The court continued the hearing to 3:00 p.m. on May 3, 2016. Dckt. 47.

The court also issued the Order to Appear in connection with the

instant Motion for Bank of America, N.A., Deutsche Bank National Trust Company, as Trustee Under The Pooling And Servicing Agreement Relating To IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2007-1 ("Deutsche Bank National Trust Company, as Trustee"),Home Retention Services, Inc., with their respective counsel to appear and advise the court of the basis for Bank of America, N.A. entering into the Loan Modification Agreement with the Debtor in this case, which identifies Bank of America, N.A. as the creditor with the obligation being modified for a claim against the Debtor.

EX PARTE MOTION TO EXCUSE APPEARANCE OF DEUTSCHE BANK NATIONAL TRUST COMPANY

On April 19, 2016, Deutsche Bank National Trust Company, as Trustee, filed an Ex Parte Motion to Excuse Appearance at the continued hearing. Dckt. 56. The Ex Parte Motion states with particularity (Fed. R. Bank. P. 9013) the following grounds upon which the relief is requested:

A. "DBNTC has designated Ronaldo Reyes ("Reyes"), a vice president, to appear on its behalf. Reyes has provided with this motion a declaration regarding the authority of DBNTC to enforce the loan in questions."

B. "As to the loan modification issue, BANA has been granted contractual authority to provide loan modifications without need for further approval of DBNTC, the trustee of the loan trust which holds the loan of Debtor. PSA § 3.01, 3.07, Reyes Decl., Ex. A."

C. "Therefore, DBNTC cannot testify to the loan modification process or the terms offered."

D. "As to the issue of the identity of the claimant, it is DBNTC. The loan in question was conveyed to the Trust on or before February 22, 2007. Reyes Decl ¶ 3."

E. "DBNTC is the current claimant. Claim 1-1. Accordingly, no further testimony is needed as to this issue."

Ex Parte Motion, Dckt. 56.

While the Ex Parte Motion and Declarations of Deutsche Bank Nation Trust Company, as Trustee, assert that the ability to act to enforce the rights has contractually been placed in the Loan Servicer, it is the Declaration of Arsheen Littlejohn that hits the issue before the court – the identity of the creditor with whom the Debtor is modifying rights.

Bank of America, N.A., as the servicer for Deutsche Bank National Trust Company, as Trustee, having clarified and corrected the Loan Modification Agreement, the need to have other Deutsche Bank National Trust Company, as Trustee, Bank of America, N.A., and Home Retention Services, Inc. no longer exists.

In relieving Deutsche Bank National Trust Company, as Trustee, Bank of America, N.A., and Home Retention Services, Inc. from having to appear at the continued hearing, the court is confident that each fully understands the requirement that the real parties in interest to federal judicial proceedings and in the contracts to be entered into by creditors with debtors, and that the failure to identify such real party in interest and to such contracts will not occur in the future (whether in courts in this District or other Districts across the country).

In light of the foregoing, the court issued the following order:

> IT IS ORDERED that the appearances of Bank of America, N.A.; Deutsche Bank National Trust Company, as Trustee; and Home Retention Services, Inc.; their respective senior managers and their respective attorneys, and each of them, as required pursuant to the prior order of this court, Dckt. 50, is waived and such appearances at the continued hearing on the Debtor's Motion to Approve Loan Modification (DCN:MMM-2) are not ordered by the court.

SUPPLEMENTAL PAPERS

Deutsche Bank National Trust Company, as Trustee, Bank of America, N.A., and Home Retention Services, Inc. filed a reply brief on April 19, 2016. Dckt. 52.

Two declarations have been provided in support of the Brief. The first is by Arsheen Littlejohn, identified as "AVP Operation's Team Manager" at Bank of America, N.A. Dckt. 53. The second declaration is provided by Ronaldo Reyes, identified as a Vice President of Deutsche Bank National Trust Company. Dckt. 54.

In Paragraphs 11 and 12 of her Declaration, Ms. Littlejohn testifies that Bank of America, N.A. is entering into the contract as the agent of Deutsche Bank National Trust Company (using a power of attorney). Dckt. 53. Further, that a revised Loan Modification Agreement has been prepared in which this agency capacity is stated and that Bank of America, N.A. is executing the agreement for its principal – Deutsche Bank National Trust Company, as Trustee. Id.

The revised Loan Modification Agreement is attached to the Declaration of Ms. Littlejohn as Exhibit B. Key parts of the revised Loan Modification Agreement with respect to the parties who have a case or controversy (or rights) which are the subject of this proceeding in federal court (U.S. Const. Art. III, Sec. 2) include the following:

A. This Loan Modification Agreement ("Agreement"), effective on the date set forth below, between SHEILA DRAY, (the "Borrower(s)") and Bank of America, N.A., as servicer via a duly authorized power of attorney for Deutsche Bank National Trust Company, as Trustee ("Lender"),..."

B. "Bank of America, N.A., for itself or as successor by merger to BAC Home Loans Servicing, LP, as servicer via a duly authorized power of attorney for Detusche [sic] Bank National Truster Company, as Trustee.

By: Stewart Lender Services, Inc., its attorney in fact

By: _____

_____

Date

_____,Stewart Lender SerNices [sic], Inc.

Exhibit B, pp. 16, 26.

While the discussion of who has the right to enforce and negotiate is relevant, the critical issue for the court is that the Loan Modification Agreement correctly identify the party whose rights, as a creditor, are being modified. It is not Bank of America, N.A., but Deutsche Bank National Trust Company, as Trustee. That is now clearly stated in this Loan Modification Agreement.

DISCUSSION

As discussed *supra*, and with the supplemental papers filed by the Creditors, the court now has sufficient information to determine if the modification is in the best interest of the parties and the estate.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. 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 Sheila Ray 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 court authorizes Sheila Ray ("Debtor") to amend the terms of the loan with Deutsche Bank National Trust Company, as Trustee, which is secured by the real property commonly known as 6900 23rd Street, Sacramento, California, on such terms as stated in the Modification Agreement filed as Exhibit B in support of the Motion, Dckt. 53.

4. 15-28605-E-13 JODY/JOY SILVA
CA-4 Michael Croddy

MOTION TO VALUE COLLATERAL OF QUANTUM3 GROUP, LLC
4-13-16 [57]

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

5. 16-20005-E-13 BEVERLY BAUER **CONTINUED ORDER TO APPEAR**
George Bye **2-5-16 [27]**

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorneys, Chapter 13 Trustee, and Office of the United States Trustee on February 10, 2016. By the court's calculation, 41 days' notice was provided.

The Order to Appear was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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.

The Order to Appear is discharged and the hearing is concluded. It is further ordered that James L. Conkey pay $800.00 to the Clerk of the Court for bankruptcy fees received which were not approved by the court; and that George H. Bye pay $2,475.00 to the Chapter 13 Trustee to be held until his attorneys' fees are approved or other order of the court.

The court has issued this Order to Appear for James L. Conkey ("Attorney Conkey") to appear and address issues concerning his filing of bankruptcy cases in the Eastern District of California. The court discusses the Order to Appear, issues, and prior hearings on this Order in Part II of this Ruling. Part I of this Ruling addresses the issues, responses, and ruling after the May 3, 2016 Continued Hearing.

PART I
MAY 3, 2016 HEARING

On April 19, 2016, Attorney Conkey filed three declarations in a single pleading. Dckt. 65; see Local Bankr. R. 9014-1(d). This three separate declaration were improperly combined into one electronic document and filed with this court. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents requires that the motion/application/opposition, points and authorities, each declaration, and the exhibits (which exhibits may be combined into one document) be filed as separate documents. The court waives this defect in light of Attorney Conkey reporting to the court that he does not intend to practice in the Eastern District of California.

Case No. 16-20005 - Beverly Bauer Case

The first declaration addresses the fees received in case no. 16-20005, Beverly Bauer (the instant case). The declaration states the following:

> A. 5. Debtor engaged in a presentation agreement for litigation defense as a new client with this office on July 6, 2015. From that date until the date of this declaration, debtor has paid JLC Law Offices a total of $5,775.00 and has been refunded $500.00. Services provided to that debtor by JLC are as follows:
>
> B. Entered into home retention negotiations with debtors' lender, collected and submitted debtor documentation to lender for review.
>
> C. Submitted documentation to debtor's lender on August 4, 2015
>
> D. Entered into repayment and/or reinstatement negotiations with debtor's lender on October 13, 2015
>
> E. Referred debtor to external bankruptcy attorney for consultation on January 3, 2016
>
> F. Received debtor's confirmation of bankruptcy filing and obtained postponement of trustee's sale on November 19, 2005.
>
> G. Drafted and filed a Summons and Complaint in Sacramento County Superior Court on April 5, 2016
>
> H. Drafted and filed an Ex Parte TRO application in Sacramento County Superior Court on April 6, 2016.
>
> I. As of the date of this declaration, these matters are still pending.
>
> J. Attorney George Bye is the external attorney that we referred the debtor Beverly Bauer to with regards to a bankruptcy filing.
>
> K. Mr. Bye has been paid $2,475.00 as of the date of this declaration. We will seek court approval if more fees are required.

Dckt. 65.

Court's Review of File

In reviewing the file for the Pierson Bankruptcy Case, the court notes that there is no "external" bankruptcy attorney involved, but all of the bankruptcy representation was done by Attorney Conkey. Attorney Conkey:

> A. Signed the Petition. 16-20005, Dckt. 1 at 7.
> B. Untimely Filed Disclosure of Compensation of Attorney. *Id.*, Dckt. 46.

On the Statement of Financial Affairs and the untimely filed Disclosure

of Compensation (which was filed after being ordered by the court) Attorney Conkey asserts that he was paid nothing for filing the bankruptcy case. However, Attorney Conkey states that he was paid $5,775.00 for other related work, and has refunded $500.00 to the Debtor.

The court concludes that Attorney Conkey was paid a portion of the $5,775.00 for his representation of the debtor in the Bauer bankruptcy case. The court, upon review of what was filed, allocates 2.5 hours of time for that work, at a hourly rate of $250, for total bankruptcy fees of $625.00.

Attorney Conkey having refunded $500.00 to the Debtor, the court orders Attorney Conkey to pay $125.00 to the Clerk of the Bankruptcy Court on or before May 31, 2016, and the Clerk of the Court shall than disburse the $125.00 to debtor Beverly Joe Bauer as unauthorized attorneys' fees paid to Attorney Conkey.

Case No. 15-28988 - Beverly Bauer Case

The second declaration addresses the fees received in case no. 15-28988, Beverly Bauer. The declaration states the following:

A. Debtor engaged in a presentation agreement for litigation defense as a new client with this office on July 6, 2015. From that date until the date of this declaration, debtor has paid JLC Law Offices a total of $5,775.00 and has been refunded $500.00. Services provided to that debtor by JLC are as follows:

B. Entered into home retention negotiations with debtors' lender, collected and submitted debtor documentation to lender for review.

C. Submitted documentation to debtor's lender on August 4, 2015

D. Entered into repayment and/or reinstatement negotiations with debtor's lender on October 13, 2015

E. Referred debtor to external bankruptcy attorney for consultation on November 16, 2015

F. Received debtor's confirmation of bankruptcy filing and obtained postponement of trustee's sale on November 19, 2005.

G. Drafted and filed a Summons and Complaint in Sacramento County Superior Court on April 5, 2016

H. Drafted and filed an Ex Parte TRO application in Sacramento County Superior Court on April 6, 2016.

I. As of the date of this declaration, these matters are still pending.

J. Attorney George Bye is the external attorney that we referred the debtor Beverly Bauer to with regards to a bankruptcy filing.

K. Mr. Bye has been paid $2,475.00 as of the date of this declaration. We will seek court approval if more fees are required.

Dckt. 65.

Court's Review of File

The payment and reimbursement of unapproved attorneys fees with respect to debtor Beverly Joe Bauer are addressed in the discussion of the fees in case no. 16-20005.

Case No. 2015-14033, Jo Ann Pierson Case

The third declaration addresses the fees received in Case No. 15-14033, Jo Ann Pierson. The declaration states the following:

A. Debtor engaged in a presentation agreement for litigation defense as a new client with this office on August 20, 2015. From that date until the date of this declaration, debtor has paid JLC Law Offices a total of $6,221.25. Services provided to that debtor by JLC are as follows:

B. Entered into home retention negotiations with debtors' lender, collected and submitted debtor documentation to lender for review.

C. Drafted and filed a Summons and Complaint on October 6, 2015 in Tulare County Superior Court seeking the cancellation of the trustee's sale on debtor's home.

D. Drafted and filed an Ex Parte TRO application in Tulare County Superior Court on October 14, 2015

E. Appeared in Tulare Superior Court for Ex Parte TRO hearing on October 14, 2015. Hearing was contested and denied.

F. Referred debtor to external bankruptcy attorney for consultation on October 14, 2015

G. Received Notice of Removal from State Court to Federal Bankruptcy Court on November 11, 2015. Notice was filed by Defendants' attorney Mark S. Blackman.

H. Appeared for a Case Management Conference on March 2, 2016.

I. Filed and served a Request of Dismissal of Civil Case #VCU262833 on March 4, 2016

Dckt. 65.

Court's Review of File

In reviewing the file for the Pierson Bankruptcy Case, the court notes

that there is no "external" bankruptcy attorney involved, but all of the bankruptcy representation was done by Attorney Conkey. Attorney Conkey:

a. Signed the Petition. 15-14033, Dckt. 1 at 3.
b. Untimely Filed Disclosure of Compensation of Attorney. *Id.*, Dckt. 46.

On the Statement of Financial Affairs and the untimely filed Disclosure of Compensation (which was filed after being ordered by the court) Attorney Conkey asserts that he was paid nothing for filing the bankruptcy case. However, Attorney Conkey states that he was paid $3,840.00 for other related work. The court does not find that contention credible, especially in light of Attorney Conkey not being admitted to practice in the Eastern District of California, omitting only the Disclosure of Compensation, and the statements that Mr. Bye, the replacement counsel has been paid and will seek approval of fees only if he is to be paid more money.

The court concludes that Attorney Conkey was paid a portion of the $6,221.25 for his representation of the debtor in the Riggie bankruptcy case. The court, upon review of what was filed, allocates 2.5 hours of time for that work, at a hourly rate of $250, for total bankruptcy fees of $625.00.

The court orders Attorney Conkey to pay $625.00 to the Clerk of the Bankruptcy Court on or before May 31, 2016, and the Clerk of the Court shall than disburse the $625.00 to debtor Jo Ann Pierson as unauthorized attorneys' fees paid to Attorney Conkey.

Case No. 2015-28736, Paul Riggie Case

The fourth declaration addresses the fees received in Case No. 15-28736, Paul Reggie Pierson. The declaration states the following:

A. Debtor engaged in a presentation agreement for litigation defense as a new client with this office on May 29, 2015. From that date until the date of this declaration, debtor has paid JLC Law Offices a total of $3,840.00. Services provided to that debtor by JLC are as follows:

B. Entered into home retention negotiations with debtors' lender, collected and submitted debtor documentation to lender for review.

C. Drafted and filed a Summons and Complaint for unlawful foreclosure on August 13, 2015

D. Drafted and filed an Ex Parte TRO application in Sacramento County Superior Court on September 21, 2015

E. Received and reviewed Unlawful Detainer for debtor on September 25, 2015.

F. Researched and drafted an Answer to the Unlawful Detainer

G. Referred debtor to external bankruptcy attorney for consultation on November 9, 2015

H. Entered into negotiations with new property owner for lease-back option on December 22, 2015

I. Refunded all of Riggie's fees of $3,840 by February 25, 2016

Dckt. 65.

Court's Review of File

In reviewing the file for the Riggie Bankruptcy Case, the court notes that there is no "external" bankruptcy attorney involved, but all of the bankruptcy representation was done by Attorney Conkey. Attorney Conkey:

A. Signed the Petition. 15-28736, Dckt. 1 at 3.
B. Untimely Filed Disclosure of Compensation of Attorney. *Id.*, Dckt. 28.

On the Statement of Financial Affairs and the untimely filed Disclosure of Compensation (which was filed after being ordered by the court) Attorney Conkey asserts that he was paid nothing for filing the bankruptcy case. However, Attorney Conkey states that he was paid $3,840.00 for other related work. The court does not find that contention credible, especially in light of Attorney Conkey not being admitted to practice in the Eastern District of California, omitting only the Disclosure of Compensation, and the statements that Mr. Bye, the replacement counsel has been paid and will seek approval of fees only if he is to be paid more money.

The court concludes that Attorney Conkey was paid a portion of the $3,840.00 for his representation of the debtor in the Riggie bankruptcy case. The court, upon review of what was filed, allocates 2.5 hours of time for that work, at a hourly rate of $250, for total bankruptcy fees of $625.00.

However, Attorney Conkey has testified that all of the $3,840.00 in monies paid have been returned to that debtor, Paul Riggie. The monies paid having been refunded, the court does not order the payment of any other corrective sanctions.

PAYMENT AND RETENTION OF ATTORNEYS FEES BY ATTORNEY GEORGE H. BYE

In his declarations concerning the Bauer bankruptcy cases, Attorney Conkey testifies:

> "6. Attorney George Bye is the external attorney that we referred the debtor Beverly Bauer to with regards to a bankruptcy filing.
>
> Mr. Bye has been paid $2,475.00 a s of the date of this declaration. **We** will seek court approval **if more fees are required**."

Declarations; Dckt. 65 at 2, 4 (emphasis added).

This statement raises several concerns. First, Attorney Conkey is not

admitted to practice law in the Eastern District of California and he is not the Debtor's attorney. There is no reason why he, as part of "We" would be seeking approval of further fees for Mr. Bye. Attorney Conkey states that Mr. Bye is an "external" attorney.

Second, the Declarations manifest a gross misunderstanding of bankruptcy law and Local Bankruptcy Rules concerning Chapter 13 attorneys fees. See L.B.R. 2016-1(b). The attorney may not demand, or receive payment of fees without court authorization after the petition is filed. Here, Mr. Bye came on the scene after the case was filed. It appears that he and Attorney Conkey are asserting that Mr. Bye has been paid $2,475.00 in fees, that Mr. Bye will keep the $2,475.00 in fees, and that no court approval of fees is required. That is incorrect. Even if the fees for the Chapter 13 work were paid prior to filing the case, the fees must be held in the client trust account until the amount of fees are approved by the court. L.B.R. (a), (c).

Further, no Disclosure of Compensation or Rights and Responsibilities between Debtor Bauer and Mr. Bye, her attorney, have been filed. The only one filing the Disclosure and Rights and Responsibilities form is Attorney Conkey – who is not Debtor Bauer's attorney.

Therefore, the court orders George H. Bye, the Debtor Bauer's Attorney, to pay $2,475.00 to the Chapter 13 Trustee in this case on or before May 18, 2016, which monies the Trustee shall hold pending further order of the court.

REVIEW OF ORDER TO APPEAR AND PRIOR HEARING

ORDER TO APPEAR
AND REVIEW OF CONDUCT LEADING TO ISSUANCE

This Chapter 13 case was commenced by Beverly Joe Bauer ("Debtor Bauer") on January 4, 2016. The Debtor Bauer filed a skeletal petition. Dckt. 1. The final page of the petition contains a verification executed by James L. Conkey ("Attorney Conkey") as the Debtor Bauer's attorney in this bankruptcy case, stating that Attorney Conkey has informed the Debtor Bauer about eligibility under Title 11 and explained the relief available under each chapter of the Bankruptcy Code. Attorney Conkey signed this section as "Attorney for Debtor." *Id.* at pg. 7. This verification indicates that Attorney Conkey works at the firm of "JLC Law Offices" located in Newport Beach, California. *Id.* Attorney Conkey states that he is licensed to practice law in California, listing California State Bar Number 46616.

On January 20, 2016, the Debtor Bauer, in *pro se*, filed a "Motion to Extend Deadline to File Schedules." Dckt. 9. The Motion states the following:

> To: Clerk of the US Bankruptcy Court, Eastern District
> Re: Bankruptcy case number: 2015-14033-A-13
> Dear Clerk:
>
> This is a request for additional time to file my bankruptcy schedules. I am in the process of substituting a new Attorney who's admission to practice in the Eastern District is pending. If I could kindly have two or three days the issue will be resolved. Thank you for your attention in this matter.

Sincerely,
Beverly Bauer

January 19th, 2016

Dckt. 9.

Of note, the case number cited in the subject line indicates Case No. "2015-14033-A-13." Debtor Bauer's case number in the instant case is 2016-20005-E-13. A search of this other case number indicates that it is the bankruptcy case number for the Chapter 13 case filed by Jo Ann Pierson on October 15, 2015, in this District. As discussed below, Attorney Conkey, counsel for Debtor Bauer in this case, is also the counsel who filed the Chapter 13 case for Jo Ann Pierson.

The judge in the Jo Ann Pierson case contacted the undersigned judge concerning a discovery that Attorney Conkey is not admitted to practice law in the Eastern District of California. A review of the United States District Court's website discloses that Attorney Conkey is not admitted to practice in the Eastern District of California.

This led the court to further review of the files of this court to determine if Attorney Conkey was purporting to represent other debtors or parties in interest in other bankruptcy or district court cases in the Eastern District of California. The information from the courts' files is discussed below.

Additionally, the court also notes that in the instant case as well as other bankruptcy cases filed by Attorney Conkey in which he represented debtors, that he either did not file the required disclosure of attorney's fees (Fed. R. Bankr. P. 2016(b)) or stated conflicting information as to whether fees have been paid.

ORDER FOR ATTORNEY CONKEY TO APPEAR

On February 5, 2016, the court issued the following Order to Appear:

> In light of the foregoing, the court finds it necessary to order Attorney Conkey to appear before the court to provide explanation for the court's concerns over his failure to disclose compensation and failure to properly be admitted to appear in the Eastern District. Additionally, that Attorney Conkey file in each the Debtor Bauer, Debtor Pierson, and Debtor Riggie bankruptcy cases: (1) amended Disclosures of Compensation accurately stating the monies received or agreed to be paid (Form B203); and (2) a supporting declaration by Attorney Conkey disclosing all payments of monies or agreements to pay money made, for any services to be provided to that debtor, during the period commencing one year prior to the filing of the bankruptcy case and ending on the date the declaration is signed by Attorney Conkey.
>
> Therefore, upon review of the files in this case, the unrelated Chapter 13 bankruptcy cases which Attorney Conkey filed for debtors by Attorney Conkey, and good cause appearing;

IT IS ORDERED that Attorney Conkey appear at **3:00 p.m. on March 22, 2016**, in person, in Department E of the United States Bankruptcy Court, 501 I Street, Sixth Floor, Sacramento, California, with no telephonic appearances permitted for Attorney Conkey.

IT IS FURTHER ORDERED that on or before **February 28, 2016**, Attorney Conkey shall file an amended Disclosure of Compensation of Attorney For Debtor (From B203) which accurately discloses all compensation required by said form and a declaration of Attorney Conkey disclosing all payments of monies or agreements to pay money for any services to be provided to that debtor, during the period commencing one year prior to the filing of the bankruptcy case and ending on the date the declaration is signed by Attorney Conkey for each of the following cases:

A. In re Beverly Joe Bauer, 16-20005;
B. In re Beverly Bauer, 15-28988;
C. In re Paul Riggie, 15-28736; and
D. In re Jo Ann Pierson, 15-14033.

IT IS FURTHER ORDERED that Attorney Conkey shall file with the court in this case exhibits consisting of the Disclosure of Compensation forms and declaration in each of the four above identified cases, as well as any other responses determined proper by Attorney Conkey, on or before **February 18, 2016**. The Exhibits and any other response pleadings shall be served on the Chapter 13 Trustees in the respective cases and the U.S. Trustee, attn: Antonia Darling, Esq., 501 I Street, Suite 7-500, Sacramento, California 95814. Responses, if any, of other parties in interest to this Order or the Exhibits and Responses filed by Attorney Conkey shall be filed and served on or before **March 4, 2016**. Replies, if any, by Attorney Conkey shall be filed and served on or before **March 11, 2016**.

IT IS FURTHER ORDERED that the Clerk of the Court shall not close this bankruptcy case except upon further order of the court.

Dckt. 27.

REQUIREMENT TO BE ADMITTED TO THE BAR FOR EASTERN DISTRICT OF CALIFORNIA

In order to appear in proceedings before the United States District Court or the United States Bankruptcy Court for the Eastern District of California Bankruptcy Courts, an attorney must not only be a member of good standing of the California State Bar, but also admitted to the bar for this District. The District Court Local Rules specify the requirements for admission to the Bar for the Eastern District of California bar. Specifically,

Local Rule 830 states:

> (a) Admission to the Bar of this Court. Admission to and continuing membership in the Bar of this Court are limited to attorneys who are active members in good standing of the State Bar of California.
>
> > (1) Petition for Admission. Each applicant for admission shall present to the Clerk an affidavit petitioning for admission, stating both residence and office addresses, the courts in which the applicant has been admitted to practice, the respective dates of admissions to those courts, whether the applicant is active and in good standing in each, and whether the applicant has been or is being subjected to any disciplinary proceedings. Forms will be furnished by the Clerk and shall be available on the Court's website.
> >
> > (2) Proof of Bar Membership. The petition shall be accompanied by a certificate of standing from the State Bar of California or a printout from the State Bar of California website that provides that the applicant is an active member of the State Bar of California and shall include the State Bar number.
> >
> > (3) Oath and Prescribed Fee. Upon qualification the applicant may be admitted, upon oral motion or without appearing, by signing the prescribed oath and paying the prescribed fee, together with any required assessment, which the Clerk shall place as directed by law with any excess credited to the Court's Nonappropriated Fund.

The District Court for the Eastern District of California maintains a database of attorneys who are active members in the Eastern District and permitted to appear.

FN.1. http://www.caed.uscourts.gov/caednew/index.cfm/attorney-info/attorney-admission-search/

Once admitted to appear in the Eastern District, the Local Bankruptcy Rules requires that "all documents shall be submitted for filing in electronic form in strict compliance with the instructions of the Clerk in a format approved by the court," with certain exceptions not applicable to the cases at hand. Local Bankr. R. 5005-1.

COMPENSATION FOR CHAPTER 13 ATTORNEYS

For attorneys admitted to the Bar for the Eastern District of California who represent debtors, the Local Bankruptcy Rules ("L.B.R.") provide two alternative methods by which fees may be allowed and paid to a debtor's attorney in Chapter 13 cases. One fee structure for a Chapter 13 debtor's attorneys is colloquially referred to as a "no-look fee." This fee structure, established after substantial input from the Bar, allows the attorney to accept a fixed fee not to exceed $4,000.00 in nonbusiness cases and $6,000.00 in business cases. L.B.R. 2016-1(c). (This Rule allows additional fees for substantial and unanticipated work by debtor's counsel, to ensure that fair

compensation is allowed based on unique circumstances of a case.) This "no-look fee" allows the debtor attorney to establish a profile for the types of cases he or she takes, collecting a fixed fee which in some cases may result in a slightly higher hourly rate and in some cases a slightly lower hourly rate based on the actual time on the specific case, but one that averages out and allows counsel the cost and expense of filing detailed, hourly, lodestar fee applications. (This is similar to the commission nature of trustee's fees in bankruptcy cases.)

The Bankruptcy Code requires that the attorney for a debtor disclose a statement of compensation paid or agreed to be paid, if such payment was agreed to or made within one year of the bankruptcy filing, for services rendered by counsel. 11 U.S.C. § 329(a). Federal Rule of Bankruptcy Procedure 2016 provides the methodology for debtor's counsel to disclose such statement accurately regarding the compensation paid or promised to be paid to debtor's counsel:

> (b) Disclosure of compensation paid or promised to attorney for debtor
>
> **Every attorney for a debtor**, whether or not the attorney applies for compensation, **shall file** and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, **the statement required by § 329** of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The **statement shall include the particulars** of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Federal Rule of Bankruptcy Procedure 2016(b) [emphasis added].

DISCUSSION

The court begins its discussion of Attorney Conkey's conduct in this and other cases in this District with a review of the cases in which Attorney Conkey has filed on behalf of debtors.

Cases Filed by Attorney Conkey in the United States Bankruptcy Court for the Eastern District of California

A search of the court's database shows that Attorney Conkey has filed and is stated to be the attorney of record for debtors for four cases in this District as follows:

1. Jo Ann Pierson, Case No. 2015-14033
   a. Chapter 13 Case
   b. Filed on October 15, 2015
   c. Dismissed on January 19, 2016

Jo Ann Pierson's Bankruptcy Case Summary

Prior to the dismissal, Debtor Pierson filed a skeletal petition on October 15, 2015. Dckt. 1. Attorney Conkey indicated that he was the attorney for Debtor Pierson. Id., pg. 3.

On October 29, 2015, Debtor Pierson, through Attorney Conkey, filed a Motion to Extend Time to File Schedules and Statement of Financial Affairs as Required by Bankruptcy Rule 1007." Dckt. 9. The Motion, in relevant part, states that the extension is necessary to "ensure the accuracy of the Schedules." Case no. 2015-14033-A-13, Dckt. 9, pg. 2. The Motion is signed by Attorney Conkey. Of note, the case manager for this case indicated on October 29, 2015 that the Motion, filed by Attorney Conkey, was "not electronically submitted per LBR."

The court granted the extension on October 31, 2015, and ordered that the missing documents be filed by November 12, 2015. Case No. 2015-14033-A-13, Dckt. 14.

On November 11, 2015, Debtor Pierson filed the remaining schedules. Notably missing from the schedules is a Disclosure of Attorney Compensation. On Debtor Pierson's Statement of Financial Affairs, Question 9, Debtor Pierson indicated that no payments to debt counseling or bankruptcy has been made within one year immediately preceding the commencement of this case. Case No. 2015-14033-A-13, Dckt. 18, pg. 24.

Reviewing Debtor Pierson's Chapter 13 Plan filed on November 12, 2015, the Plan states in Section 2.06 entitled "Debtor's attorney's fees" that "Debtor's attorney of record was paid $<u>in full</u> prior to the filing of the case." Case No. 2015-14033-A-13, Dckt. 20.

The Plan and the Statement of Affairs provide conflicting information as to whether Debtor Pierson has paid any monies to Attorney Conkey for services in connection with the bankruptcy case. Attorney Conkey failed to file Disclosure of Compensation of Attorney for Debtor, Form B203. Furthermore, the Debtor and Attorney Conkey failed to file required Form EDC 3-096, *Rights of Responsibilities of Chapter 13 Debtors and Their Attorneys*.

2. Paul Riggie, Case No. 2015-28736

a. Chapter 13 Case
b. Filed on November 10, 2015
c. Dismissed on December 2, 2015

<u>Paul Riggie Bankruptcy Case Summary</u>

Prior to the dismissal, Debtor Riggie filed a skeletal petition on November 10, 2015. Case No. 2015-28736, Dckt. 1. Attorney Conkey stated that he was the attorney for Debtor Riggie. *Id.*, pg. 3. Of note, the case manager for this case indicated on November 10, 2015 that the petition, filed by Attorney Conkey, was "not electronically submitted per LBR."

On November 13, 2015, the court issued a Notice of Incomplete Filing and Notice of Intent to Dismiss Case if Documents are Not Timely Filed. Case No. 2015-28736, Dckt. 7. The Notice gave Debtor Riggie a deadline of November 24, 2015, to file the remaining documents, which consisted of all of Debtor Riggie's schedules, proposed plan, Attorney's Disclosure Statement, and Statement of Financial Affairs. *Id*.

Debtor Riggie and Attorney Conkey failed to file the missing documents by the November 24, 2015 deadline. The court issued an Order Dismissing Case For Failure to Timely File Documents on December 2, 2015. *Id.*, Dckt. 14.

On December 4, 2015, Debtor Riggie, through Attorney Conkey, filed the missing documents. *Id.*, Dckt. 19. Included in the filing is the Disclosure of Compensation of Attorney for Debtor, Form B203. *Id.*, Dckt. 19, pg. 21. The Disclosure states:

> "For legal services, [Attorney Conkey] have agreed to accept.....$2,500.00
> Prior to filing of this statement,[Attorney Conkey has] received.....$2,500.00
> Balance Due.....$0.00

Id.

However, conflicting with this Disclosure, Debtor Riggie, with the assistance of Attorney Conkey, states under penalty of perjury in the Statement of Financial Affairs, Question 9, that Debtor Riggie has not made any payments to debt counseling or bankruptcy within one year immediately preceding the commencement of this case. *Id.*, Dckt. 19 at 26. Furthermore, the Debtor Riggie and Attorney Conkey failed to file a Form EDC 3-096, *Rights of Responsibilities of Chapter 13 Debtors and Their Attorneys*.

Debtor Riggie and Attorney Conkey chose not to file a Motion to Vacate the Dismissal, even though Debtor and Attorney Conkey filed the missing documents two days after the deadline stated in the Notice of Intent to Dismiss.

On January 13, 2016, the Order Approving Final Report and Discharging Trustee and the Order Closing Dismissed Case was entered. *Id.*, Dckt. 26 and 27.

3. Beverly Bauer, Case No. 2015-28988

a. Chapter 13 Case
b. Filed on November 19, 2015
c. Dismissed on December 7, 2015

Beverly Bauer's Bankruptcy Case Summary

In a prior bankruptcy case, Debtor Bauer filed a skeletal petition on November 19, 2015. Case No. 2015-28988, Dckt. 1. Attorney Conkey stated that he was the attorney for Debtor Bauer. *Id.* at 3. The court notes that the bankruptcy case manager for this case indicated that on November 19, 2015, the petition, filed by Attorney Conkey, was "not electronically submitted per LBR."

On November 23, 2015, the court issued a Notice of Incomplete Filing and Notice of Intent to Dismiss Case if Documents are Not Timely Filed. *Id.*, Dckt. 7. The Notice gave Debtor Bauer a deadline of December 3, 2015, to file the remaining documents, which consisted of all of Debtor Bauer's schedules, proposed plan, Attorney's Disclosure Statement, and Statement of Financial Affairs. *Id.*

Debtor Bauer and Attorney Conkey failed to file the missing documents by the December 3, 2015 deadline. The court issued an Order Dismissing Case For

Failure to Timely File Documents on December 7, 2015. *Id.*, Dckt. 9.

4. Beverly Joe Bauer, Case No. 2016-20005 (Instant Case)
a. Chapter 13 Case
b. Filed on January 4, 2016

Beverly Joe Bauer's Second Bankruptcy Case Summary

As discussed *supra*, Debtor Bauer filed a subsequent case on January 4, 2016. Case No. 2016-20005, Dckt. 1. Once again, Debtor Bauer, through Attorney Conkey, filed a skeletal petition.

On January 6, 2016, the court issued a Notice of Incomplete Filing and Notice of Intent to Dismiss Case if Documents are Not Timely Filed. *Id.*, Dckt. 7. The Notice gave Debtor Bauer a deadline of January 19, 2016, to file the remaining documents, which consisted of all of Debtor Bauer's schedules, proposed plan, Attorney's Disclosure Statement, and Statement of Financial Affairs. *Id.*

On January 20, 2016, the Debtor Bauer filed a "Motion to Extend Deadline to File Schedules." Case No. *Id.*, Dckt. 9. On January 21, 2016, the court granted the Motion, extending the deadline to February 3, 2016. *Id.*, Dckt. 11.

Attorney Conkey Is Not Admitted to the Bar of the United States District Court for the Eastern District of California

The court has searched the District Court website's database to determine if Attorney Conkey is admitted to practice in the Eastern District of California. When the court searched using the name "Conkey," no results appear. According to the record of the United States District Court for the Eastern District of California, Attorney Conkey is not admitted to the Bar for the Eastern District of California and is not admitted to practice in this District.

FN.1.
http://www.caed.uscourts.gov/wconnect/wc.dll?caedprocess~Attorney_Lookup~&tbxLastName=Conkey&tbxFirstName=J

Adding further concerns, the court researched to see if Attorney Conkey at any point in time attempted to apply for the ability to electronically file using the District's docketing system. The court uncovered that on October 14, 2015, Attorney Conkey submitted a "New eFiler Registration" to acquire login information to electronically file documents. This request was denied because Attorney Conkey was not, and remains not, admitted to practice in the Eastern District.

However, even in light of this denial, Attorney Conkey has proceeded to represent debtors and filed bankruptcy cases in the Eastern District of California for debtors in four bankruptcy cases since his application for e-filing access – three of which were filed following the denial of Attorney Conkey's application due to the fact he is not admitted to practice in the Eastern District.

It appears to the court that Attorney Conkey, even though having knowledge that he is required to file documents electronically and that he must be admitted to the Bar for the Eastern District of California to appear in this District, Attorney Conkey disregarded such requirement and intentionally filed bankruptcy cases for debtors.

Attorney Conkey appears to have achieved this by circumventing the electronic filing of documents requirement, and, instead, hand delivered the pleadings to the court for filing. In doing so, Attorney Conkey appears to have exploited the Clerk's Office obligation to accept documents for filing, leaving it to the judges to address any such misconduct by an attorney. Even though the Clerk accepted the documents, the Clerk notified Attorney Conkey that he was required to electronically file documents on repeated occasions.

Attorney Conkey has Failed to File Accurate Disclosures of Compensation

The court notes that in three out of the four cases, Attorney Conkey has failed all together to file any required disclosures of compensation. The other case filed by Attorney Conkey, while providing a disclosure of compensation, offers conflicting information over whether the debtor had, in fact, paid the fees.

In the two cases of Debtor Bauer, Attorney Conkey indicated on the Statement of Financial Affairs that the debtor in each of those cases did not pay any form of monies in attorney's fees within the year preceding in contemplation of filing bankruptcy. However, in these cases, Attorney Conkey failed to file a required disclosure of compensation paid and failed to file a plan to indicate if fees, if any, were to be paid for representing Debtor in those bankruptcy cases.

In Debtor Riggie's case, Attorney Conkey did file both a Disclosure and Statement of Financial Affairs. However, in conflict with the Disclosure, Debtor Riggie, with the assistance of Attorney Conkey, states under penalty of perjury in Statement of Financial Affairs, Question 9, that Debtor Riggie has not made any payments to debt counseling or bankruptcy within one year immediately preceding the commencement of this case. Case No. 2015-28736, Dckt. 19, pg. 26.

In Debtor Pierson's case, the Statement of Financial Affairs, Question 9, states under penalty of perjury that no payments to debt counseling or bankruptcy has been made within one year immediately preceding the commencement of this case. Case No. 2015-14033-A-13, Dckt. 18, pg. 24.

However, reviewing Debtor Pierson's Chapter 13 Plan filed on November 12, 2015, the Plan states in Section 2.06 entitled "Debtor's attorney's fees" that "Debtor's attorney of record was paid $<u>in full</u> prior to the filing of the case." Case No. 2015-14033-A-13, Dckt. 20.

Consequently, the Plan and the Statement of Affairs provide conflicting information as to whether Debtor Pierson has paid any monies to Attorney Conkey for services in connection with the bankruptcy case.

This raises additional concerns in the sense that it appears that Attorney Conkey is actively attempting to avoid filing disclosures of his

compensation, as required by both Local Rules and Federal Rules of Bankruptcy Procedure. In each of the four cases, Attorney Conkey does not indicate on any of the Statements of Financial Affairs that any fees have been paid by the debtor for attorney compensation in connection with the bankruptcy. However, at least in Debtor Pierson's and Debtor Riggie's cases, subsequent information, noted in the Plan and Disclosure respectively, indicate that Attorney Conkey had been paid in full prior to filing.

This inconsistent information mixed with the fact that Attorney Conkey failed to file necessary disclosures concerns the court over whether Attorney Conkey, in an attempt to receive compensation in matters that he is not admitted to appear on, wilfully intended to not file disclosures of compensation and to appear without being properly admitted.

DEBTOR'S RIGHTS AND RESPONSIBILITIES

On February 27, 2016, Attorney Conkey filed the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys." Dckt. 35. The Rights and Responsibility (identified as Form EDC 3-096) states, in the final paragraph before the signatures:

> Initial fees charged in this case are $4000.00 and of this amount $495.0 was paid by the Debtor before the filing of the petition.

The form is signed by typing both the Debtor's and Attorney Conkey's name, and is dated February 20, 2016, forty-seven days after this bankruptcy case was filed. .

Attorney Conkey also filed the Disclosure of Compensation of Attorney for Debtor. The Disclosure states the following:

> Pursuant to 11 U.S.C. § 329(a) and Fed. Bank. P. 2016(b), I certify that I am the attorney for the above named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:
>
> For legal services, I have agreed to accept.....$4,000.00
> Prior to the filing of this statement I have received...$4,000.00
> Balance Due.....$0.00

Based on the above documents, Attorney Conkey states that he has been paid $4,000.00 by Debtor to represent her in this bankruptcy case in the Eastern District of California - which is a legal impossibility because Attorney Conkey is not admitted to practice in the Eastern District of California.

MARCH 22, 2016 HEARING

At the March 22, 2016 hearing James L. Conkey appeared, represented by George Bye, an attorney who also seeks to represent the Debtor in this case. It was explained to the court that George Bye, another California attorney, has

come out of retirement to work with James L. Conkey on various matters, including this case. Beverly Bauer, the Debtor, was also in attendance at the hearing.

Mr. Conkey and Mr. Bye explained that Mr. Conkey had returned monies to the clients in the bankruptcy cases for the bankruptcy work done. However, it was clear that Mr. Conkey had returned all monies paid - stating that some monies paid was for work other than the bankruptcy cases. Mr. Conkey had not filed declarations in each of the bankruptcy cases, apparently believing that the Statement of Compensation filed in the cases was sufficient.

The court continues the hearing for Mr. Conkey to prepare and file his declarations accounting for all monies paid to him in each of the bankruptcy cases identified in the prior year as set forth in the Order to Appear.

It was also disclosed that the fee arrangement in the present case is for Mr. Conkey to pay Mr. Bye's attorneys' fees for representing the Debtor in this case. No such fee disclosure has been made and no such fee arrangement has been approved by the court. In addition to the declarations, a motion for approval of the fee agreement with Mr. Bye must be filed by April 19, 2016.

In reviewing the present case and considering Attorney George Bye representing the Debtor and appearing for Attorney James L. Conkey, as well as the heretofore prosecution of this and the Debtor's prior case, the court notes that the Chapter 13 Plan consists of using the bankruptcy process to cure the Debtor's arrearage on her home mortgage over 36 months of the plan, make the current mortgage payment, and pay 100% of approximately $1,450.00 in general unsecured claims. While the track record of Attorney James Conkey has not been positive in this District, it appears that he and Attorney George Bye are taking steps to provide for the Debtor in this case.

At the hearing, the court continued the Order to Show Cause to 3:00 p.m. on May 3, 2016. The court issued the following order continuing the hearing:

> **IT IS ORDERED** that the hearing on the Order to Appear is continued to 3:00 p.m. on May 3, 2016. Telephonic appearances for the continued hearing for all persons is permitted.
>
> **IT IS FURTHER ORDERED** that on or before April 19, 2016; the following shall be filed and served on the U.S. Trustee and the Chapter 13 Trustee:
>
> A. The Declarations by Attorney James L. Conkey in this case; the *Jo Ann Pierson Case*, No. 2015-14033; the *Paul Riggie Case*, No. 2015-28736; and the *Beverly Bauer Case*, No. 2015-28988; which shall disclose all payments of monies or agreements to pay money made, by the debtor in each case or any other person, for any services to be provided to that debtor, during the period commencing one year prior to the filing of the bankruptcy case and ending on the date the declaration made pursuant to this Order is signed by Attorney James L. Conkey.
>
> B. A motion for approval of the fee agreement and arrangement for payment of the attorneys' fees and

expenses for Attorney George Bye in this case. See L.B.R. 2016-1.

Dckt. 67.

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 Appear 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 Appear is discharged and the matter is removed from the calendar.

IT IS FURTHER ORDERED that James Conkey shall:

A. Pay $125.00 to the Clerk of the Court on or before May 31, 2016, which monies represent the balance of the unauthorized fees paid to Mr. Conkey for his representation of Beverly Joe Bauer in bankruptcy case No. 16-20005. The Clerk of the Court shall, after the payment has cleared, disbursed the $125.00 to Beverly Joe Bauer.

B. Pay $625.00 to the Clerk of the Court on or before May 31, 2016, which monies represent the balance of the unauthorized fees paid to Mr. Conkey for his representation of Jo Ann Pierson in bankruptcy case No. 15-14033. The Clerk of the Court shall, after the payment has cleared, disbursed the $125.00 to Jo Ann Pierson.

IT IS FURTHER ORDERED that on or before May 18, 2016, George H. Bye, successor attorney for Beverly Joe Bauer in bankruptcy case no. 16-20005, shall pay $2,475.00 to the Chapter 13 Trustee in this case, which monies represent the monies paid, but not authorized by the court, to Mr. Bauer for his future representation of Debtor Bauer in this case. The Chapter 13 Trustee shall hold the $2,475.00 for disbursement to Mr. Bye for attorneys' fees approved by the court, or if in excess of approved attorneys' fees, as otherwise provided for payment of monies through the Chapter 13 Plan in this case.

6. 16-20005-E-13 BEVERLY BAUER **CONTINUED MOTION TO CONFIRM PLAN**
George Bye **2-3-16 [18]**

Final Ruling: No appearance at the May 3, 2016 hearing is required.

The court previously issued an order denying the Motion to Confirm which was issued March 23, 2016. Dckt. 48.

On March 12, 2016, the Debtor filed a First Amended Plan. Dckt. 40. The only correction in the amended plan and the original plan filed on February 3, 2016 is that the Debtor has now put 0% for interest rate on arrears as to the Class 1 Creditor. However, the Debtor failed to file an accompanying Motion to Confirm the Amended Plan nor set a hearing for confirmation of the first amended plan. L.B.R. 3015-1(d).

On April 2, 2016, the Debtor filed a second amended plan. Dckt. 54. On April 4, 2016, the Debtor filed a Notice of Continued hearing, resetting the Motion to Confirm that the court previously denied back on calendar. This is improper. As with the first amended plan, the Debtor failed to file an accompanying Motion to Confirm the Second Amended Plan nor set a hearing for confirmation of the second amended plan. L.B.R. 3015-1(d). It is not permissible to "renew" a prior Motion to Confirm on a newly filed amended plan.

Therefore, because the court had previously denied the Motion to Confirm and the Debtor has failed to properly file and serve a new Motion to Confirm the Second Amended plan, **this calendar entry is removed from calendar.**

7. 16-21105-E-13 REX GARDNER
DEF-1 David Foyil

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.
4-18-16 [17]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 18, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Value secured claim of Bank of America, N.A.,("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Rex Gardner ("Debtor") to value the secured claim of Bank of America, N.A., ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 467 Solstice Circle, Diamond Springs, California ("Property"). Debtor seeks to value the Property at a fair market value of $197,000.00 as of the petition filing date. As the owner, 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 valuation of property which secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (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.

11 U.S.C. § 506(a) [emphasis added]. For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2; case or controversy requirement for the parties seeking relief from a federal court.

No Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor which appears to be for the claim to be valued.

No Opposition

Creditor has not filed an opposition.

Discussion

The senior in priority first deed of trust secures a claim with a balance of approximately $205,562.12. Creditor's second deed of trust secures a claim with a balance of approximately $40,467.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. 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 Rex Gardner ("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 Bank of America, N.A., secured by a second in priority deed of trust recorded against the real property commonly known as 467 Solstice Circle, Diamond Springs, 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 $197,000.00 and is encumbered by senior liens securing claims in the amount of $205,562.12, which exceed the value of the Property which is subject to Creditor's lien.

8. 13-31706-E-13 RUDOLPH JUGOZ
SJS-4 Matthew DeCaminada

MOTION TO EMPLOY RE/MAX GOLD AS BROKER(S) AND/OR MOTION FOR COMPENSATION FOR RE/MAX GOLD, BROKER(S)
4-18-16 [88]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 18, 2016. By the court's calculation, 15 days' notice was provided.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Employ is granted.

Rudolph Delmar Jugoz ("Debtor") seeks to employ real estate broker, RE/MAX Gold pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Broker to assist the Debtor to establish the fair market value of the property commonly known as 10650 Calvine Road, Sacramento, California ("Property").

The Debtor filed a Motion to Shorten Time for the instant Motion and

the Motion to Sell. The court set the hearing on both matters for 3:00 p.m. on May 3, 2016. Dckt. 103.

The Debtor argues that Broker's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding the present sale of the Property and for the Broker to procure and submit all purchase offers.

Beverly Kendall, an broker of RE/MAX Gold, testifies that she is representing in the listing and selling of the Property. Ms. Kendall testifies she and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The Debtor also requests that the court authorize the payment of the real estate broker's commission of $30,750.00.

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.

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.

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ RE/MAX GOLD as broker for the Debotr estate on the terms and conditions set forth in the Residential Listing Agreement filed as Exhibit A, Dckt. 92. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted and the Debtor is authorized to employ RE/MAX Gold as broker for

the Debtor on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit A, Dckt. 92.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by broker in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

9. 13-31706-E-13 RUDOLPH JUGOZ **MOTION TO SELL**
SJS-5 Matthew DeCaminada **4-19-16 [94]**

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

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

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

Local Rule 9014-1(f)(3) 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, creditors, parties requesting special notice, and Office of the United States Trustee on April 18, 2016. By the court's calculation, 15 days' notice was provided.

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Sell Property is ----------.

The Bankruptcy Code permits the Chapter 13 Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to sell the "Property" described as follows:

A. 10650 Calvine Road, Sacramento, California

The proposed purchaser of the Property is Arrachone and Tracy Baril and the terms of the sale are:

1. Purchase prove of $615,000.00

2. The sale price is all cash.

3. The sale of the Property will net proceeds for the benefit of creditors beyond the current claim of exemptions of the Debtor

4. The propose sale is a short sale.

LIMITED OPPOSITION OF WELLS FARGO BANK, N.A.

Wells Fargo Bank, N.A. ("Creditor") filed a limited opposition to the instant Motion on April 22, 2016. Dckt. 105. The Creditor states it has no opposition to the Motion "so long as any and all amounts secured by Creditor's Deed of Trust is paid in full through escrow and Creditor retains its lien on the Property until the Loan is paid in full."

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on April 26, 2016. Dckt. 106.

The Trustee states that he does not oppose the Motion on the terms of the sale. However, the Trustee notes that the Debtor in the Motion states that it is a short sale but the Settlement Statement indicates that the Debtor is to receive proceeds in the amount of $149,662.52 from the sale.

The Trustee believes the Debtor intends for the Trustee to receive some of the proceeds to apply to Debtor's case. The Trustee calculates that approximately $76,000.00 of the proceeds would be sufficient to conclude the Debtor's plan at 100% to all filed and allowed claims (with the Creditor being paid through the sale.). This would allow for 2-months of interest for the vehicles being paid through the plan. A stipulation was filed February 9, 2016 regarding a Franchise Tax Board post-petition debt.

Trustee asserts that the Debtor needs to clarify if the Motion is to request a sell or short sell of the Property.

DECLARATION OF REAL ESTATE SALESPERSON

On April 27, 2016, Dough Watson, a licensed real estate salesperson, filed the instant Declaration in support of the Motion. Dckt. 108.

Mr. Watson states that the Sales Agreement of the Property is attached as Exhibit C. Dckt. 109. Mr. Watson restates that the purchase price of the Property is $610,000.00.

DISCUSSION

The court has similar concerns as the Trustee. The Debtor's Motion offers conflicting information as to whether the sale is a short sale or not.

In paragraph 6 of the Motion, the Debtor states that "The sale of the Property will net proceeds for the benefit of creditors beyond the current claim of exemptions of the Debtor." Dckt. 94, ¶ 6.

Then, in paragraph 10, the Debtor states "Upon the close of escrow and the short sale, all proceeds will be paid according to the Settlement Statement (HUD-1)." Dckt. 94, ¶ 10.

Just in the three-page motion, the Debtor fails to accurately state the type of sale.

A review of the Settlement Statement discloses that rather than being a "short sale," there will be approximately $149,662.52 of net sales proceeds after paying the secured claims and closing costs.

On April 7, 2016, Debtors filed an Amended Schedule C, claiming a $100,000.00 homestead exemption in the property being sold. Dckt. 87. However, Debtor did not give notice to anyone that Debtor was changing the exemptions.

To date, the Debtor has not filed a supplemental declaration to clarify this inconsistency. While the court do have the terms of the sale, the concern over the type of sale as well as to what the distribution will be, the court cannot determine if the sale is in the best interest of the estate, Debtor, or creditors.

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

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

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 Sell Property filed by Rudolph Jugoz the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

~~**IT IS ORDERED** that the Rudolph Jugoz, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Arrachone and Tracy Baril or nominee ("Buyer"), the Property commonly known as 10650 Calvine Road, Sacramento, California ("Property"), on the following terms:~~

~~1. The Property shall be sold to Buyer for $610,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit C, Dckt. 109, and as further provided in this Order.~~

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

3. The Chapter 13 Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. The Chapter 13 Debtor be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the broker, RE/MAX Gold.

5. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen (14) days of the close of escrow the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

10. 16-20229-E-13 MICHAEL/DOLORES RENDON
DPC-1 Peter Macaluso

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
2-17-16 [15]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 17, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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.

The court's decision is to overrule the Objection

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Debtor has failed to file tax returns. The Trustee states that the First Meeting of Creditors was continued from February 11, 2016 to April 7, 2016 to allow the Debtors the opportunity to verify that recently filed tax returns have been received and processed by the appropriate agencies.

The Trustee states that on February 11, 2016, an amendment to Proof of Claim No. 2 filed by the Internal Revenue Service indicates that no tax returns for either Debtor for 2012 and 2015, and no 2010 return for Debtor Michael Rendon.

At the hearing on March 17, 2016, the court continued the hearing to 3:00 p.m. on May 3, 2016. Debtor's supplemental pleadings were ordered to be filed and served on or before March 29, 2016. Replies, if any, were to be filed and served on or before April 5, 2016.

On April 11, 2016, the Trustee filed a withdrawal of the instant Objection, stating that the Debtor has provided all necessary documents to the Trustee.

As there being no objections remaining and upon review of the plan, the Plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

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

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on January 15, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

11. 11-29034-E-13 DOUGLAS/ELIZABETH EDWARDS
PGM-9 Peter Macaluso

MOTION FOR COMPENSATION BY THE LAW OFFICES OF PETER G. MACALUSO FOR PETER G. MACALUSO, DEBTORS' ATTORNEY
3-31-16 [180]

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees 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 non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Peter Macaluso, the Attorney ("Applicant") for Jim Ledesma, the Chapter 13 Debtor ("Client"), makes a Substantial and Unanticipated Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period February 25, 2015 through July 7, 2015. Applicant requests fees in the amount of $1,840.00.

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on April 4, 2016.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

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

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to

> the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including preparing a Motion to Sell, addressing responses and opposition, appear at the hearing, prepare documents to effectuate sale, and prepared supplemental schedules. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

"No-Look" Fees

In this District the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

> "(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."
> ...
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The

> fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in attorneys fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Applicant prepared the order confirming the Plan.

If Applicant believes that there has been substantial and unanticipated legal services which have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). He may file a fee application and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. 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).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

FEES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Motion to Sell Real Property: Applicant spent 9.2 hours in this category. Applicant assisted Client with preparing a Motion to Sell, addressing responses and opposition, appear at the hearing, prepare documents to effectuate sale, and prepared supplemental schedules.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso, Esq.	9.2	$200.00	$1,840.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$1,840.00

FEES AND COSTS & EXPENSES ALLOWED

Fees

The Applicant asserts that the additional post-confirmation work was actual, reasonable, necessary and unanticipated. Namely, the Applicant's work in preparing the Motion to Sell and completing all necessary steps to effectuate the sale.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Unanticipated and Substantial fees in the amount of $1,840.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant is allowed, and the Trustee under the confirmed plan is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $1,840.00

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Peter Macaluso ("Applicant"), Attorney for the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:
>
> Peter Macaluso, Professional Employed by Chapter 13 Debtor
>
> Fees in the amount of $1,840.00
>
> The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Trustee under the confirmed plan is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

12. 16-20951-E-13 DPC-1 FELICIA MARTINEZ Thomas Gillis

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 4-6-16 [13]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on April 6, 2016. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to sustain the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. It is not clear if the Debtor can make the payments under the plan.

   a. The Debtor is delinquent $1,775.00. To date, the Trustee has not received any payments when one has come due.

   b. The Debtor admitted at the Meeting of Creditors that she is not sure if she can make the plan payments of $1,775.00. The Debtor stated she was concerned with her

budget as it was filed.

c. On Schedule I, the Debtor lists $213.00 per month as other monthly income from "Tax over-withholding." Based on the amount listed on Schedule B in Debtor's bank accounts, the Debtor does not appear to have the $213.00 additional monthly income.

2. The Debtor's plan may not be the Debtor's best efforts. The Debtor's monthly net income listed on Schedule J totals $3,783.00. Debtor is proposing on $1,775.00 in monthly payments.

DEBTOR'S RESPONSE

The Debtor filed a response on April 12, 2016. Dckt. 23. The Debtor states that, at the Meeting of Creditors, the Debtor was confused by the Trustee's question as to the ability to make plan payments. The Debtor has suffered two strokes. The Debtor states that she will be able to adjust the over-withholding per month to help with her payments, if needed.

DISCUSSION

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is $1,775.00 delinquent in plan payments. The Debtor has failed to make a plan payment to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

The creditor next alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

> [i]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan–-(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The Plan proposes to pay a 100% dividend to unsecured claims over 60 months, though the Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $3,783.00. Thus, the court may not approve the plan.

Furthermore, the concern over whether the Debtor is capable of complying with the terms of the plan is valid. The Debtor appears to have indicated that she was concerned with the budget at the Meeting of Creditors but appears to have substantially more income than what she is committing to the plan. Additionally, while the Debtor tries to assert that she will be able to adjust the over-withdrawal to support the plan, the Debtor does not indicate how this will be accomplished. As described by the Trustee, there does not appear to be this additional money.

While the Debtor does state that she was confused by the questions, the Debtor's statement that she is not sure if the budget as proposed is viable and feasible is concerning to the court. With there being discrepancies in both the length of the plan, the amount of disposable monthly income, and the delinquency, the plan does not appear to be confirmable.

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

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

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

13. 13-27960-E-13 DARRELL/JOYCE WOLTKAMP — MOTION TO COMPEL ABANDONMENT
LRR-2 — Len ReidReynoso — 3-29-16 [61]

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 29, 2016. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property 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 non-responding parties 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 Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Darrell Woltkamp and Joyce Woltkamp ("Debtor") requests the court to order the Trustee to abandon property commonly known as 251 Aruba Circle, Sacramento, California (the "Property"). This Property is encumbered by the lien of PNC Mortgage, securing claim of $208,850.00.

The Debtor states that Debtor Joyce Woltkamp only has a one-half interest in the Property. The other half-interest is owned by the Debtor's sister, Sandra Littlefield. The Debtor states that Ms. Littlefield has been fully responsible for the property and provides the full mortgage payment, property taxes, insurance, as well as any repairs and utilities associated with this Property. The Debtor has not and still does not provide any monetary assistance for this Property.

The Debtor asserts that Ms. Littlefield became behind on the mortgage

payment and would like the opportunity to obtain a modification or assistance. However, Ms. Littlefield cannot due to the automatic stay.

The Debtor would like to Quitclaim the Property to her sister in order to relieve er of the burden of the Property.

The Declaration of Debtor has been filed in support of the motion and values the Property to be $208,000.00.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on April 26, 2016. Dckt. 72. FN.1.

FN.1. The court notes that the Trustee docketed multiple responses in error. The court will consider the Amended Response as the Trustee's actual response, the Trustee having corrected the address of the Property.

The Trustee does not believe that the Property has any equity based on the scheduled value and claim. The Trustee does not oppose the Motion.

DISCUSSION

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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 Abandon Property filed by Darrell Woltkamp and Joyce Woltkamp ("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 Compel Abandonment is granted and that estate's interests in the Property identified as:
>
> 1. 251 Aruba Circle, Sacramento, California
>
> and listed on Schedule A by Debtor is abandoned to Darrell Woltkamp and Joyce Woltkamp by this order, with no further act of the Trustee required.

14. 16-20374-E-13 KURT/BARBARA DELACAMPA — OBJECTION TO CONFIRMATION OF PLAN BY VICKI BELL
MBS-1 Michael Croddy — 4-1-16 [21]

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 1, 2016. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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.

The court's decision is to sustain the Objection.

Vivki Bell ("Creditor") opposes confirmation of the Plan on the basis that the Debtor is not entitled to the homestead exemption of California Code of Civil Procedure § 704.730 and that the plan is not filed in good faith based on the alleged inconsistencies in the Debtor's papers.

AMENDED PLAN FILED ON APRIL 19, 2016

On April 19, 2016, Debtor filed a new Amended Plan. The hearing on the Motion to Confirm the Amended Plan is scheduled for June 14, 2016. Motion and Notice, Dckts. 43 and 44.

The filing of an amended plan is a de facto withdrawal of the current plan to which the objection was filed.

In light of the Debtor filing an amended Chapter 13 plan, 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 Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to Confirmation the Plan is sustained and the plan is not confirmed.

15. 16-20374-E-13 KURT/BARBARA DELACAMPA — OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS
MBS-2 Michael Croddy — 4-1-16 [25]

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

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

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 April 5, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The objection to claimed exemptions is sustained and the exemption is disallowed in its entirety.

Vicki Bell ("Creditor") objects to the Debtor's use of the California homestead exemptions pursuant to California Code of Civil Procedure §704.730. FN.1.

FN.1. Some of the bloodiest, longest, least economically reasonable litigation involves family doing battle, most commonly in family law court (dissolution of a marriage) or probate (fighting over who should get whatever may remain after all of the litigation expenses). Here, the joint declaration filed by Debtor, Dckt. 39, provides a clue to why and how the parties are spread over two states, battling in state court, property unable to be sold, and the

conflicting information provided by Debtor. Creditor is identified as one of the Debtor's mother. While referencing a civil law suit, no detail is provided in the Declaration. It is further stated that Creditor has obtained a judgment and is garnishing Debtor's wages.

The Creditor asserts that the property commonly known as 17877 Ditch Creek Road, Rogue River, Oregon ("Oregon Property") is not Kurt Lynn Delacampa and Barbara Lee Delacampa ("Debtor") primary residence for purposes of the exemption.

First, the Creditor states that Pacific Trust Deed Servicing filed Proof of Claim No. 2, asserting a secured interest in the Oregon Property, reporting that the balance due is $121,955.99. However, the Proof of Claim indicates in Section 9 that the Property is "Non-owner occupied".

Second, the Creditor asserts that the Debtor's Statement of Financial Affairs, No. 2, the Debtor states that they have not lived anywhere else in the last three years.

Third, the petition filed by the Debtor indicates that the Debtor lives at:

4522 Midway Rd.
Vacaville, CA 95688

Dckt. 1. Further, the Debtor indicates on the petition that the mailing address of the Debtor is:

4524 Midway Rd.
Vacaville, CA 95688

Dckt. 1.

DEBTOR'S RESPONSE

The Debtor filed a response on April 19, 2016. Dckt. 38.

The Debtor states that in September 2014, the Debtor purchased the Oregon Property. The Debtor asserts that it was their primary residence. The Debtor asserts that since September 2014, the Debtor has attempted to sell their property located at 4522/4524 Midway Road, Vacaville, California but has been unable to do so due to a civil lawsuit from Creditor filed in Superior Court of California, Solano County., Creditor filed a *Lis Pendens* on the property, effectively blocking any sale.

The Debtor asserts that because of the lawsuit and *lis pendens* filed by the Creditor, the Debtor has been unable to sell or refinance the Midway Property. The Debtor asserts that because the refinancing and selling efforts failed, the Debtor is unable to obtain the funds to settle the lawsuit. The Creditor allegedly won her law suit and began Debtor's wages.

The Debtor argues that Debtor commutes to and from the Oregon Property to the Midway Property. The Debtor argues that the Debtors have chosen to surrender the Midway Property because it is not their home and because they

cannot refinance or sell it. The Debtor asserts that transportation costs are low because at the time of the petition, gas in Oregon was low and the Debtor has a fuel efficient vehicle.

Furthermore, the Debtor argues that the Main House on the Midway Property had burned down twice, leaving only one set of in-law quarters and old barn.

The Debtor argues that the Debtor has not rented the Oregon Property to anyone since the purchase nor has treated the Oregon Property as a vacation home. The Debtor asserts that the only people to live in the Oregon Property have been the "Debtor, Joint Debtor, and Joint Debtor's Mom (75 years Old and disabled)."

In support, the Debtor provides bills from the Oregon Property, including property taxes, Pacific Power bill, Direct TV bill, and receipts for gas. Dckt. 40.

APPLICABLE LAW

Debtor has claim an exemption under California law for real property located in Oregon. In the Objection, Creditor does not question the legal propriety of a California exemption being claimed in extra-California property. This may be because the Objection goes to the core factual question of what is the Debtor's residence.

Not having been raised in the Objection, Debtor does not address this issue.

The court proceeds with the issues as framed by the Parties.

California Homestead Exemption

California Code of Civil Procedure § §704.730(a)(3)(A) states:

> "For purposes of the instant Objection, California law provides the following 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.
> >
> > (C) A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars ($25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars ($35,000) and the sale is an involuntary sale.
>
> (b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead."

The term "homestead" is defined by the California Legislature as follows:

> "(c) 'Homestead' means the **principal dwelling** (1) in which the **judgment debtor or the judgment debtor's spouse resided** on the date the judgment creditor's lien attached to the dwelling, **and** (2) in which the **judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead....**"

Cal. C.C.P. § 704.710(c) (emphasis added).

The term "dwelling" is provided a non-exclusive definition by the

California Legislature as follows:

As used in this article:

> "(a) 'Dwelling' means a place where a person resides and may include but is not limited to the following:
>
> (1) A house together with the outbuildings and the land upon which they are situated.
>
> (2) A mobilehome together with the outbuildings and the land upon which they are situated.
>
> (3) A boat or other waterborne vessel.
>
> (4) A condominium, as defined in Section 783 of the Civil Code.
>
> (5) A planned development, as defined in Section 11003 of the Business and Professions Code.
>
> (6) A stock cooperative, as defined in Section 11003.2 of the Business and Professions Code.
>
> (7) A community apartment project, as defined in Section 11004 of the Business and Professions Code.

Cal. C.C.P. § 704.710(a).

Under California law, the factors a court should consider in determining residency, for homestead purposes, are physical occupancy of the property and the intention with which the property is occupied. *In re Kelley*, 300 B.R. 11 (B.A.P. 9th Cir. 2003). California Government Code specifies what should be considered when determining the place of residence:

> In determining the place of residence the following rules shall be observed:
>
> (a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.
>
> (b) There can only be one residence.
>
> (c) A residence cannot be lost until another is gained.
>
> (d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child.
>
> (e) The residence of an unmarried minor who has a parent living cannot be changed by his or her own act.
>
> (f) The residence can be changed only by the union of act and

intent.

> (g) A married person shall have the right to retain his or her legal residence in the State of California notwithstanding the legal residence or domicile of his or her spouse.

Cal. Govt. Code § 244.

Under California law, debtor or debtor's spouse must reside in dwelling when bankruptcy petition is filed in order to be entitled to homestead exemption, whether homestead is claimed under article on homestead exemption or under article on declared homesteads. Cal. C.C.P. §§ 697.710, 704.710 et seq., 704.910 et seq; *see, e.g. In re Dodge*, 138 B.R. 602 (Bankr. E.D. Cal. 1992) (under California law, debtors' claim of homestead exemption was valid, even though debtors did not physically occupy house all the time, where debtors were only temporarily absent for a few days at a time for employment away from home).

California courts have discussed the requirements in order to claim a homestead exemption:

> "In *Tromans v. Mahlman*, 92 Cal. 1, 8 [27 P. 1094, 28 P. 579], it is said: 'To effect its purpose, the [homestead] statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word 'actually,' to show that the residence must be real, and not sham or pretended. ... Here it clearly appears from the evidence that the respondents went to Haywards, not to make their home or place of abode there, but only to spend a night or two, and then return to their home in San Francisco. ...'"

Ellsworth v. Marshall, 196 Cal. App. 2d 471, 474, (Dist. Ct. App. 1961).

Bankruptcy courts in the Eastern District have grappled with the proper burden of proof as to proving that applicability of an exemption. Specifically,

> "Because California law mandates the use of state exemptions, prohibits the use of federal exemptions, and allocates the burden of proof to the exemption claimant, the court further concludes that California Code of Civil Procedure § 703.580(b) is a substantive element of a California exemption and California exemption law that must be applied inside bankruptcy the same as it would outside bankruptcy."

In re Pashenee, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015).

DISCUSSION

The court does not find that the Debtor has met his burden to justify the use of a exemption on the Oregon Property. The burden of proof in on the Debtor to show that the Debtor is entitled to an exemption. *In re Tallerico*, 532 B.R. 774, 778 (Bankr. E.D. Cal. 2015); *In re Pashenee*, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015).

As to the homestead exemption, it is settled in the Ninth Circuit that the applicability and validity of exemptions is determined as of the petition date. *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 392 (B.A.P. 9th Cir. 2003); Citing *White v. Stump*, 266 U.S. 310 (1924), and *In re Herman*, 120 B.R. 127, 230 (B.A.P. 9th Cir. 1990). As stated in *White*,

> "[t]he point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed. This has been recognized in our decisions. Thus we have said that the law discloses a purpose 'to fix the line of cleavage' with special regard to the conditions existing when the petition is filed, *Everett v. Judson*, 228 U.S. 474, 479, and that -- 'It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed and that his estate passes actually or potentially into the control of the bankruptcy court.' *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268, 275; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307."

White v. Stump, 266 at 313.

The date the cleavage in this case occurred, by which the rights and interests of the estate were created, was January 22, 2016. 11 U.S.C. § 541(a). This effectuated the "sale" of whatever interests the Debtor had to the bankruptcy estate and cleaved away from the Estate is that portion of the value of the property is the Debtor's homestead exemption as of January 22, 2016.

Review of Debtor's Petition and Schedules

First, the court reviews the Debtor's Schedules and Petition, signed under the penalty of perjury, as to where the Debtor stated their residence.

The petition, filed on January 22, 2016, filed by the Debtor indicates that the Debtor lives at:

> 4522 Midway Rd.
> Vacaville, CA 95688

Dckt. 1. Further, the Debtor indicates on the petition that the mailing address of the Debtor is:

> 4524 Midway Rd.
> Vacaville, CA 95688

Dckt. 1.

Also on the petition, the Debtor indicates that the Eastern District of California was chosen as venue for the instant case because:

> Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.

Dckt. 1. FN.2.

FN.2. The bankruptcy petition form uses the "I have lived in this district longer..." language. The actual venue statute uses more precise terms, with 28 U.S.C. § 1408 providing in pertinent part (emphasis added),

> "Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district--
>
> (1) in which the **domicile**, **residence**, **principal place of business** in the United States, **or principal assets** in the United States, **of the person** or entity that is the subject of such case **have been located** for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district;...."

It may well be that the fight exits today because the bankruptcy case should properly be in Oregon if Debtor is correct that Oregon is the place of Debtor's "principal dwelling" in which Debtor has "resided continuously" for purposes of the homestead exemption claim.

However, an issue of proper venue is not jurisdictional, but is left to either the motion of the parties or *sua sponte* by the court, if determined appropriate. 28 U.S.C. § 1412; Fed. R. Bankr. P. 1014(a)(2). The court has not yet determined whether venue in the Eastern District of California is proper in light of Debtor now stating that Debtor's residence is in Oregon.

The Debtor indicates that they do not "rent" their residence. Dckt. 1, Item 11.

On Schedule A, the Debtor lists the Oregon Property. Dckt. 10. On Schedule C, the Debtor claims an exemption on the Oregon Property in the amount of $100,000.00 pursuant to California Code of Civil Procedure § 704.730.

The Debtor's Schedule I provides the following for employment information for both Debtors:

	Debtor 1	Debtor 2
Employment Status	Employed	Employed
Occupation	Mechanic	Investigative Assistant
Employer's Name	World Oil	Solano County DA
Employer's Address	7297 Chevron Way, ***Vacaville***, ***CA*** 95687	675 Texas St, Suite 4500, ***Fairfield, CA*** 94533
How long employed there?	9 years	14 years

On Debtor's Schedule J, the debtor only reports mortgage expense of

$1,230.00. Dckt. 10. There are no other mortgage expenses listed. Additionally, the Debtor reports $405.00 for "electricity, heat, natural gas";$124.00 for "water, sewer, garbage collection"; and $430.00 for "telephone, cell phone, internet, satellite, and cable services."

On the Statement of Financial Affairs, the Debtor reports on question 2 that "during the last three years" that they have not lived anywhere other than where the Debtor currently lives – which is the Midway Property in California as reported on the petition.

Debtor's Declaration

The Debtor's declaration filed in opposition to the instant Objection indicates that as of September 2014, the Oregon Property was the primary residence of the Debtors. Dckt. 39.

However, on the following page, the Debtor states: "On The Midway Property, Debtors live in the in-law unit for over 10 years".

The Debtors appear to argue that they travel to and from the Oregon Property to the Midway Property for work. The court takes judicial notice that the distance between the two properties is 336 miles, and would take approximately five hours and three minutes to travel. FN.1.

FN.1. The court used Google Maps to estimate the mileage between the two properties, much in the same manner that a court could take a gas station map of old, a piece of string, and a ruler to estimate the mileage. https://www.google.com/maps.

In support, the Debtor provides copies of: (1) Property Taxes for the Oregon Property; (2) Pacific Power bills; (3) DirectTV bill; (4) Junk mail; and (5) receipts of gas.

Reviewing these exhibits, the documentation does not support the conclusion that the Oregon Property is the Debtor's primary residence for purposes of California Code of Civil Procedure § 703.140.

Oregon Tax Assessor's Records

The property tax assessment of the Oregon Property indicates that the "Mailing Address" of the owners (indicated to be the Debtors) is:

DELACAMPA KURT LYNN/BARBARA
LEE
4524 MIDWAY RD

VACAVILLE CA, 95688

Dckt. 40, Exhibit A. If the Oregon property has been the Debtor's residence since acquiring it in 2014 and there have been merely diversions to California, it would not make sense for Debtor to have the California address as the mailing address for the Oregon Property.

Power Bills

Then, reviewing the usage history attached with the Pacific Power bill, the court notes that since November 2014, the Debtor's electricity bill never exceeded $31.00 per month. Dckt. 40, Exhibit 2. This includes electricity during the winter months in Oregon. For example in December 2015, the power bill on the Oregon Property was $28.67.

The court cannot fathom how an alleged primary residence where three grown adults live only use less than $31.00 per month on electricity in winter months.

Further on Exhibit B, it shows that Debtor's electricity bills during the period November 2014 through March 2016 were generally right around $20.00 a month. This almost token power bill does not support a contention that it is this house in Oregon which has been Debtor's residence.

Direct TV Bills

Debtor offers no explanation how having a monthly TV entertainment (and possibly internet) bill for a house is evidence of it being a residence. Commonly vacation and second homes will have TV and other entertainment services provided.

Automobile Fuel Bills

Debtor provides the court with what appears to be four gas receipts. Two from Safeway and two from Fred Meyer. The court cannot readily identify the location of the Safeway stores, and for the Fred Meyer receipts one states Crater Lake Highway and the other Grants Pass Parkway. One Safeway receipt is for March 25, 2016 and the other for April 15, 2016. The court cannot identify dates on the Fred Meyer receipts.

What the four receipts show is $30.00 worth of "fuel" was purchased, once in March and once in April, 2016. For the Fred Meyer receipts, $45.74 of diesel and $30.00 of gas was purchased at some point in time.

Though Debtor contends that due to gas prices being so much lower in Oregon than California, this is evidence that Debtor resides in Oregon, not California. Even with a lower price, fuel, and more than the amount shown, would be consumed by Oregon residents working jobs in California.

Ruling

As discussed supra, the Debtor has failed to provide evidence that, at the time of filing, the Debtor's primary residence was the Oregon Property, nor that the Debtor is entitled to claim an exemption under California Code of Civil Procedure § 703.140.

The Debtor's Petition and Schedules all clearly state that the residence of the Debtor is the Midway Property. The Debtor's address is the Midway Property. The Debtor's mailing address is the Midway Property. The mailing address for the Oregon Property taxes is the Midway Property.

The court is not persuaded by the Debtor's exhibit. In fact, the

exhibits filed by the Debtor further indicate that the Midway Property is the Debtor's residence. The Debtor does not provide any information outside of "gas being cheap" how the Debtors, who both work in the Eastern District of California, travel 672 miles, round trip from Oregon to California, every day, for work.

Based on the representations made under the penalty of perjury on the Debtor's Schedules and Petition, the court finds that the Debtor's attempt to claim that the Oregon Property is residence for purposes of exemption is more akin to a "sham or pretended" residence. See *Ellsworth v. Marshall*, 196 Cal. App. 2d 471, 474, (Dist. Ct. App. 1961). FN.3

FN.3. The possible economic impetus for such a sham may exist when one considers the dollar amount of the homestead exemption in California (where homes are much more expensive) and Oregon. The homestead exemption exists under California law to provide the judgment debtor with a "grubstake" to put a roof back over the judgement debtor's head.

In fact, the Debtor's declaration indicates that the Debtor in fact still resides at the Midway Property, indicating that the Debtors have lived in the in-law suite for over ten years. Dckt. 39. While it is possible that this was a mere scrivener's error, the fact that Debtors indicate in the declaration signed under penalty of perjury that the Debtors "live" – not "lived"– at the Midway Property in conjunction with the repeated representation in the Debtor's Petition and Schedules that the Midway Property is their residence, the court finds that the Debtor's primary residence at the date of the petition was the Midway Property.

Therefore, the Creditor's Objection is sustained and the claimed exemption on the Oregon Property pursuant to California Code of Civil Procedure § 703.140 is sustained and the claimed exemption is disallowed in its entirety.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is sustained and the claimed exemption is disallowed in its entirety.

16. 16-20777-E-13 MICHELE WILLIAMS
DPC-1 Peter Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
4-6-16 [31]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on April 6, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to sustain the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. The Debtor may not be able to make the plan payments.

   a. This is the Debtor's fifth bankruptcy case.

      i. Case No. 09-40428, Filed September 23, 2009 - Dismissed as Debtor failed to file complete documents.

ii. Case No. 10-23333, Filed February 12, 2010 - Converted to Chapter 7; Discharged July 30, 2010

iii. Case No. 11-41829, Filed September 9, 2011 - Dismissed Post Confirmation on Trustee's Notice of Default

iv. Case No. 14-23385, Filed on April 1, 2014 - Dismissed Post Confirmation on Trustee's Motion to Dismiss due in part to delinquent payments.

b. The Trustee asserts that the Debtor incurred new debt since the last filing bankruptyc case, even though the Debtor does not report such.

c. The Debtor could increase the likelihood they will make the plan payments by submitting a wage order. To date, no wage order has been submitted.

2. The Debtor's plan fails liquidation analysis because the Debtor has non-exempt equity while only proposing to pay the unsecured creditors a 0% dividend.

The Trustee's objections are well-taken.

The Debtor does not indicate how, after being delinquent nearly $9,000.00 in the prior case which led to the dismissal of the Debtor's case, now the Debtor can propose the instant case in good faith. This is only further exasperated by the Debtor failing to report all bankruptcy cases filed in the past eight year and the Debtor's misleading statement as to additional debts incurred.

The court might assume that the Debtor's failure to list the Debtor's most recently dismissed prior case was due to there being only three spaces available on the Official Form 101, Part 2, #9 and that the Debtor's counsel accidently forgot to attach an additional page with the case. This is Debtor's fifth case since 2009.

Debtor's first Chapter 13 case, 09-40428 (in pro se), was filed on September 23, 2009, and dismissed on November 19, 2009. Debtor follow up two months later, filing her second Chapter 13 case, 10-2333 (in pro se) on February 12, 2010. The second Chapter 13 case was converted to one under Chapter 7 by Debtor on February 26, 2010. Debtor was granted a discharge on July 30, 2010.

Debtor's third Chapter 13 case was filed on September 9, 2011, 11-41829 (represented by her current counsel, Peter Macaluso). That case was dismissed on March 24, 2014. Debtor confirmed a plan which required her to may two payments of $100.00 each and then fifty-eight payments of $3,000.00 each. The Chapter 13 Plan sought to cure the $30,000.00 pre-petition arrearage and $6,500.00 post-petition arrearage on the claim secured by the first deed of trust recorded against Debtor's property and restructure Debtor's car loan. 11-41829; Plan, Dckt. 43. The order confirming the Plan was filed on February 21, 2012. On February 10, 2012, (even before the order confirming the prior

plan was filed) Debtor filed a proposed Modified Plan and Motion to Confirm the modified plan. Debtor sought to increase the Plan payments to $4,330.00 a month. *Id.*; Modified Plan, Dckt. 69.

The court denied the motion to confirm the Modified Plan, which was necessary because the Debtor was delinquent on the prior confirmed plan $3,000.00, even before the order confirming was filed by the court. *Id.*; Civil Minutes, Dckt. 87. In addition, Debtor was $1,330.00 delinquent on the proposed Modified Plan. *Id.*

In the third Chapter 13 Case Debtor ran a Second Modified Plan by the court and creditors, with the motion to confirm being granted by order dated June 25, 2012. By September 13, 2012, two months later, the Chapter 13 Trustee had filed a Notice of Default under the Second Modified Plan. *Id.*, Dckt. 102. As of September 13, 2012, Debtor was $1,935.00 delinquent in plan payments ($1,035.00 monthly plan payments).

Debtor then filed a proposed Third Modified Plan, which would forgive the prior defaults and require $1,035.00 payments for forty-eight months. *Id.*, Dckt. 108. The court confirmed the Third Modified Plan by order filed on December 20, 2012. *Id.*, Dckt. 113.

Eight months later the Chapter 13 Trustee filed a Notice of Default in Plan payments. *Id.*, Dckt. 114. As of August 14, 2013, Debtor was $3,105.00 delinquent in payments (June and July 2013 payments). In response on September 12, 2013, Debtor filed a Fourth Modified Plan. *Id.*, Dckt. 116. The Debtor would start remaking payments with a $1,045.00 payment in September 2013 and continuing for thirty-six months thereafter. On November 1, 2013, the court confirmed Debtor's Fourth Modified Plan. *Id.*; Order, Dckt. 129.

By January 2014, merely one month after confirmation, the Trustee filed a Notice of Default. *Id.*, Dckt. 130. The Trustee gave notice that Debtor was $2,090.00 delinquent in payments (the November and December 2013 plan payments). Upon confirmation of the Fourth Modified Plan, Debtor immediately defaulted.

On March 24, 2014, the court dismissed Debtor's Third Chapter 13 case. *Id.*; Order, Dckt. 133.

With the March 24, 2014 dismissal, Debtor then immediately commenced her fourth Chapter 13 case; 14-23385, counsel Peter Macaluso; on April 1, 2014. Debtor's Chapter 13 Plan in the fourth case required monthly plan payments of $2,895.00 for forty-two months and then payments of $3,065.00 for twelve months. *Id.*; Plan, Dckt. 5. The court filed its order confirming the plan on June 18, 2014. *Id.*, Dckt. 56.

On December 22, 2014, the Chapter 13 Trustee filed a Notice of Default in the fourth Chapter 13 case. *Id.*, Dckt. 61. The Notice states that Debtor was delinquent $5,790.00 in payments (October and November 2014). These defaults occurred three months after confirmation of the Plan in the fourth Chapter 13 case.

Debtor responded with a First Modified Plan in the fourth Chapter 13 case. *Id.*; First Modified Plan, Dckt. 67. The First Modified Plan forgave the defaults, required a $1,500.00 payment for January 2015, then twelve payments

of $2,000.00, then thirteen payments of $2,095.00, and then twenty-six payments of $2,180.00. The court denied confirmation of the First Modified Plan. *Id.*; Order, Dckt. 77. In denying the motion, the court recounted the history of Debtor's prior filing of cases and defaults. *Id.*; Civil Minutes, Dckt. 75. The court's findings include the following:

> "In seeking the various modifications, the Debtor has some routine and some extraordinary emergencies which have arisen. Each of these has derailed the Debtor in performing what she had promised. While the court is sympathetic to consumers dealing with everyday real life struggles, **the Debtor and her counsel have demonstrated that the Debtor is not a credible witness with respect to her finances**. It appears that **Debtor and her counsel create whatever plan is the Debtors dream, not one based on financial reality.**
> ...
> The Trustees objection concerning the adequate protection payment is well-taken. A review of the proposed plan and the supplemental pleadings show that the Debtor has not explained or provided information as to how the proposed adequate protection payments are sufficient. The Debtor, in her reply, does not provide any information on the sufficiency or adequacy of the proposed payment but instead only addresses the Trustees first part of the objection concerning the escrow. The court cannot determine, based on the information provided, if the proposed payments is sufficient.
> ...
>
> **The Debtors response to the inaccurate expense information is not credible.** This Debtor has been represented by counsel for three year, through multiple plan modifications, multiple defaults, and multiple preparation of financial information. Merely stating that the Debtor did not understand that the expenses were to reflect her real, accurate expenses as averaged over the year is not sufficient. **To say so implies that the Debtor believe she could make up a budget choosing the expenses from whatever month is lower to mislead the court, Trustee, and creditors**.
> ...
> Using the information from Schedules I and J filed by Debtor in April 2014, the court considers the feasibility of the Debtor performing this modified plan (which following in the footsteps of five prior plans which have failed). While the Debtor reports have good income from a stable employer, **the expenses listed on Schedule J are not reasonable as documented by the Debtors bankruptcy history.** Debtor has a child with significant medical issues. Debtor only budgets only $75.00 a month. **Debtor has a son who is unemployed, living at home, and dependant on the Debtor not only for his needs, but his minor daughter. Debtor has not budgeted for that.**
>
> Debtor's plan requires her to make payments for two vehicles. One is a 2006 Land Rover, to repay a $12,000 debt. This vehicle is now 9 years old, and it is likely that the next

> extraordinary event explaining a default is that there has been a major vehicle expense. The Debtor is also choosing to pay for a 2009 Dodge Charger. **While repeatedly defaulting in her Chapter 13 Plan, it is necessary for this Debtor to be paying for two cars....”**

Civil Minutes, *Id.* (emphasis added).

Debtor responded with a Second Modified Chapter 13 Plan. *Id.*, Dckt. 82. The court denied confirmation of the Second Modified Plan. *Id.*; Order, Dckt. 92. In denying confirmation, in addition to findings as with the prior Plan, the court states,

> “The Debtor has not shown that yet another modification of a Chapter 13 Plan will result in a feasible plan that can be performed. While the Debtor may desire to have a plan, she has shown that she cannot perform the plan. **It is concerning to the court that both Debtor and Debtor's counsel have not addressed these concerns as they have been on notice of such inadequacies in the proposed plans for awhile.** The Debtor seeks a continuance to provide information that the Debtor should have provided the first time she sought to modify the plan. The court will not grant a continuance.”

Civil Minutes, Dckt. 90.

Debtor bounced back and filed a Fourth Modified Chapter 13 Plan in her fourth Chapter 13 case. *Id.*; Fourth Modified Plan, 97. In denying the Motion to Confirm the Fourth Modified Plan, the court findings included (in addition to findings consistent with denial of the prior motions to confirm the prior plans in the fourth Chapter 13 case) the following:

> “The Debtor filed a reply on September 29, 2015. Dckt. 118. The Reply is Debtors counsels arguments, for which no declarations or other evidence has been presented. However, **the Reply purports to argue facts for which no evidence is presented.**
> ...
> The Trustees objection concerning the adequate protection payment is well-taken. A review of the proposed plan and the supplemental pleadings show that the **Debtor has not explained or provided information as to how the proposed adequate protection payments are sufficient**. The **Debtor**, in her reply, **merely states this is proper without any evidence or citations to justify the Debtors calculation**. The objection by the Trustee, however, should not have come as a surprise given the fact that the Trustee raised the same exact objection on the Debtors last attempt to confirm a modified plan. The Debtor still has not provide any evidence that this amount, however, actually does protect the creditor, outside of merely saying it does. The court cannot determine, based on the information provided, if the proposed payments is sufficient.
> ...
> Finally, the proposed adequate protection payment based on

> 31% of Debtors income bears no relationship to what a plausible modified loan payment would be for Debtor. Just because Debtor can only afford to pay $1,698.01 a month for a payment doesn't mean that it is adequate for the secured claim. Proof of Claim No. 7 states as of the commencement of this case the secured claim was $403,795.48. When the case was filed, Debtor stated the property had a value of $316,000.00. Schedule A, Dckt. 1.
>
> If the Creditor were to modify the loan to capitalize all of the pre-petition arrearage, waive the post-petition arrearage and reamortize the obligation over 30 years at 3.5% interest per annum (as if Debtor had a high credit score and had placed a 20% down payment, not 100% financing), the monthly principal and interest payment alone would be $1,813.22."

Id.; Civil Minutes, Dckt. 127.

On November 9, 2015, the court filed its order dismissing the fourth Chapter 13 case. *Id.*, Dckt. 138.

Filing of Current (fifth in last six years) Chapter 13 Case

Three months later, Debtor commenced the current (fifth in the last six years) Chapter 13 case. As evidence in support of the present Motion, Debtor provides her declaration. Dckt. 9. Most of the motion appears to be a copy of the prior declarations used in support of the many motions to confirm amended and modified plans in the prior four Chapter 13 cases.

The only testimony is that Debtor received a raise (amount not stated in declaration), Debtor is looking for a second job, and Debtor is encouraging her two kids (ages 19 and 21) to get jobs. Debtor offers no evidence of any ability to prosecute this fifth bankruptcy case in good faith.

First, Debtor makes a material misstatement as to not having incurred any new debt. In addition to the 2009 Dodge Charger and 2006 Land Rover Rsport that Debtor wants to pay for, Debtor has added a 2013 Mercedes-Benz C-Class to her stable of vehicles. Schedules B, Dckt. 18. For these three vehicles, Debtor's secured debt has grown to more than $79,000.00 - for one Debtor.

The Debtor now has an additional car payment in the amount of $631.01 a month. If the Debtor had already been unable to afford the plan payments in the prior plan, the Debtor does not provide sufficient evidence that the instant case will be successful.

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). While Debtor has reported non-exempt equity in the amount of $8,083.06 and the Debtor is proposing a 0% dividend to unsecured creditors, additional equity exists. The Debtor has not explained how, under the proposed plan and the schedules filed under the penalty of perjury, that the unsecured claimants are entitled to a 0% dividend when there may be upwards of $8,083.06 in non-exempt equity.

Therefore, as discussed supra, 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.

17. 14-28079-E-13 MRL-2 | **ERNESTO/MILAGROS SANTOS** Mikalah Liviakis | **MOTION TO APPROVE LOAN MODIFICATION** 3-31-16 [66]

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on March 31, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification filed by Ernesto and Milagros Santos ("Debtor") seeks court approval for Debtor to incur post-petition credit. OneWest Bank Mortgage Servicing, a division of CIT Bank, N.A. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will provide the following:

1. New Principal balance of $401,372.26 ($56,372.26 is eligible for interest free deferral and forgiveness provided that the Debtor does not default).

2. Total payment of $1,644.03 per month ($1,366.50 for principal and interest and $307.53 for escrow/option insurance)

3. The balance of pre-petition arrears, if any, shall be cured by the modification

David Cusick, the Chapter 13 Trustee, filed a non-opposition on April 19, 2016.

The Motion is supported by the Declaration of Debtor Ernesto Santos.

The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms.

IDENTITY OF ACTUAL CREDITOR

The Loan Modification Agreement states that the parties are the Debtor and "OneWest Bank Mortgage Servicing, a division of CIT Bank, N.A." as the "Lender or Servicer." Exhibit A; Dckt. 68 at 3. The Loan Modification Agreement is executed by "OneWest Bank Mortgage Servicing, a division of CIT Bank, N.A." identified as "Lender." This signature block does not purport to have OneWest Bank Mortgage Servicing acting in the capacity of an agent for any identified principal.

The Proof of Claim relating to this Loan was filed by OneWest Bank, N.A., fka OneWest Bank, FSB. Proof of Claim No. 3. CIT Bank, N.A. has not filed a notice of assignment of the claim, thus it would appear that this Loan Modification Agreement fails to be executed between the actual creditor and the Debtor – possibly to provide the actual creditor or a future debt buyer with "plausible deniability" of the modification promised to Debtor.

Normally, the court would deny, without prejudice, such a motion between the Debtor and an apparent undisclosed principal. However, through information obtained on other cases (in which it was improperly asserted by attorneys that OneWest Bank, N.A. was an existing entity) the court learned that OneWest Bank, N.A. has been renamed CIT Bank, N.A. The FDIC confirms this on its website. FN.1.

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https://research.fdic.gov/bankfind/detail.html?bank=58978&name=OneWest.

The court grants the Motion, authorizing modification of the loan with the creditor, now named CIT Bank, N.A.

Counsel for Debtor should not count on the court sua sponte correctly identifying the creditor with whom counsel's client is purporting to contract.

RULING

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. 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 Ernesto and Milagros Santos 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 court authorizes Ernesto and Milagros Santos ("Debtor") to amend the terms of the loan with CIT Bank, N.A., executed byOneWest Bank Mortgage Servicing, a division of CIT Bank, N.A., which is secured by the real property commonly known as 8289 Bedford Cove Way, Sacramento, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 68.

18. 16-21885-E-13 SUSAN REICHARD
ELG-1 Steele Lanphier

MOTION TO VALUE COLLATERAL OF WANG YANG ENTERPRISES, LLC
4-4-16 [12]

Final Ruling: No appearance at the May 3, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on April 4, 2016. By the court's calculation, 4 days' notice was provided. 28 days' notice is required.

The Motion to Value 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 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 Motion to Value secured claim of Wang Yang Enterprises, LLC ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Susan Reichard ("Debtor") to value the secured claim of Wang Yang Enterprises, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 10803 Coloma Road #2, Rancho Cordova, California ("Property"). Debtor seeks to value the Property at a fair market value of $72,971.00 as of the petition filing date. FN. 1. As the owner, 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).

FN.1. The court notes that Debtor's Motion contains conflicting statements as to the fair market value of the Property. The Motion first states: "In the opinion of Debtor . . . the Home had a value of $86,956.61 on the day of filing. However, elsewhere in that Motion, and in the Debtor's Declaration and Schedule A, the fair market value is identified as $72,971.00. It is clear that the first amount provided, being the same as the value owed to Creditor, was merely a scrivener's error.

The valuation of property which secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (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.

11 U.S.C. § 506(a) [emphasis added]. For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2; case or controversy requirement for the parties seeking relief from a federal court.

No Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor which appears to be for the claim to be valued.

No Opposition

Creditor has not filed an opposition.

Discussion

The senior in priority first deed of trust secures a claim with a balance of approximately $86,956.61. Creditor's second deed of trust secures a claim with a balance of approximately $69,252.46. Therefore, Creditor's claim secured by a junior deed of trust is partially under-collateralized. 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 Susan Reichard ("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 Wang Yang Enterprises, LLC secured by a second in priority deed of trust recorded against the real property commonly known as 10803 Coloma Road #2, Rancho Cordova, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $72,971.00 and is encumbered by senior liens securing claims in the amount of $86,956.61, which exceed the value of the Property which is subject to Creditor's lien.

19. 11-47286-E-13 TROY/TERI MCCOMAS
PGM-1 Peter Macaluso

MOTION FOR OMNIBUS RELIEF UPON DEATH OF DEBTOR
4-5-16 [76]

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

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 5, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Omnibus Relief Upon Death of Debtor is denied without prejudice

Joint Debtor, Troy L McComas, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Teri L. McComas.

The Debtor filed for relief under Chapter 13 on November 20, 2011. On February 21, 2012, the Debtor's Chapter 13 Plan was confirmed. Dckt. 45. On September 16, 2014, Debtor Teri L. McComas passed away. The Joint Debtor asserts that he is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. The Suggestion of Death was filed on March 17, 2016. Dckt. 75. Joint Debtor is the husband of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that he will continue to prosecute this case in a timely and reasonable

manner.

The a Declaration for the Surviving Debtor has been filed. Dckt. 78. However, that Declaration does not state that the testimony given therein is made under penalty of perjury. 28 U.S.C. § 1746. In addition to being required by law, this is a standard signature block paragraph that is part of the standard declaration form used by law offices which regularly practice in federal court.

While not stated under penalty of perjury, the "Declaration" tells a tale of heartbreak and anguish relating to the loss of a spouse. The loss of one's spouse or a child is described as a wound that cuts deep and is slow, if ever, to heal.

The "Declaration" also tells of $150,000.00 of the $200,000.00 insurance proceeds spent or given by the Surviving Debtor to others. Much of this appears to have been transactions for which there may be tangible assets for the estate or which can be recovered from family members and friends. Or the tangible assets may provide collateral for the Debtor providing a reasonable recovery for the bankruptcy estate – an estate to which the Surviving Debtor is the fiduciary. FN.1.

FN.1. Take at face value, not having been stated under penalty of perjury, the "Declaration" indicates that Debtor has a $42,000.00 pickup, $3,500.00 gift to son, two used cars held by Debtor's two sons (appears to have aggregate values of at least $20,000), $13,000.00 transfer to son, $5,000.00 transfer to friend Surviving Debtor had "not seen for a while," $3,500.00 transfer to daughter, Honda in which $5,400.00 of repairs have been made, and $27,000.00 Mini-Cooper.

Debtor's general unsecured claims in this case total "only" approximately $125,000.00. One possible starting point of inquiry is a consideration that since the Plan already provides for a 35% dividend, "finding" or "recovering" $50,000.00 (plus an additional 7% for Trustee fees) of the $200,000 in insurance proceeds would boost the minimum dividend to 75%. While not a 100% dividend, it would provide a significant dividend for creditors with unsecured claims, not unduly disrupt the Surviving Debtor, and facially vindicate the rights, obligations, and duties under the Bankruptcy Code.

While the court recognizes the need to tread carefully under the circumstances, Debtor's counsel can also surely recognize the need for the court to insure that this explanation cannot be seen as a signal for less scrupulous parties and fiduciaries (debtors and their attorneys) to ignore their duties and obligation, as well as the rights of the bankruptcy estates.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on April 19, 2016. Dckt. 81.

First, the Trustee states that he does not consent to any dismissal or withdrawal of the pending motion as the court must address the instant Motion where a Statement Noting a Party's Death was filed on March 17, 2016.

At the time of filing, the Debtors were represented by counsel, Anthony Hughes. The Debtor's confirmed plan called for property to vest on confirmation and for $900.00 per month for 60 months, with at least a 35% dividend to general unsecured. The Trustee notes the following terms: (1) second deed of trust was valued at $0.00 (Dckt. 29); (2) Schedule B shows a term life insurance policy as well as three vehicles (Dckt. 1); and (3) a "potential 2011 tax refund" in the amount of $5,000.00 (Dckt. 1).

Since the time of Co-Debtor Teri McConmas' passing, the Debtor Troy McComas received $200,000.00 which was deposited in the bank. Dckt. 78, pg. 4., lines 16-17. The Debtor states that he has since spent most of the funds without advising the court or the Trustee. Dckt. 78, pg. 4, line 17 - pg. 7, line 12. The Trustee also asserts that the Debtor may also have received tax refunds based on the Debtor's declaration which stated:

> We ask Hughes if the court would take our tax returns, Hughes said he didn't know. So my wife and I figured out of sight out of mind.

Dckt. 78, pg. 7, line 28 - pg. 8, line 2.

The Debtor now seeks to substitute Debtor Troy McComas for Debtor Teri McComas. The Debtor cites as authority Fed. R. Civ. P. 25(a), Fed. R. Bankr. P. 7025 but failes to city Fed. R. Bankr. P. 1016 or Local Bankr. R. 1016-1.

The Trustee then continues to highlight facts that the Trustee alleges are missing from the record:

1. The Declaration is not signed under the penalty of perjury

2. The Declaration is not dated as to when it was executed. However, the Declaration does have a hearing caption which is for November 24, 2015.

3. The Declaration does not indicate the amount of monies remaining if any. The Debtor's declaration indicates that there were funds remaining that the Debtor did not report.

4. The Debtor does not provide copies of documents showing the amounts spent from the $200,000.00 in insurance proceeds.

5. The Debtor has not filed current statement of incomes and expenses. The Debtor indicates in the Declaration that the Debtor Troy McComas retired July 2015.

The Trustee concludes that the Debtor has failed to comply with their legal requirements by spending over $150,000.00 and the court should dismiss the case.

DEBTOR'S REPLY

Debtor Troy McComas filed a reply to the Trustee's opposition on April 26, 2016. Dckt. 85. The Declaration merely states:

> The Surviving debtor requests more time in which to

reply to the Trustee's concerns given the present situation."

Dckt. 85.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under chapter 11, chapter 12, or chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, §7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in

> terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

See also, *Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Local Bankruptcy Rule 5009-1(b) requires the filing with the court Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. Local Bankr. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

DISCUSSION

Here, the court is equally as concerned with the instant status of the case and Motion as the Trustee.

As outlined by the Trustee's opposition, the Surviving Debtor has failed to provide the transparency that is required of a Chapter 13 Debtor. The Debtor, in the declaration, admits, point blank, that the Surviving and Deceased Debtor did not report tax refunds to the Trustee, failed to report how the $200,000.00 insurance was spent, and failed to provide updated employment and expenses.

Additionally, also as the Trustee highlighted, the Debtor fails to properly state the legal basis for the instant Motion. While it is correct that the analysis is, in part, arising under Fed. R. Civ. P. 25 and Fed. R. Bankr. P. 7025, the relative provision for the instant Motion is pursuant to Fed. R. Bankr. P. 1016 and Local Bankr. R. 1016-1. This alone is grounds to deny the instant Motion.

A further concern of the court is that the Debtor's declaration is neither signed under the penalty of perjury nor dated. The caption on the Declaration indicates that the date of the hearing on the instant Motion is "November 24, 2015." This suggests to the court that this declaration was filed months prior to the instant hearing and no longer accurately reflects the Debtor's finances and whether continued administration is possible.

The Trustee also requests that the court dismiss the case based on the failure of the Debtor to comply with the Plan and properly report proceeds and expenses. The court declines to dismiss the case at this time.

Further Discovery and Proceedings

The court denies the Motion without prejudice. Clearly, the Trustee needs to investigate further, as well as Debtor to take stock of the situation, work with his counsel, and figure out whether there is a "way out of this mess" which properly vindicates the rights of the estate and at least passably appears to correct the failures to comply with the Bankruptcy Code. The Trustee can proceed with discovery utilizing Federal Rule of Bankruptcy Procedure 2004.

The court denies the Motion rather than providing a continuance in order to afford both parties the opportunity to create a "clean" record with proper evidence. Additionally, this will afford Debtor and his counsel the opportunity to figure out what, if anything, can be done without the pressure of there being a hearing shortly on the horizon.

Debtor and his current counsel appear to argue that blame for the Surviving Debtor's shortcoming, at least in part, on Debtor's prior counsel. As attorneys' are aware, merely saying that hundreds of thousands of dollars of property of the estate are missing, and it's another attorney's fault, doesn't end the inquiry, discovery, or recovery of lost property for the bankruptcy estate. While unpleasant on a professional level, rights of the estate must be reasonably enforced.

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 for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

20. 15-23596-E-13 ELENA RODRIGUEZ — MOTION TO MODIFY PLAN
CRG-1 Carl Gustafson — 3-25-16 [21]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 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).

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

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 25, 2016. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Elena Rodruguez ("Debtor") filed the instant Motion to Confirm the Modified Plan on March 25, 2016. Dckt. 21.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on April 19, 2016. Dckt. 25. The Trustee states that the Debtor fails to specify a dividend to unsecured claims in Section 2.15. The Debtor to indicate any percentage to unsecured, leaving the section blank. In cases like this, the plan provides for a 0% dividend if the space is left blank.

The Debtor's current plan proposes a 14% dividend to general unsecured creditors. The Trustee calculates general unsecured creditors would receive a 40% to 45% dividend under the proposed plan.

The bar date for filing claims was October 27, 2015. The Debtor states that the reason for the modified plan is to provide for the claim by the Franchise Tax Board and to remove the amount owed to the Internal Revenue Service.

The Trustee argues that a blank line is not the same as zero. If the plan does not provide for unsecured claims any longer, where it does not even provide a zero, the unsecured claims may not be discharged.

DISCUSSION

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

The Trustee's objection is well-taken. A review of the improperly filed plan shows that Section 2.15 dealing with unsecured claimants is left completely blank - both amount of debt and proposed distribution percentage.

First, the court notes that the Debtor failed to properly filed the modified plan. Pursuant to the Local Bankruptcy Rules, the procedure to confirm a modified plan requires that "[t]he plan shall be filed as a separate document." Local Bankr. R. 3015-1(d)(2). The court will waive this defect for the instant Motion. However, the court will not offer such a service in the future.

Second, the Trustee is correct that the failure of the Debtor to indicate the percentage to unsecured claimants raises concerns over whether the plan is the Debtor's best efforts, whether it is a mere scrivener's error, or whether the Debtor is attempting to propose a 0% dividend to unsecured claimants.

While the Debtor indicates in the Motion that, besides the changes to the Franchise Tax Board and Internal Revenue Service claims, that "[t]here are no other changes in the Modified Plan." Dckt. 31, ¶ 8.

Under the confirmed plan, the Debtor proposes a 14% dividend on unsecured claimants' claims, which total $35,088.00. However, this is not provided for by the Debtor.

It is likely that this is a mere scrivener's error and an oversight of the Debtor and Debtor's counsel. However, as the plan is presented, the information is absent and the plan cannot be confirmed. The court will not presume to know the intention of the Debtor and "fill-in-the-blank."

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.