UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

July 29, 2014 at 3:00 p.m.

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1. 13-22901-E-13 VICTOR/SANDRA GARCIA — CONTINUED MOTION TO MODIFY PLAN
PGM-5 Peter Macaluso — 5-5-14 [106]

CONT. FROM 6-24-14, 6-10-14

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, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 5, 2014. By the court's calculation, 36 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.

JULY 29, 2014 SECOND CONTINUED HEARING

As addressed below, the court does not further continue this hearing. Further, give that this is the third hearing on this Motion, the court does not consider last minute further amendments, representations of

facts, or requests for a further continuance to file other proposed amendments or evidence to support confirmation.

The Debtors can prepare and file a new plan and motion to confirm a modified plan, in good faith and properly supported by all of the required evidence (the Debtors have never filed their current financial information with the court, merely providing copies to the Trustee).

Though a month has passes since the first continue hearing on this Motion, nothing further has been filed. (Court's July 27, 2014 review of the Docket.) Any additional pleadings should have been filed no later than seven days before the July 29, 2014 hearing.

In their declaration the Debtors state, under penalty of perjury,

> "We were unaware that our payment needed to increase, so we continued making the same payment. Our domestic support obligation is still ongoing and we are uncertain when it will end."

Declaration, Dckt. 108, pg. 1:24-26.

The Debtors offer no testimony as to how or why they were and are unaware of the need to increase their "payments" (whether plan or support obligation, or both) and why they are "uncertain" when it will end. To the extent that the Debtors were buffeted unrepresented in the family court proceedings, they are represented by experienced counsel in this bankruptcy case.

Additionally, the Debtors have failed (or intentionally refused to keep this court ignorant as to what has actually been ordered by another court) a copy of the domestic support order.

Whether through inattention, intentional obfuscation, or willful deception, the Debtors have now had a third hearing on (what should be simple) a simple motion to confirm a modified plan. It would be a simple motion if the Debtors were truthful, honest, and forthcoming with the necessary information (such as their current finances), the domestic support order, and their plan terms.

Proposed First Modified Plan – Denial of Confirmation

The proposed First Modified Plan dials back the stipulated to payments under the confirmed plan to $6,710.00 through May 25, 2014 (first thirteen months of the plan, averaging $599.16 per month), then only $1,091.00 for twelve months, and then only $1,662.00 for the remaining thirty-four months of the proposed First Modified Plan. Dckt. 110. In addition to paying Debtors' Counsel $3,000.00 on his fees and the Chapter 13 Trustee's fees, the First Modified Plan provides for the following claims:

A. 2005 Acura Loan (increased from $260).....$400.00
B. 2005 Chevy Impala Loan (increased from $40)..$100.00
C. Kay Jewelers (increased from $20).....$ 50.00
D. Bank of New York Lien Strip.....$ 0.00
E. General Unsecured Claims (from 28%)..... 4.00%

The Motion to Confirm the First Modified Plan carefully avoids any reference to these substantial changes in distributions to creditors. Rather, it merely states that the "changed circumstances" are that Debtors "'[w]ere unaware that our payment needed to increase, so we continued making the same payment. Our domestic support obligation is still ongoing and we are uncertain when it will end.'" Motion ¶ 3, Dckt. 106.

To the extent that the Debtors are now stating under penalty of perjury (Declaration, Dckt. 108) that they were "unaware" that they amended their Second mended Chapter 13 Plan to require them to make $2,000.00 a month payments starting in month twelve – such statements are unbelievable. They made the amendments and their attorney drafted the Order confirming the Second Amended Chapter 13 Plan, which was amended by the Debtors and counsel at the confirmation hearing, expressly providing the $2,000.00 a month payment.

To the extent that Debtors now state under penalty of perjury that they now don't know when the DSO payment ends, that is clearly in conflict with their prior testimony in multiple declarations of when the DSO garnishment terminates.

While not filing further Amended Schedules I and J for post-petition amendments, the Debtors have provided the court with new income and expense statements under penalty of perjury as Exhibits 2 and 3 in support of confirmation. Dckt. 109. With respect to the Income, the gross income has remained the same – $9,384.65. Exhibit 1. Debtors expenses continue to be $5,789.39 a month, yielding Net Monthly Income of $430.00. Exhibit 2. The Debtors disclose on Exhibit 2 that there are now two DSO obligations for which there are wage garnishments. Only one ends June 2014, and the second ends June 2015.

While seeking to modify the confirmed plan in this case and backtrack on the specific plan payments upon which the court relied in confirming the Second Amended Plan, as amended by Debtors at the confirmation hearing, the Debtors carefully avoid providing any testimony about these changes, why they have defaulted (the court not believing that the general, non-specific statement drafted by counsel that they "didn't know" they amended the plan to provide for $2,000.00 a month payment) on the plan payments. FN.1.

FN.1. The Debtors' excuse that they "didn't know" the plan terms they represented to the court to induce the court to confirm their Second Amended Plan raises significant issues for Debtors' counsel. If true, then counsel would appear to be proposing plan terms and stipulating to plans for which he had no authorization. Further, that counsel is not communicating with his clients about orders of this court and is allowing his clients to ignore orders sent to them directly from the court. None of these bode well for an attorney.

The Debtors have demonstrated several things in connection with this case. First, they are not prosecuting this case and the proposed First Modified Plan in good faith. They have repeatedly misrepresented their finances – only becoming honest and truthful when forced by the Trustee.

Second, they are not truthful in their communications with and representations to the court. The Debtors will say whatever, and make any and all representations (irrespective of the truthfulness thereof) which will "let them win." Though amending their plan to provide for $2,000.00 a month payments, the Debtors defaulted and failed to make such payments. The Debtors never intended to make such payments – intentionally misleading the court, Chapter 13 Trustee, U.S. Trustee, and creditors.

Third, Debtors have demonstrated that they cannot perform with plan. They have, as provided in Exhibits 2 and 3 (if the court assumes that they are truthful), only $430.00 on Net Monthly Income to perform the proposed reduced plan payments of $1,091.00 and $1,662.00. The DSO garnishment (or multiple garnishments) total only $900.00 a month. Even if all of that disappeared, it still falls short of the Debtors having the $1,662.00 to fund a reduced payment a year from now. The Debtors provide no testimony as to how (even if the court were to now believe them the monthly payments should be for these reduced amounts) they can make these much lower plan payments.

The Debtors have continued to hide from the court and creditors information relating to the alleged DSO garnishment (or garnishments). They merely say that a DSO garnishment end in June 2014 and that another DSO garnishment ends in June 2015. The Debtors do not provide any testimony as to how much each garnishment is and what monies will be available.

Fourth, the Debtors' Class 2 payments for the two vehicles loans have dramatically increased, almost doubling. No testimony is provided for this increase, the Debtors and counsel merely treating it as a something they have the right to demand and the court blindly allow.

While the court prefers to allow debtors, trustees, and creditors work out plan issues and provide the court with their concurrence with respect to financial information for which debtors may not provide clear evidence, the court cannot, and will not, ignore the misstatements, misrepresentations, and abuse of the Bankruptcy Code by the Debtors.

The proposed Modified Chapter 13 Plan fails to comply with 11 U.S.C. §§ 1322, 1325(a), and 1329. The Debtors have failed to provide the court with sufficient evidence to support confirmation of a plan.

Confirmation of the proposed Modified Plan is denied.

REVIEW OF PRIOR STATEMENTS UNDER PENALTY OF PERJURY AND PRIOR CHAPTER 13 PLANS

Inaccurate or Incomplete Information Re Domestic Support Obligation

As this one Motion has dragged on, the court has been prodded into more carefully reviewing the Debtors' prior statements under penalty of perjury in this case. These statements, and their lack of action and up-front candor (failing to provide current financial information) causes the court concern.

Bankruptcy Case Commenced

On March 4, 2013, the Debtors Commenced this voluntary Chapter 13 case. The Petition and Original Schedules, Statement of Financial Affairs, and Statement of Current Monthly Income (Dckt. 1.) include the following information:

A. Debtors' combined gross monthly income is $9,384.65. *Id.* at 8. This is well over the Applicable Family Median Family Income of $74,122.00 for a family of four persons. Statement of Current Monthly Income. *Id.* at 5.

B. The Gross Income listed on Schedule I is the same as shown on the Statement of Current Monthly Income. *Id.* at 32. In addition to $1,527.97 in deductions listed for payroll taxes and Social Security, the Debtors list additional deductions totaling $737.29, consisting of,

1. Retirement.....$353.99
2. Union.....$ 51.60
3. Med A.....$ 49.88
4. BSNETVAL.....$214.55
5. Dental.....Nothing
6. Vision.....Nothing
7. SEIU1000F.....$ 68.27

By Debtors' calculations this results in $7,119.39 in Average Monthly Income.

C. On Schedule I the Debtors list two dependants,

1. Son-Student, Age 21
2. Daughter-Student Age 19

No income is listed for either dependant, nor for the student any information concerning scholarships or student loans from which the dependant's expenses are paid.

D. On Schedule J the Debtors list $6,619.39 in projected average monthly expenses. *Id.* at 34. These expenses include,

1. Food.....$1,000
2. Laundry and Dry Cleaning.....$ 250
3. Medical and Dental.....$ 450
4. Transportation.....$ 500
5. Charitable Contribution.....$ 122
6. IRS Offset.....$ 300
7. FTB Offset.....$ 100
8. Educational Needs.....$ 200

After expenses, the Debtors projected only Monthly Net Income of $500.00 to fund a plan.

E. In response to Question 2 of the Statement of Financial Affairs the Debtors disclosed that they tax withholding generated tax refunds of $3,382.00 in 2012 and $3,574.00 in 2011. *Id.* at 37.

F. In response to Question 4 the Debtors stated that they are not parties to any suits or any garnishments within the one year of the 2013 filing of this commencement of the bankruptcy case. *Id.* at 38. This appears to be clearly false, in that the Debtors are having their wages garnished for a domestic support obligation.

G. In response to Question 16, the Debtors state have no spouses, and had no spouses within the eight year period prior to the commencement of the bankruptcy case. *Id.* at39.

First Amended Schedules I and J

On April 22, 2013, the Debtors amended Schedule I to add an additional deduction of $900.00 for a "DSO." Dckt. 33 at 5. This reduced, as calculated by Debtors, their Average Monthly Income to only $6,219.39. Based on this change, the Debtors' then existing proposed plan (Dckt. 5) which required the full prior computed $500.00 of net monthly income unconfirmable (with the DSO deduction causing the Debtors to have a negative ($400.00 net monthly income).

But this prior undisclosed deduction was not to be an impediment to Debtors trying to prosecute the $500.00 a month plan, as they then amended Schedule J. *Id.* at 7. The Debtors were able to adjust the following expenses,

A. $100 House Maintenance Reduced to.....$ 0.00
B. $450 Medical and Dental Reduced to.....$430.00
C. $100 Recreation Reduced to.....$100.00
D. $400 IRS and FTB Tax Offset.....$ 0.00
E. $100 Personal Care (not identified as Amended)..$ 0.00

With these amendments the Debtors are able to get back to exactly the $500.00 a month plan payment they proposed (and apparently have pre-determined should be made irrespective of their actual income and expenses).

In response to line 19 on Amended Schedule J the Debtors state that (1) Debtors need $400 per month to offset future taxes, (2) cannot do so until the $900 a month DSO payments ends in 13 months, and (3) need to forgo all personal care, home maintenance, and recreation expenses for 13 months.

Denial of Original $500 a Month Chapter 13 Plan

The Chapter 13 Trustee objected to confirmation of the Debtors' Original Chapter 13 Plan. The Trustee's objections upon which confirmation was denied included (1) Debtors' failure to provide any documentation of the $430.00 a month health care expenses, (2) the $230 cable/internet and $115 telecommunications expenses are duplicative, (3) Debtors' failure to provide evidence that they actually have made and are making $122.00 a month charitable contributions, (4) the $353.99 in retirement contributions are discretionary, and (5) the Debtors' tax withholding is excessive and is made to generate tax refunds. Additionally, the court had denied Debtors' motion to value a secured claim. Civil Minutes, Dckt. 38.

Debtors' First Amended Plan and Denial of Confirmation

On August 28, 2013, Debtors filed their First Amended Chapter 13 Plan. Dckt. 65. The proposed First Amended Plan continued to provide for monthly plan payments of $500.00. From this the Debtors proposed paying,

A. $3,000.00 in Debtors' Counsel's fees;
B. Chapter 13 Trustee's fees;
C. 2005 Acura Car Loan.....$270.00
D. 2005 Chevy Impala Car Loan.....$ 55.00
E. Kay Jewelers.....$ 25.00
F. Bank of New York, 2nd DOT Lien Stip..$ 0.00
G. Unsecured Claim Dividend..... 0.00%

In their Declaration in support of confirmation the Debtors state under penalty of perjury that the $900.00 monthly domestic support garnishment end in 13 months. Declaration, Dckt. 63, pg. 2:4-5.

The court denied confirmation for several reasons. First, notwithstanding their testimony that they could make the $500.00 a month plan payment, the Debtors were in default in their plan payments. Civil Minutes, Dckt. 78. Additionally, the Debtors admitted (in light of the Trustee's opposition) that they needed to increase the plan payments in month 14 when the DSO garnishment ended.

Debtors' Second Amended Plan and Confirmation

The Debtors filed their Second Amended Chapter 13 Plan on October 13, 2013. Dckt. 88. In the Second Amended Chapter 13 Plan the Debtors provided for a total of $3,700.00 a month through October 2013 (average $523.57 a month), $430.00 for eleven months, and the $1,100.00 a month for forty-two months (commencing in October 2014). The increase in plan payments created at least a 28% dividend for creditors holding general unsecured claims.

In their Declaration of the Second Amended Plan the Debtors stated under penalty of perjury that the $900.00 a month DSO garnishment would end in eleven months. Dckt. 86, pg. 2:2-3.

The court confirmed the Second Amended Chapter 13 Plan, notwithstanding concerns as to the Debtors' good faith and lack of honest disclosures.

> "Debtors respond, stating they can afford the payments proposed and have offered to increase the payments as appropriate. However, the Declaration provided by Debtor does not appear to propose an increase in payment. **Further, the Debtors do not address how they forgot to provide for the decrease in the support payment.** At best, they may be asserting that hypothetically the ex-spouse could possibly seek to increase support payments for the then remaining minor child. Therefore, the **Debtors appear to contend that the court should ignore the known legal situation and let them keep the money.**

> This does not evidence good faith by the Debtors. **The judicial process is not one in which financial information is misstated or key information omitted, unless and until the Debtors are caught in the lie.** This plan is not proposed in good faith."

Id. at 2 (emphasis added).

Having been caught in their misstatements by the Trustee, they proposed further amending the plan to increase the plan payments to $2,000.00 a month beginning in the eleventh month of the plan. *Id.*

With this amendment and the concurrence of the Trustee, the court confirmed the Second Amended Plan, as amended at the confirmation hearing – notwithstanding the Debtors lack of honesty and candor in prosecuting this case.

The Order confirming the Chapter 13 Plan contains the amendment that the Debtors will make plan payments of $2,000.00 a month for fifth months. Confirmation Order, Dckt. 102.

JUNE 24, 2014 FIRST CONTINUED HEARING – MOTION TO MODIFY PLAN

The Trustee received the Debtors' pay stubs as requested. Trustee states that while the pay stubs support the present budget and continue to have a deduction for child support, there is still no indication as to when the Domestic Support Obligation will end. The Debtor's prior plan proposed to increase the payments once the obligation ended; now, the Debtor disclaims any knowledge as to when the obligations will end.

The court continued the hearing to allow Debtor to address this missing term of the proposed Modified Plan.

JUNE 10, 2014 HEARING

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The modified plan is not proposed in good faith, 11 U.S.C. § 1325(a)(3). The Debtor initially proposed a plan paying $500.00 per month. No domestic support obligation appeared on Schedule I or J. The Trustee objected that the plan was not the Debtor's best effort, among other reasons, which was sustained. The Debtor subsequently amended that plan and declared that they had a domestic support obligation that ended in 13 months.

The Debtors confirmed a plan that incorporated an increased payment based on this amendment and additional information. The Debtors now declare they were unaware that their domestic support payment needed to increase, so they continued making the same payment. Debtors state their domestic support obligation is still ongoing and are uncertain when it will end.

Trustee argues that the Debtor now proposes to merely defer the payment increase called for by the confirmed plan without providing the Court evidence of current pay- such as a copy of current pay stubs - and without proving specific details as to the domestic support obligation to

the Court. The Trustee requests pay stubs from both Debtors.

DEBTOR'S RESPONSE

Debtors respond, stating that the last two pay stubs were provided to the Trustee on June 3, 2014. Debtors request more time to allow the Trustee to review the pay stubs and provide additional documentation to the Trustee if needed.

As the Debtors have just recently provided the pay stubs to the Trustee, the court allowed a brief continuance for the Objection to Confirmation to June 24, 2014.

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 Modified 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 Modified Plan is denied.

2. 14-26001-E-13 KEVIN/BEVERLY WAY
FF-1 Gary Ray Fraley

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA
7-15-14 [23]

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 Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 15, 2014. By the court's calculation, 14 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.

The Motion to Value filed by Kevin and Beverly May, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 8733 El Toreador Way in Elk Grove, California, "Property." Debtor seeks to value the Property at a fair market value of $175,023.00 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 senior in priority first deed of trust secures a claim with a balance of approximately $208,514.57. Creditor's second deed of trust secures a claim with a balance of approximately $57,543.00. 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 Kevin and Beverly May, "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 8733 El Toreador Way in Elk Grove, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $175,023.00 and is encumbered by a senior lien securing claims in the amount of $208,514.57, which exceeds the value of the Property which is subject to Creditor's lien.

3. 14-20809-E-13 HENRY/LINDA GUISANDE MOTION TO MODIFY PLAN
SDB-2 Scott deBie 6-24-14 [37]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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 Debtors, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 24, 2014. By the court's calculation, 35 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 grant the Motion to Confirm the Amended Plan.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Trustee is unsure if Debtors' can afford the proposed full amount of the lump sum payment of $49,000.00 or can afford the original plan as proposed, (11 U.S.C. §§ 1325(a)(6), 1325(b), 1325(a)(3)). The additional provisions of the proposed modified plan lists lump sum payments paid into the plan as "In addition to the monthly payments, Debtors shall make a lump sum payment of $49,000.00 in July 2014." The supporting motion states "Mrs. Guisande has received $24,000.00 as her interest in the trust disclosed on their Schedule B. In addition, Debtors' son has agreed to gift them the sum of $25,000.00 to assist them. With these sums available, Debtors can pay in a lump sum of $49,000.00 to the plan in July 2014."

Trustee also states the motion also provides "Debtors' confirmed plan called for a lump sum payment of $80,000.00 to be funded by a loan from their son. Unfortunately, their son was not able to qualify for the loan he had anticipated obtaining to provide these funds." Trustee argues that the Debtor does not supply when his spouse received her interest in the trust,

whether th trust is the 1/6 interest in deceased father's estate, and whether $24,000 was all the funds received, where the estate was scheduled at $24,500.00. Nor does the Debtor disclose when the loan was denied and why the loan was originally referred to in the original plan as, "Debtors have arranged an unsecured loan." Where the Debtor's motion to borrow was denied, but the Debtor only states, "Unfortunately, our son was not able to obtain the loan against his home," the Trustee is not certain why the loan is no longer being pursued.

DEBTOR'S RESPONSE

Debtors respond, stating Debtors' proposed modified plan includes the submission of $24,000.00 from Mrs. Guisande's interest in a trust. This trust is disclosed on Schedule B with an estimated value of $24,500.00. Debtors state the actual realized total amount in the trust is 152,000.00 of which Debtor's interest is 1/6 or approximately $25,333.33. This is the full and only interest in the trust. The sum of $24,000.00 became available to Debtors from this trust on or about May 1, 2014. Debtors also state Mrs. Guisande may receive an additional sum of no more than $1,333.33 in the future, but this is dependant upon the deduction of certain fees and costs that may be charged against the trust.

Debtors explain that their original plan depended upon a loan to be made to them by their son. The loan and the terms of repayment were arranged with their son in March 2014 and Debtors sought approval of the loan from the court. This was a loan to be made to Debtors as an unsecured loan, but their son expected to obtain the funds as a mortgage loan upon his residence. He was unable to qualify for the loan given his own credit situation and his application was denied in May. Debtors therefore cancelled this loan arrangement with their son, abandoned further motion for approval of the loan, and submitted the within modified plan using their recently obtained trust funds and a gift of funds from their son, from monies he had on hand, to supplement the proposed monthly plan payments.

With the explanation provided by the Debtor, and the lump sum available to the Trustee, the amended Plan complies with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on June 24, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed

order to the court.

4. 14-26411-E-13 WINONA EDMONSON — MOTION TO EXTEND AUTOMATIC STAY
JMC-1 Joseph Canning — 6-24-14 [8]

Tentative Ruling: The Motion to Extend the Automatic Stay 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, parties requesting special notice, and Office of the United States Trustee on June 24, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Extend Automatic Stay 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 to Extend Automatic Stay is denied.

Debtor Winona Edmonson moves for an order extending the automatic stay, as she had a prior bankruptcy filed February 18, 2014 and dismissed on June 5, 2014. Debtor filed this case on June 19, 2014.

11 U.S.C. § 362(c)(3)(B) states that on the motion for a party in interest for continuation of the automatic stay, "the court may extend the stay after notice **and a hearing** completed before the expiration of the 30-day period" (emphasis added).

As Debtor failed to set this hearing before the expiration of thirty days after June 19, 2014, the court cannot extend the automatic stay pursuant to 11 U.S.C. § 362(c)(3).

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

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

**5. 14-20321-E-13 SDB-2 | DWIGHT BROWN
Scott de Bie | MOTION TO VALUE COLLATERAL OF DREAMBUILDERS INVESTMENTS, LLC
7-1-14 [39]**

Final Ruling: No appearance at the July 29, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 1, 2014. By the court's calculation, 28 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 Dreambuilders Investments, LLC, "Creditor," is granted.

The Motion to Value filed by Dwight Brown, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 525 Carousel Drive, Vallejo, California, "Property." Debtor seeks to value the Property at a fair market value of $260,000.00 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 senior in priority first deed of trust secures a claim with a balance of approximately $383,200.00. Creditor's second deed of trust secures a claim with a balance of approximately $95,246.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's second deed of trust 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 Dwight Brown, "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 Dreambuilders Investments, LLC, secured by a second in priority deed of trust recorded against the real property commonly known as 525 Carousel Drive, Vallejo, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $260,000.00 and is encumbered by senior liens securing claims in the amount of $383,200.00, which exceed the value of the Property which is subject to Creditor's lien.

6. 14-20321-E-13 DWIGHT BROWN
NLE-1 Scott de Bie

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

CONT. FROM 6-24-14, 3-25-14

Final Ruling: No appearance at the July 29, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 20, 2014. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

The Chapter 13 Trustee ("Trustee") opposes confirmation of the Plan on the basis that Debtor has failed to file a Motion to Value Collateral. According to the Trustee, Debtor proposes to value the secured claim of ResMae Mortgage Corp in Class 2 but has not filed a Motion to Value Collateral. Accordingly, the Trustee believes that Debtor cannot make plan payments or comply with the plan. 11 U.S.C. § 1325(a)(6).

Debtor's opposition

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

DISCUSSION

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

The court continued the Motion to Value for Debtor to properly identify and serve the correct Creditor.

Debtor filed an Ex Parte Motion for Examination in order to determine the creditor for the Motion to Value secured claim.

Debtor filed a Motion to Value the secured claim of Creditor Dreambuilders Investments, LLC. The court having granted the Motion to Value, the court overrules the Trustee's objection.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that hearing on the Objection to confirmation is overruled Debtor's Chapter 13 Plan filed on January 14, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

7. 11-30435-E-13 FREDERICK QUINN — MOTION FOR COMPENSATION FOR
PGM-3 Peter Macaluso — PETER G. MACALUSO, DEBTOR'S ATTORNEY(S)
6-30-14 [87]

Final Ruling: No appearance at the July 29, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 30, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

Law Offices of Peter G. Macaluso, Counsel for Debtor, seeks additional attorney fees in the amount of $1,120.00. Counsel argues that these additional fees are actual, reasonable, necessary and unanticipated as post-confirmation work required.

Description of Services for Which Fees Are Requested

1. Motion to Incur Debt: Debtor requested permission to purchase a home. Counsel prepared and filed a Motion to Incur Debt, prepared Response; attended hearings; and corresponded with the Trustee.

TRUSTEE'S RESPONSE

Trustee responded, stating that he does not oppose the attorney fees requested. However, the Trustee raises two inconsistencies in the Motion: one reference to a Motion to Modify plan when the motion in question appears to have been a Motion to Incur Debt; and the Declaration stating that initial fees were $5,000 when a review of the record indicate initial fees were $3,500.00.

COUNSEL'S REPLY

Counsel replied, stating that the Trustee is correct and that they were scriber's errors in the Motion.

CONCLUSION

The hourly rates for the fees billed in this case are $200.00/hour for counsel for 5.6 hours of unanticipated and substantial work. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $1,120.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

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

Applicant's Fees Allowed in the amount of $ 1,120.00.

8. 14-23348-E-13 OMAR PINGOL
KFS-1 Karl-Fredric Seligman
MOTION TO VALUE COLLATERAL AND/OR MOTION TO AVOID LIEN OF CHASE BANK
6-13-14 [66]

Tentative Ruling: 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).

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, parties requesting special notice, and Office of the United States Trustee on June 13, 2014. By the court's calculation, 46 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Value is denied without prejudice.

Debtor moves for an order valuing real property and determining that the junior lien of an unidentified creditor.

However, the Motion to Value does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states:

> 1. Debtor in Chapter 13 bankruptcy Omar Pingol hereby moves this Court for order valuing the residential real property commonly known as 509 Lakesprings Court, Fairfield, CA 94534 ("Property") and deeming the junior lien recorded thereon and

represented by the Deed of Trust recorded 9/29/06 and set forth in Exhibit A hereto as unenforceable.

2. Debtor states and represents that the applicable value of the Property is $258,352.00 as supported forth by Exhibit B hereto and represented by Schedule A to the Petition in Chapter 13 bankruptcy. The first position lien serviced by Chase Bank currently encumbers the property for at least $462,594.62.

3. This Motion is based the Notice, this Motion, the accompanying Points and Authority and Declaration and the proposed Chapter 13 Plan (as may be amended). FN.1.

FN.1. The court has not found persuasive arguments such as "why judge, this is so simple that even a debtor's/creditor's attorney can wade through the points and authorities, declarations, exhibits, all of the other documents in the court's file, and all of the docket entries and figure out the grounds for the relief and specific relief. Such a contention only invites the court having to "lower the boom" on attorneys in situations where the court believes that it is beyond the "simple understanding of 'even' a debtor's/creditor's attorney." This leads to these attorneys then believing that the court applies the rules in an inconsistent, differential manner. If it is that "simple," then it is even easier for the much more sophisticated debtor's/creditor's attorney filing the motion to comply with Federal Rule of Bankruptcy Procedure 9013 or Federal Rule of Civil Procedure 7(b) and state the grounds, in the motion, with particularity.

Debtor does not provide the name of the creditor holding the second deed of trust to which the court is requested to value the secured claim.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-

with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the short-and-plain-statement standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at

1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

CREDITOR'S OPPOSITION

U.S. Bank, N.A., as Trustee, responds opposing the Debtor's valuation of the subject real property at $258,352.00 based on his personal opinion. Creditor seeks to obtain its own valuation on the property and requests additional time to obtain an independent appraisal.

The denial of this motion will allow the additional time for the Creditor to obtain an appraisal, as well as for the Debtor to revise the motion forms to properly state the grounds for relief.

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

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

9. 14-23348-E-13 KFS-3 — OMAR PINGOL — Karl-Fredric Seligman — MOTION TO AVOID LIEN OF GREEN VALLEY LAKE COMMUNITY ASSOCIATION, INC. — 6-26-14 [86]

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

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, parties requesting special notice, and Office of the United States Trustee on June 26, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Lien is denied without prejudice.

Debtor moves for an order avoiding the judicial lien of Green Valley Lake Community Association, Inc. ("Creditor").

DEFECTIVE SERVICE OF PROCESS

Debtor has failed to properly service Creditor with the Motion and supporting pleadings. Service in the bankruptcy court is governed by Federal Rule of Bankruptcy Procedure 7004. *See* Fed. R. Bankr. P. 9014. Service may be made by First Class Mail for most parties but for a corporation, partnership, or other unincorporated association, mailing the pleadings to the attention of an officer, managing or general agent, or any other agent authorized to receive service is required. Fed. R. Bankr. P. 7004(b)(3).

Here, service was made on,

"Green Valley Lake Community Association, Inc.
1451 Riverpark Drive
Sacramento, California 95815."

Certificate of Service, Dckt. 95.

Using the link provided at this court's website (http://www.caeb.circ9.dcn/Links.aspx), the court accessed the California Secretary of State's website for information for corporations, limited liability companies, and limited partnerships (http://kepler.sos.ca.gov/). At this readily available website maintained by the Secretary of State, the information for Green Valley Lake Community Association, Inc., is,

> "Green Valley Lake Community Association, Inc.
> Attn: Richard Cardosi, Agent for Service of Process
> 500-A Merchant Street
> Vacaville, California 95688"

A general internet search indicates that the address 1451 River Park Drive, Sacramento, California is a 73,000 square foot office building. http://rubiconpartnersinc.com/properties/1451riverparkdr.html.

It appears that a 1451 Riverpark Drive, Suite 125 address is listed on the Abstract of Judgment (Exhibit A, Dckt. 90). Another general internet search turns up information that this Suite 125 address is for a law firm identified as Angius & Terry, LLP, stated to be "Attorneys specializing in construction defect litigation and general counsel assistance for community associations throughout California and Nevada." http://www.angius-terry.com/.

Quite possibly Angius & Terry, LLP are collection attorneys for Green Valley Lake Community Association, Inc. in the state court action. Courtesy service on them may have been nice, but that doesn't effectuate service as required by Federal Rule of Bankruptcy Procedure 7004 and 9014 on the creditor. Angiusu & Terry, LLP are not the agent for service of process as stated by the California Secretary of State, and nothing has been presented to the court that Angius & Terry, LLP is an officer of this Creditor. *See Perle v. Fiero (In re Perle)*, 725 F.3d 1023 (9th Cir. 2013)(holding the creditor did not have notice or actual knowledge of the bankruptcy in time to file a timely complaint because its attorney's knowledge of the bankruptcy could not be imputed to the creditor under an agency theory).

REVIEW OF MOTION.

The Motion to Avoid the Lien states with particularity (Fed. R. Bank. P. 9013) the following grounds and relief which is requested:

A. Debtor seeks to avoid a judicial lien held by Green Valley Lake Community Association, Inc. pursuant to 11 U.S.C. § 522(f).

B. Debtor, relying on the value stated under penalty of perjury in Schedule A, that real property commonly known as 509 Lakesprings Court, Fairfield, California has a value of $258,352.00.

C. It is allege, in reliance on the obligations as stated under penalty of perjury by the Debtor on Schedule D, that the senior lien on the property is $462,594.62.

D. Additionally, there is a second senior lien, as stated on Schedule D, securing a claim of at least $99,156.00.

E. The Debtor has claim an exemption, in an unstated amount, on Schedule C.

F. Debtor files copies of Schedules A, C, and D in support of the Motion (and appears to instruct the court to review the exhibits, assemble from those exhibits the relevant information, and then state such information for the Debtor to the extent that it should have been stated with particularity in the Motion).

G. Debtor further states that the grounds for the Motion are as stated in the Motion, and the Points and Authorities, Declarations, and any proposed Chapter 13 Plan (as may be amended in the future). It appears that Debtor is further instructing the court to review and assemble the grounds which have not been stated in the Motion for the Debtor.

Motion, Dckt. 86.

Federal Rule of Bankruptcy Procedure 9013

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The Twombly pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. Id. A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." Id. It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also In re White, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations,

legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

The court declines the opportunity to provide associate attorney or law clerk services to Movant, to assemble the proper motion for Movant, assert those grounds, and then rule upon such asserted grounds.

Grounds as Stated in the Motion

Here, Debtor has managed to state the minimal grounds for the granting of relief – Judicial lien (though in an unknown amount), against property in which the Debtor has claim an exemption (though in an unknown amount), for which the senior liens and exemption exceed the value of the property. (Counsel should not take the above to be a statement that the court finds the motion to be of a level of practice which the court deems proper, but merely if the court ignores the shortcomings, there may be the absolute minimal pleading having been made by Debtor.)

Though not stated in the Motion, the Abstract of Judgment includes the recording information which the court can use in drafting the order.

Based on the foregoing, the motion is denied without prejudice. The Debtor can file a new motion and properly serve it on the Creditor whose lien is being avoided.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Lien filed by 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.

10. 14-23348-E-13 OMAR PINGOL — MOTION TO CONFIRM PLAN
KFS-2 Karl-Fredric Seligman — 6-14-14 [74]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the

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

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 June 15, 2014. By the court's calculation, 44 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 Amended Plan.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

The Chapter 13 Trustee opposes the plan on the basis that the plan relies on pending Motions: Motion to Avoid Lien of Chase Bank and Motion to Avoid Lien of Green Valley Lake Community Association.

Additionally, Trustee argues that the Debtor's Plan is not the Debtor's best effort under 11 U.S.C. § 1325(b). Debtor is above median income and proposes a 36 month plan paying $106.00 per month with a 0.5% guaranteed dividend to unsecured claims. According to the Trustee's review and recalculation of Form B22C, the Statement of Current Monthly Income, Line #59, the Debtor's monthly disposable income totals $1,198.56. On line #35, Debtor deducted $143.75 for childcare expense. Debtor has failed to provide the trustee with evidence of this expense, despite the trustee's request for evidence. $143.75 should be added back into line #59. On line #37, Debtor deducts $143.00 for telecommunication services, excluding services such as basic home telephone and cell phone service. The Debtor has not specifically itemized the services on Schedule J but deducts $250 for telephone, cell phone, internet, satellite and cable services. $143.00 should be added back into line 59, until debtor provides evidence of qualifying expense. On line #40, Debtors deduct $500.00 per month for contribution to the care of household or family member. Debtor has failed to provide the Trustee with any evidence of the contribution or how long the

Debtor has been assisting the family member or why the support is necessary. $500 should be added back into line #59.

Trustee also states on line #43, Debtor deducts $156.25 for education costs for dependent children under 18. Debtor has not provided the Trustee with any evidence of expense for attendance at a private or public elementary or secondary school. $156.25 should be added back into line #59. On line #44, Debtor deducts $43 for additional food and clothing expense. Based on the provision of this line item, debtor must demonstrate that the additional amount claimed is reasonable and necessary. Debtor has not done so. $43 should be added back into line #59. On line #45, Debtors deducts $200 per month for charity. Debtor fails to report any cash donations to charity on Statement of Financial Affairs #7. $200 should be added back into line #59. On line #47(a), Debtor deducts $1,515.27 for future mortgage payments. On Schedule J, Debtor reports his mortgage payment being $1,261.88 and his Homeowner's Association Dues as $186 per month. $67.39 should be added back into line #59. Also On line #60, Debtor deducts $1,088.00 for reasonable excess transportation costs. Debtor has failed to explain why the additional cost is reasonable. Based on Schedule I and Debtor's residential address, Debtor drives approximately 7.4 miles to work and his non-filing spouse drives approximately 28.8 miles each way or 57.6 miles per day which is approximately a 40 minute drive each way.

Trustee argues that if the plan is extended to 60 months which is the applicable commitment period, unsecured creditors would receive payment exceeding the 0.5% dividend, and therefore unsecured creditors are not receiving what they are entitled to under 11 U.S.C. § 1325(b).

Furthermore, the Trustee argues that the Debtor may not be able to make the payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6). At the 341 held on June 19, 2014, Debtor indicated that his non-filing spouse was not currently working due to an injury. Debtor admitted that his spouse is currently receiving approximately $3,200 per month from Workers Compensation, which is significantly less than the income reported on Schedule I. It appears the Debtor may not be able to make proposed plan payments.

Lastly, the Trustee states the plan may not pay unsecured claims what they would receive in a Chapter 7, 11 U.S.C. §1325(a)(4). At the 341 held on June 19,2014, Debtor admitted that his spouse is currently out on a workers comp disability claim. This asset is not listed as a potential asset on Debtor's Schedule B.

DEBTOR’S REPLY

Counsel for Debtor filed a reply, stating that the Debtor’s proposed plan is proper in length and amount, stating the Trustee has recalculated by conjecture. Counsel states that the Trustee did not request additional documents after the 341 meeting and that he never received their email.

The Debtor has not provided any testimony or properly authenticated evidence in responding to the objections. Rather, Debtor merely has his attorney file a Reply making arguments which make statements as to unestablished facts.

Counsel argues that Debtor's non-filing spouse has commenced an absence from employment on a workers compensation claim as the Trustee has represented and represents that this is anticipated as short term and his spouse will return to the same position with the same income and expenses as before the injury. Counsel for Debtor also represents that the worker's compensation claim by his non-filing spouse occurred post petition and that it is not subject to disclosure because it is not an asset of the estate within the meaning of the code.

DISCUSSION

The court has denied the Motion to Value and Motion to Avoid Lien on which this pending plan relies on. Therefore, the plan cannot be confirmed.

Furthermore, Debtor has not provided evidence in support of his opposition. Argument by Counsel cannot be considered as evidence. It appears Debtor has not provided an adequate explanation for the expenses claimed in Schedule J. The Debtor is incorrect in arguing that the Trustee's objections are mere "conjecture" as to the deductions that Debtor makes in computing the required term of the Chapter 13 Plan.

On the Chapter 13 Statement of Current Monthly Income states gross income of $10,605.67 for the Debtor and Debtor's Spouse. Dckt. 47 at 34. Debtor then makes the necessary calculations, and shows that annualized current monthly income of $127,268.04 for the Debtor's family of three persons is more than the Applicable Family Median Income of $66,618.00. The Debtor states on the Statement of Current Monthly Income that the applicable commitment period if 5 years. *Id.*

The Applicable Commitment Period is five years. 11 U.S.C. § 1325(b)(4)(A)(ii). This computation is based on "Current Monthly Income," which is statutorily defined to be base on the immediate six month pre-petition period historical information, without regard to post-petition changes. 11 U.S.C. § 101(10A). (This does not mean that the Debtor's post-petition projected disposable income is this pre-petition historical amount, but is a forward looking projection based upon the actual post-petition finances for the Debtor – *Hamilton v. Lanning*, 560 U.S. 505 (2010).

Computation of Projected Disposable Income

The Debtor's Reply takes exception to the Trustee challenging amounts claimed as expenses – contending that merely because the Debtor (who bears the burden of proof for confirmation) states that he has these expenses, then they are per se reasonable and beyond challenge. That is not the case.

Though Form 22B has been created to assemble some of the financial information, neither the parties and court are mindlessly wedded to that form to the extent that it conflicts with or is contrary to the Bankruptcy Code. For over-median income debtors, the Ninth Circuit Court of Appeals clearly stated that Congress has mandated a "simple" mathematical calculation of expenses in determining current monthly income.

In *Drummond v. Welsh*, 717 F.3d 1120, 1128-1130, 1133-1135, (9th Cir. 2012) [footnotes omitted],

"In 1984, Congress amended Chapter 13 to address perceived abuses in the bankruptcy process. Most pertinent to the issues currently before us was the concern that, as in In re Goeb, debtors were proposing plans that provided for minimal repayment of unsecured creditors, while the debtors maintained excess income that could have been devoted to those debts. The 1984 amendments, therefore, added a projected disposable income requirement: An objection by the trustee or an unsecured creditor triggered a requirement that the debtor devote all of his disposable income for three years to make payments under the plan. Section 1325(b) defined 'disposable income' as 'income which is received by the debtor and which is not reasonably necessary to be expended' either 'for the maintenance or support of the debtor or a dependent' or for the continuation of a going business.

The changes in the Bankruptcy Code did not require our reconsideration of the 'totality of the circumstances' test as a measure of good faith, and we continued to employ that formulation. Nevertheless, they did raise questions about the breadth of the "good faith" inquiry. The 1984 amendments included statutory language that directly addressed matters, such as how much a debtor had to pay under a plan, that previously had been subsumed in the 'good faith' inquiry. Once Congress explicitly addressed those issues, a number of courts and commentators concluded that there was no need to consider them as part of the inquiry into good faith.

In 2005, Congress again revised Chapter 13 when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). The good faith requirement under § 1325(a) remained the same, but there were significant changes with respect to the calculation of disposable income. Before the BAPCPA, bankruptcy judges had authority to determine a debtor's ability to pay based on the individual circumstances of each case and each debtor. Congress replaced this discretion with a detailed, mechanical means test, which requires debtors with above-median income to calculate their 'disposable income' by subtracting specific expenses from 'current monthly income,' as defined by the Bankruptcy Code. For our purposes, several elements of this calculation are important. The debtor begins with his 'current monthly income,' which, by definition, explicitly 'excludes benefits received under the Social Security Act.' The debtor then subtracts living expenses based on the Internal Revenue Service's 'Collection Financial Standards,' a detailed series of averages for living expenses that the Service uses to calculate necessary expenditures for delinquent taxpayers. The debtor also subtracts his averaged payments to secured creditors due during the following sixty months.

...

Section 1325 states that disposable income is current monthly income 'less amounts reasonably necessary to be

expended— . . . for the maintenance or support of the debtor or a dependent of a debtor.' 11 U.S.C. § 1325(b)(2) (2006). Section 1325 further provides that '[a]mounts reasonably necessary to be expended under paragraph (2) . . . shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2).' 11 U.S.C. § 1325(b)(3) (emphasis added). For its part, section 707(b)(2) provides that current monthly income shall be reduced by '[t]he debtor's average monthly payments on account of secured debts,' 11 U.S.C. § 707(b)(2)(A)(iii); that section, however, does not include any qualification or limitation on the kind of secured debt that is deducted from current monthly income. As we recognized in *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 873 n.2 (9th Cir. 2008), overruled on other grounds by *Hamilton v. Lanning*, 130 S. Ct. 2464, 2475, 177 L. Ed. 2d 23 (2010), prior to the BAPCPA,

> '[d]etermining what was 'reasonably necessary' for the maintenance or support of the debtor was dependent on each debtor's individual facts and circumstances. This amorphous standard produced determinations of a debtor's 'disposable income' that varied widely among debtors in similar circumstances. BAPCPA replaced the old definition of what was 'reasonably necessary' with a formulaic approach for above-median debtors. 11 U.S.C. § 1325(b)(3).'

Again, in the BAPCPA, Congress chose to remove from the bankruptcy court's discretion the determination of what is or is not 'reasonably necessary.' It substituted a calculation that allows debtors to deduct payments on secured debts in determining disposable income. That policy choice may seem unpalatable either to some judges or to unsecured creditors. Nevertheless, that is the explicit choice that Congress has made. We are not at liberty to overrule that choice.

...

The calculation of 'disposable income' under the BAPCPA requires debtors to subtract their payments to secured creditors from their current monthly income. In enacting the BAPCPA, Congress did not see fit to limit or qualify the kinds of secured payments that are subtracted from current monthly income to reach a disposable income figure. Given the very detailed means test that Congress adopted, we cannot conclude that this omission was the result of oversight. Moreover, even if it were, we would not be justified in imposing such a limitation under 'the guise of interpreting 'good faith.''"

While the bankruptcy judge has retained his or her full range of discretion in determining disposable income for the under-median income debtor, for the over-median income debtor the court, debtor, and trustee are limited to the expenses permitted under the Internal Revenue Service

Guidelines applicable for a § 707(b)(2)(A), (B) analysis (11 U.S.C. § 1325(b)(3)).

Debtor has not shown that from the $10,605.67 in gross monthly income, Debtor has only $106.00 of "projected disposable income." Debtor has not provided the court with a chart of the Internal Revenue Service Guideline amounts (which are the lesser of the Guidelines or actual amount).

In reviewing the income set forth on Schedules I, Dckt. 47, the court notes the following:

A. Debtor lists the family unit gross income to be $11,729.00. *Id.* at 17.

B. For $11,729.00 in gross income, the Debtors have $2,441.01 (21%) withheld for income taxes and Social Security.

C. Debtor has a deduction of $468.70 for voluntary contribution for his retirement plan, in addition to Debtor's USPS retirement. Id. at 18.

D. Debtor has a deduction of $392.52 for his health savings account.

E. After Deductions and Withholding, the Debtor computes on Schedule I the Monthly Income to be $7,069.55. *Id.*

F. Co-Debtor has $38.32 withheld for a 401k. *Id.*

For Expenses stated on Schedule J, the Debtor lists $6,963.88 (for the family of 3 persons), Dckt. 47, and the court notes the following:

a. Mortgage, Property Taxes, and Insurance of $1,261.88. FN.1.

FN.1. Though no proof of claim has been filed by Bank of America, N.A. in the present case, in the Debtor's Prior Bankruptcy Case a proof of claim was filed. 11-22652, Proof of Claim No. 5. On that Proof of Claim the Bank listed the debt to be $128,611.34, with an arrearage of $30,827.37. The monthly payments were stated to be $942.89. It is possible that the $1,263.88 could include property taxes and insurance. However, the court did not approve a loan modification in the prior case. It is not clear in this case whether an arrearage exists or whether the Bank of America, N.A. debt is current.

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b. Food and Housekeeping.....$1,100.00

c. Childcare and Education.....$ 400.00

d. Medical and Dental (in addition to HSA deduction of $392.52).....$ 300.00

e. Transportation.....$1,350.00

f. Charitable.....$ 200.00

(The court cannot determine if this is consistent with the historical and actual contributions of Debtor or created for Schedule J)

g. Support Payments to Others.....$ 500.00
(No evidence of income and expenses of persons being given support)

Id. 20.

The footnote to this Schedule J is telling – "Actual expenses have been higher but Debtor is restraining expenses to extent set forth on this Schedule." Notwithstanding having over $10,000.00 in monthly gross income, the Debtor has now ended up in two bankruptcy cases. The statement that expenses are "restrained" appears to be illusory or part of an economic delusion for this Debtor and his spouse.

The only creditors to be paid through the Chapter 13 Plan are creditors holding general unsecured claims (00.5% dividend). All the proposed Chapter 13 Plan proposes to do is "lien strip" a junior lien from the Debtor's property. This raises a good faith issue for confirmation, and whether the plan is merely a disguised Chapter 7 case intending to improperly circumvent the Supreme Court's ruling in *Dewsnup v. Timm*, 502 U.S. 410, 416 (1992). See *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case).

On its face, the Debtor's plan provides that Debtor's counsel shall be paid $0.00 for fees in this case. Chapter 13 Plan, ¶ 2.06. Counsel's Disclosure of Compensation of Attorney for Debtor(s) states that he has agreed to accept $0.00 for legal services in connection with this case. The court notes that Debtor had a prior Chapter 13 case in this District, 11-22652, in which it was disclosed that counsel received $3,500.00. 11-22652 Dckt. 23. The Prior Case was dismissed by the Debtor. This was after the Chapter 13 Trustee filed his motion to dismiss the case because of Debtor's failure to prosecute the case. 11-22652, Motion, Dckt. 25.

The Debtor states that his spouse's income has been reduced temporarily due to an injury for which a Worker's Compensation is being asserted. Thus, considering the Plan in light of the $10,000 a month gross income is reasonable and proper. Debtor argues that the Worker's Compensation Claim should not be considered it is not an asset of the estate, citing 11 U.S.C. § 541(a). Debtor does not direct the court to which of the seven subsections of 11 U.S.C. § 541(a) which he is referencing. Debtor also states that the Worker's Compensation Claim would not be an asset upon conversion, citing 11 U.S.C. § 348(f)(1)(A).

Beginning with the later, 11 U.S.C. § 348(f)(1)(A) provides that upon conversion, property of the estate shall consist of property of the estate as of the date of the filing of the petition, and still in the possession or control of debtor upon conversion.

However, with respect to 11 U.S.C. § 541(a), the Debtor ignores the provisions of 11 U.S.C. § 1306 – which provides a specific "property of the

estate" definition for Chapter 13 cases. It provides that property of the estate in a Chapter 13 case consists of all of the property as specified in 11 U.S.C. § 541(a), plus

> "(1) all property of the kind specified in such section that the **debtor acquires after the commencement of the case** but before the case is closed, dismissed, or converted to a case under chapter 7, or 11, or 12 of this title, whichever occurs first; and
>
> (2) earnings from services performed by the debtor **after the commencement of the case** but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first."

It appears that the Worker's Compensation Claim, at least to the extent that it replaces any lost wages, is property of the bankruptcy estate. (The parties not having addressed this Code section, the court does not issue a final ruling on this point.)

The amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is not confirmed.

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

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

11. 12-25050-E-13 BLG-5 — CARLOS/MARTHA MORALES — Chad Johnson — MOTION TO APPROVE LOAN MODIFICATION — 7-1-14 [68]

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

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative

ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 1, 2014. By the court's calculation, 28 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Carlos and Martha Morales ("Debtor") seeks court approval for Debtor to incur post-petition credit regarding their existing mortgage encumbering their residence commonly known as 1222 Shoreline Circle, Fairfield, California. Nationstar Mortgage, LLC ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $1,335.40 a month. The modification will capitalize the pre-petition arrears and provide an interest rate of $.625%.

The Motion is supported by the Declaration of Carlos and Martha Morales. 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.

TRUSTEE'S OPPOSITION

Trustee opposes the motion on the basis that the Debtor's Proof of Service does not provide for service to all creditors nor the legal authority for the motion. If the legal authority for the motion includes 11 U.S.C. §363(b)- use, sale or lease of estate property other than in the ordinary course of business- then Federal Rule of Bankruptcy Procedure 2002(a)(2) applies, and all creditors must be served unless the court for cause directs another method for giving notice.

Additionally, Trustee states Debtor's Declaration provides no specifics regarding the loan modification or whether Debtor's have an understanding of the terms of the loan modification. The Declaration merely refers to Exhibit A, a copy of the loan modification, and requests court approval. Admittedly, the Debtors' signature does appear on the loan modification agreement.

Trustee also states that the copy of the loan modification agreement Debtor's have filed as Exhibit A is scarcely legible. Debtor's Motion, does provide an adequate description of the loan modification.

Lastly, the Trustee states that under Debtor's confirmed plan, the ongoing mortgage payments of $1,947.04, including escrow, are classified as a Class 1 secured claim and paid through the plan. The loan modification proposes a principal and interest payment of $1,335.40 effective July 1, 2014 and does not appear to address escrow. The Trustee is uncertain whether Debtor's now intend to pay escrow directly, or if taxes and insurance are to be incorporated into the monthly mortgage payment. Debtor's have not filed a modified plan or amended Schedules.

DEBTOR'S RESPONSE

Debtor responds, stating that the Motion to Incur Debt is made pursuant to Federal Rule of Bankruptcy Procedure 4001(c)(1)(A) which only requires notice to be served on a party against whom relief is sought, which is Nationstar Mortgage. Fed. R. Bank. P. 4001(c)(1)(C). This being a Chapter 13 case, no committees have been appointed and the addition service parties do not exist. The court has not required additional service. Debtor states they have met this requirement.

Debtor also filed a supplemental Declaration stating that they fully understand them terms of the proposed loan modification and have provided a more legible copy of the proposed loan modification agreement.

Lastly, Debtors state the loan modification proposes a principal and interest payment of $1,335.40 plus an escrow payment of $546.04 for a total monthly payment of $1,881.44. Upon approval of the requested loan modification, Debtors will file a modified plan with a motion to confirm modified plan.

DISCUSSION

After a review of the legible copy of the Loan Modification Agreement and Supplemental Declaration of Debtors, this post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. The Motion to Incur Debt made pursuant to Federal Rule of Bankruptcy Procedure 4001(c)(1)(A) only requiring notice to be served on a party against whom relief is sought, the court finds service proper. Fed. R. Bank. P. 4001(c)(1)(C). There being no further 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 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 court authorizes Carlos and Martha Morales ("Debtor") to amend the terms of the loan with Nationstar Mortgage, LLC, which is secured by the real property commonly known as 1222 Shoreline Circle, Fairfield, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 78.

12. 13-34152-E-13 ALLISON JOHNSON **MOTION TO CONFIRM PLAN**
NUK-2 Najeeb U. Kudiya **5-29-14 [63]**

Final Ruling: No appearance at the July 29, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 29, 2014. By the court's calculation, 61 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

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

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on May 28, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

13. 12-28856-E-13 KEVIN/BRANDEE MCCANN — MOTION TO MODIFY PLAN
DEF-4 David Foyil — 5-14-14 [71]

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 the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 23, 2014. By the court's calculation, 36 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.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of the Second Amended Plan on the basis that it appears that the Debtors cannot make the payments required under 11 U.S.C. § 1325(a)(6). Debtors are delinquent $1,669.00 under the terms of the proposed modified plan. This case was filed on May 7, 2012.

According to the proposed modified plan, Dckt. No. 75, Page 6, Section 6.02), payments are due at $435 months 1 through23, then $625 thereafter, which results in $11,255.00 have become due. The Debtor has paid a total of $9,586.00 to the Trustee, with the last payment posted on March 27, 2014 in the amount of $420.00

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

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

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

14. 12-28856-E-13 KEVIN/BRANDEE MCCANN — MOTION TO VACATE ORDER
DEF-5 David Foyil — 5-14-14 [77]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 14, 2014. By the court's calculation, 75 days' notice was provided. 28 days' notice is required.

The Motion to Vacate Order 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 Vacate Order is Denied.

The Debtors in this case, Kevin McCann and Brandee McCann, move for an order pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b) modifying this court's prior order entered on September 20, 2012. The Motion states with particularity (Fed. R. Bank. P. 9013) the following grounds and relief requested:

A. On May 7, 2012 the Debtors filed the current bankruptcy case.

B. On September 20, 2012 the court granted a motion to value the secured claim of Springleaf Financial. (Debtors make no effort to identify the order for the court.)

C. The Debtors have decided to "surrender" real property commonly known as 9472 Spanish Street, Drytown, California.

D. Debtors ask that the court vacate the Order valuing the Springleaf Financial secured claim.

Motion, Dckt. 77. From the above, Debtors fail to state grounds with particularity by which this court may properly vacate a prior order.

Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic),

misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863.

Though not identified by Debtors, the court issued an order on September 20, 2012 valuing the secured claim of Springleaf Financial Services, Inc. (the court infers that this is the "Springleaf Financial" named by Debtors in the Motion), for which a second deed of trust recorded against the Spanish Street Property provides the lien, to have a value of $0.00 as a secured claim and the balance to be unsecured for purposes of a Chapter 13 Plan. Order, Dckt. 38.

The Debtors have now filed a Second Modified Plan. Dckt. 75. The Debtors now desire to abandon the Spanish Street Property pursuant to the proposed Second Modified Plan. A "surrender" modifies the automatic stay to allow creditors having liens against collateral to exercise their lien rights in the collateral. Such a "surrender" does not transfer title to the property to the creditors or otherwise determine their claims.

The proposed Second Modified Plan provides for the payment of a 0.00% dividend to creditors holding general unsecured claims.

The Motion does not state any grounds by which the prior order is "void." The court properly determined it after proper notice to the Creditor and upon the evidence presented by Debtors. Merely because the Debtors want to allow the creditors to foreclose the on the Property does not render the Order void. It may be that the Order does not determine the value for purposes of the proposed Second Modified Plan, but it is not void. See, *Gold Coast Asset Acquisition, L.P. v. 1441 Veteran Street Co (In re 1441 Veteran Street Co.)*, 144 F.3d 1288, 1292 (9th Cir. 1998).

The Motion is denied, without prejudice to the court determining, if necessary and properly presented to the court, the unsecured claim, if any, of Creditor for purposes of any Class 7 unsecured claim dividend.

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 Vacate Order 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 Vacate the court's prior order valuing the secured claim of Springleaf Financial Services, Inc. ("Creditor"), without prejudice to the court determining, the unsecured claim, if any, of Creditor for purposes of any Class 7 unsecured claim dividend., issued on September **18, 2012, Dckt. No. 38, is vacated.**

15. 11-25363-E-13 THOMAS SAKAOKA
PGM-6 Peter Macaluso

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTOR'S ATTORNEY(S)
6-30-14 [99]

Tentative Ruling: 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).

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 the Chapter 13 Trustee, parties requesting special notice, all creditors, and Office of the United States Trustee on June 30, 2014. By the court's calculation, 29 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). The defaults of the non-responding parties are entered.

The Motion for Allowance of Professional Fees is granted in the amount of $480.00, with the balance of the fees denied.

FEES REQUESTED

Peter Macaluso, the Attorney ("Applicant" or "Counsel") for Thomas Sakaoka, the Chapter 13 Debtor ("Client"), makes an Additional Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period of May 30, 2012 through February 14, 2013. The Motion states with particularity (Fed. R. Evid. 9013) the following grounds upon which the fees are requested:

A. Counsel provided necessary, substantial, unanticipated legal serves to the Debtor in this case, which consisted of,

1. Motion to Modify the confirmed plan to address an unprovided for claim; and

2. Responding to a motion to convert to Chapter7.

B. The additional fees are in the amount of $2,000.00.

C. The loadstar rate used by counsel is $200.00 for 6 hours of work which was "unanticipated."

D. The unanticipated time services are stated to be:

1. Motion to Modify .....3.6 hours

2. Motion to Convert.....2.4 hours

Six hours at $200.00 an hour equals $1,200.00 in fees. It appears that Counsel seeks $2,000.00 in additional fees based on the pre-confirmation and anticipated work exceeding the set fee which he opted to accept for this case. Local Bankruptcy Rule 2016-1 allows for additional fees above the set fee amount only for substantial, unanticipated services provided, not merely because in retrospect Counsel does not fee that the set fee he elected to take was not as advantageous as it appeared previously. L.B.R. 2016-1(c)(3).

REVIEW OF BANKRUPTCY CASE

This case was filed on March 3, 2011, as a joint case by Thomas Sakaoka and Natalie Sakaoka. The Chapter 13 Plan was confirmed in this case on October 26, 2011. Order, Dckt. 78. On June 11, 2012 Debtors filed a motion to modify the confirmed plan to provide for Class 3 Plan Treatment (surrender) for the secured claim of Colonial Pacific Leasing Corp. Motion Dckt. 81. The court denied confirmation without prejudice. Order, Dckt. 93. The court denied confirmation for several reasons. First, the motion failed to comply with the basic pleading requirements of Federal Rule of Bankruptcy Procedure 9013.

As separate grounds, the Debtors' updated financial information showed that the Debtors' gross income doubled and there was a corresponding unexplained increase in expenses. Civil Minutes, Dckt. 92; July 17, 2012 hearing.

Having the substantial increase in income and unexplained increase in expenses which exhausted all of the additional income, Debtor Natalie Sakaoka

threw in the towel and elected to convert her case to one under Chapter 7. Election to Convert, filed February 14, 2014; Dckt. 94. The joint case was severed and Natalie Sakaoka is the Debtor in Case No. 13-22829. Debtor Natalie Sakaoka received her discharge on June 26, 2013.

This has left only Thomas Sakaoka as the only Debtor in this case.

OPPOSITION BY TRUSTEE

The Chapter 13 Trustee objects to the Applicant's Motion for Approval of Additional Attorney fees on the basis that Counsel is applying for fees for a failed Motion to Modify and for services rendered to the Debtor now in a different case (which was converted to a Chapter 7), in this present Chapter 13 case.

Counsel applies for fees for $1,200 for work performed on a Motion to Modify and Conversion to Chapter 7 for Debtor Natalie Sakaoka. The petition that was originally filed in March 3, 2011, was a joint petition.

The Motion to Modify at issue was objected to the Trustee, and denied on a number of deficiencies noted by the court, Dckt. No. 93.

On February 14, 2013, Debtor Natalie Sakaoka filed a request for conversion to Chapter 7, which was granted, Dckt. No. 96, which split the cases. The converted case was assigned a new case number.

RESPONSE BY APPLICANT

Counsel reiterates from his Motion that the additional fees are actual, reasonable, necessary and unanticipated. In this case, the debtors' received a Motion to Dismiss, and thus, the Debtors attempted to modify the plan to surrender a "Bobcat Skid Loader S160." Dckt. No. 81.

Counsel states that unfortunately Debtors did not express the 'martial issues' that prevented a "Sufficient" motion being confirmed. As a result, of both the denial of the motion and the pending divorce, the Joint Debtor converted to chapter 7, and a detailed discussion as to the reasoning for the failure of filing a sufficient disclosure, and conversion is difficult due to the pending divorce and litigation as counsel represented both parties to the divorce and has a duty to both parties which prevented certain disclosures as to who's at fault for the breach of plan.

Applicant restates his request that the Motion be granted as to 6.00 hours, or $1,200.00, and that the motion for attorney fees be granted.

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).

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.

DISCUSSION

This court recognizes that attorneys for debtors do not guaranty specific results and are not "contingent fee" attorneys who will get paid only if a debtor completes a plan. Such would be an unreasonable standard and unduly burden consumer attorneys to prosecute cases in good faith with their clients.

The Trustee filed his first motion to dismiss this case on June 1, 2011, because the Debtors were $10,270.00 delinquent in plan payments and had not confirmed a plan. Motion to Dismiss, Dckt. 35. Debtors confirmed their Second Amended Plan on October 26, 2011, for which Counsel elected to accept a $3,500.00 set fee pursuant to Local Bankruptcy Rule 2016-1(c)(3). Confirmation Order, Dckt. 78.

The Debtors proposed a First Modified Plan, which was denied confirmation due to significant defects in the Motion and evidence. The fact that the plan was denied confirmation, the motion defective, and the evidence insufficient is not something that was unanticipated, nor the Debtors' fault. It is Counsel who prepared the Motion and supporting evidence.

No "necessary" modified plan has been prosecuted by Debtor Thomas Sakaoka. Notwithstanding the unprovided for claim and the double income information provided in connection with the motion to modify, the Chapter 13 Trustee has not sought to modify the plan. Presumably, that has worked itself out, with everyone determining that no modification of the Plan is "necessary."

FEES ALLOWED

The court looks at the timing of the court's denial of the motion to confirm the proposed Modified Plan. By July 2012, few attorneys should have believed that this court did not enforce the provision of Federal Rule of Bankruptcy Procedure 9013 or required that parties (be they a debtor or a creditor) not merely file conflicting testimony under penalty of perjury and not explain why the testimony has changed. The court notes that the Chapter 13 Trustee's opposition states the failure to comply with Federal Rule of Bankruptcy Procedure 9013, but does not raise the conflicting testimony point. The Trustee did object based on the Debtors having failed to provide current financial information. Trustee's Opposition, Dckt. 85.

It was necessary for Counsel to meet with and assist Debtor Natalie Sukaoka in electing to convert her case to one under Chapter 7. While one could argue that such would be covered by the set fee if both Debtors elected to convert, Counsel still has to fulfill all of his obligations on the set fee in this Chapter 13 case for Debtor Thomas Sakaoka.

The court allows $480.00 of additional fees for the service provided to Natalie Sukaoka in this case relating to her election to convert to Chapter 7.

For the remaining $720.00 in fees relating to the motion to modify, the court disallows any additional fees. Debtor Thomas Sakaoka have demonstrated that the motion was not "necessary." Even more significantly, the failure of that motion did not rest with the court interpreting conflicting evidence against the interpretation asserted by the Debtors or addressing non-well established law. Rather, it failed for the failure of the motion itself and the Debtors providing conflicting testimony under penalty of perjury, without any explanation.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay as provided in the confirmed Chapter 13 Plan, the following amounts as additional compensation to this professional in this case:

Fees $480.00

pursuant to this Application 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 the Chapter 13 Debtor,
>
> Fees in the amount of $ 480.00,
>
> in addition to the Fees previously allowed Counsel in this case.
>
> **IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay the fees allowed by this Order from the available funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

16. 12-41175-E-13 MALAI KHAMVONGSA **MOTION TO MODIFY PLAN**
MMN-2 Michael Noble **6-13-14 [43]**

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 Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 13, 2014. By the court's calculation, 46 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.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. On June 13, 2014, Debtor filed a proposed First Modified Plan. Dckt. 47. The Motion, consisting of two unnumbered paragraphs consuming approximately one-half of one page of pleadings, states with particularity (Fed. R. Bankr. P. 9013) the following grounds and relief requested:

A. The mortgage arrearage has come in $7,000.00 higher than anticipated.

B. Debtor's income is a little lower "than before she lost her job."

C. Debtor's expenses are also a little lower.

D. Debtor has a small amount of severance (in an unstated amount) and unemployment (in an unstated amount) to carry her through the next year until she can find comparable work.

E. Debtor then directs the court to read Exhibits I and J, and the Debtor's declaration to determine what information therein are the "grounds" which the court will state in the Motion for Debtor.

F. Debtor is increasing (in an unstated amount) her plan payments to provide for higher (in an unstated amount) than anticipated amount of (unidentified by creditor or type) claims.

G. Text, which appears to be a notice to creditors of some items (academically) which the court considers whether to confirm a modified plan. (The Motion does not clearly allege the various elements of 11 U.S.C. §§ 1322, 1325(a), and 1329.)

Motion, Dckt. 43.

Debtor states under penalty of perjury,

A. "My income is a little lower [in an unstated amount] as I lost my job."

B. Debtor is on unemployment (in an unstated amount).

C. Debtor has about $9,000.00 of severance (which total amount is unstated).

D. Debtor's expenses are lower.

E. Debtor directs the court to read Exhibits I and J (but does not authenticate them under penalty of perjury, which exhibits are not signed under penalty of perjury).

F. The Debtor's sources of income are (1) unemployment, (2) small business income of $100, (3) family support (unstated amount), and (4) severance pay.

G. Debtor states that her "net income" is $3,380.00 a month, with expenses of only $1,525.00 a month (with mortgage payment included in the Plan).

H. Debtor provides her personal conclusions of law and findings of fact, determining that her Modified Plan should be confirmed.

Declaration, Dckt. 45.

CHAPTER 13 TRUSTEE OPPOSITION

The Chapter 13 Trustee opposes the Motion on the following grounds:

Severance Pay

The Trustee is uncertain whether the proposed plan payment is Debtor's best effort under 11 U.S.C. § 1325(b). Debtor's Motion and Declaration, Dckt. Nos. 43 and 45, indicate that Debtor lost her job at an unspecified pay, but received severance pay of some amount. Debtor's Declaration states that she has $9,000.00 left of her severance and that she paid off her loans on her retirement accounts out of these funds.

Debtor does not provide information regarding her severance, such as: what the original amount of severance received; when it was received; nature of her severance; whether it was pre-paid wages or calculated on years of service; the total payment of loans on retirement accounts, and how else has the money been used. Debtor's Schedule I filed at the onset of the case, Dckt. No. 19, indicates how Debtors was employed for 1- years as a specialist for the Bank of America.

Mortgage Arrears

Debtor's modified plan proposed a monthly dividend of "" for mortgage arrears in Class 1. The additional provisions of the confirmed plan provides for payments of $236.00 per month beginning in Month 15, through monthly 43, then $310.00 for months 44 or 60. Trustee reflects that the arrears are based on the confirmation plan and are already owed $522.42 in monthly payments based on the monthly payments called for by the plan, and the additional provisions of Debtor's proposed plan do not address what monthly payments on the arrears to be paid prior to Month 15.

RESPONSE TO OBJECTION (Dckt. 59)

Debtor states that she will add the following language in the order confirming the plan to address the Trustee’s concern about how much is being paid toward the mortgage arrears:

> The plan will pay attorney fees at $100.00 a month for 7 months, 236 a month for 7 months. The plan will also pay $236 a month for arrearages for 4 months, $396 a month for 25 months, and $464 for 17 months.

Debtor states that she also addresses the Trustee’s questions about her severance pay in her declaration filed with the reply. She states that she is making her best effort by stating current with her plan payments despite being laid off.

Supplemental Declaration in Support of Motion to Modify Plan (Dckt. 60)

To rehabilitate her prior deficiencies, Debtor provides a Supplemental Declaration. Dckt. 60. In it, she states,

> I thought I had about $9,000 to carry me through the next year until I can find work. The savings is the result of receiving a regular pay check after being laid off in December 2013 until May 2014 as severance, receiving unemployment in January 2014, and my retirement plan which I had to cash out leaving me with an extra tax bill. My

> severance was based on my years in service and I lived off my paycheck until May of this year, and now live off the unemployment. I also paid off my car loan of $4,000 and oral surgery for my son of about $4,000. After paying off my loans on my retirement, I received a check of about $13,000 cashing out my retirement. I will have to pay tax on this. When all of this was said and done, I ended up with around $9,000 in the bank and about $4,000 in cash that I hid away for an emergency. So I was mistaken in saying I only had $9,000 as it is more accurate to say I have around $13,000 with the money I hid away.

Declaration in Support of the Motion to Modify Plan, Dckt. No. 60.

The Debtor acknowledges that she has been spending her severance payments and has not contributed her severance play towards her plan payments. Debtor states that she has paid off her car loan and for surgery for her son with a portion of her severance payments, after she was laid off recently. Debtor also admits to "hid[ing] away" money for emergencies in the bank.

In substance, Debtor admits to having violated the Bankruptcy Code and operated with the protection of the Bankruptcy Code. Clearly, the Debtor has chosen to dictate to Congress, the Chapter 13 Trustee, and Creditors her bankruptcy terms – drafting her *sui generis* bankruptcy laws. She takes the money she wants, pays the creditors she wants, hides the assets she wants, and maintains the lifestyle she wants – unencumbered by the laws as enacted by Congress and signed by the President of the United States.

In proposing a new modified plan, however, Debtor has not filed revised schedules reflecting her up-to-date income and expenses. Instead, she continues to hide that information from the court and creditors.

Debtor has not included her severance payments in Line #1 of her Schedule I, stating her gross wages, salary, and commissions. In *United States v. Quality Stores*, Inc., the Supreme Court recently held that severance payments constituted "wages" for which employer was required to withhold FICA tax. *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 188 L. Ed. 2d 413 (2014). Debtor offers no explanation as to why her schedules have not been amended, and why her severance payments have not been contributed towards her payments in her Chapter 13 Plan.

In her Original Declaration, she makes references to "we filed this case" and "plan proposes to pay as much as we can afford," "our creditors," and "we have always paid our debts." Dckt. 45; Declaration, pg. 2:16-21. While the court initially thought that this may have been a simple typographical error (counsel possibly just failing to correct the pronouns in a form), it may be that there is a spouse, former spouse, or cohabitating partner for the Debtor and her two sons.

Review of Exhibits I and J

Though not stated under penalty of perjury, not authenticated, and

not incorporated into Debtor's Declaration, the court has reviewed Exhibits I and J. For income, the Debtor states that she has $100.00 from a business, $1,000.00 support from (unidentified family), and $1,733.33 in unemployment compensation. Dckt. 46, pg. 4. In addition, Debtor lists $547.00 in "severance pay." She states that she has $3,380.33 gross income each month.

The monthly expenses for the Debtor and her two sons is stated to be $1,525.33 a month. To reach this number Debtor purports to have expenses including the following: (1) $50.00 for home maintenance; (2) $75 for electricity, heat, and natural gas; (3) $204.00 for telephone, cell phone, internet, cable; (4) $400 food and housekeeping supplies (for Debtor, 19 year old son, and 11 year old son); (5) $150.00 clothing; (6) $0.00 personal care; (7) $0.00 medical and dental; (8) $250.00 transportation; and (9) $0.00 health insurance; (10) $0.00 for taxes. The Debtor offers no testimony how she and her two sons exist on $75.00 for utilities, $0.00 for health care; $400.00 for food, and $250.00 for transportation.

The court does not find these unauthenticated, not under penalty of perjury expenses to be credible. Rather, they appear to be a fabrication to create the illusion of a plan. Additionally, the Debtor having hidden assets and operated under her private "bankruptcy laws," keeping whatever assets she wants and paying the creditors she favors, does not enhance her credibility.

There is not a bonus given a debtor (or creditor for that matter) for lying, hiding assets, and sneaking payments to creditors. Debtor does not have the ability to fund a plan. Debtor does not provide for submitting her assets and providing for creditors in good faith or as required under the Bankruptcy Code. She has chosen to give only selective, misleading information to the court and creditors. Only when forced by the Chapter 13 Trustee, does Debtor let a little more information trickle out, but continuing to hide how much she had taken in the past, what she really has now, and when she will have in the future.

This plan does not represent Debtor's best effort under 11 U.S.C. § 1325(b), in that the Debtor has not included all disposable income into making payments under the plan. 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.

17. 10-23278-E-13 JOSEPH/LOURDES IBARRA **MOTION TO VALUE COLLATERAL OF**
PLC-3 **BANK OF AMERICA/NATIONSTAR MORTGAGE, LLC**
6-20-14 [37]

Final Ruling: No appearance at the July 29, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the respondent Creditor, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 20, 2014. By the court's calculation, 39 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 the Bank Of New York Mellon FKA The Bank Of New York, As Trustee For The Certificateholders CWHEQ, INC., Home Equity Loan Asset Backed Certificates Series 2006-S4, previously serviced by Bank of America and presently serviced by NATIONSTAR MORTGAGE LLC, "Creditor," is granted.

The Motion to Value filed by Joseph M. Ibarra and Lourdes V. Ibarra, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtors are the owner of the subject real property commonly known as 8249 Redford Way, Sacramento, California, "Property." Debtors seek to value the Property at a fair market value of $158,000.00 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 senior in priority first deed of trust held by Countrywide (which was replaced by Nationstar servicing for Bank of New York, Trust) secures a claim with a balance of approximately $326,496.00. Creditor's second deed of trust secures a claim with a balance of approximately $23,000.00. 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 Joseph M. Ibarra and Lourdes V. Ibarra, "Debtors," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of the Bank Of New York Mellon FKA The Bank Of New York, As Trustee For The Certificateholders CWHEQ, INC., Home Equity Loan Asset Backed Certificates Series 2006-S4 (previously serviced by Bank of America and presently serviced by NATIONSTAR MORTGAGE LLC), secured by a second in priority deed of trust recorded against the real property commonly known as 8249 Redford Way, Sacramento, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $158,000.00 and is encumbered by senior liens securing claims in the amount of $326,496.00, which exceed the value of the Property which is subject to Creditor's lien.

18. 09-46380-E-13 ROBERT/CYNTHIA BOWEN MOTION TO MODIFY PLAN
NUU-9 Chinonye Ugorji 6-23-14 [199]

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 the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 23, 2014. By the court's calculation, 36 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.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Here, the Chapter 13 Trustee objects to the Motion to Confirm the proposed plan on ths basis there is no evidence of any pending loan modification.

Debtors are proposing to reclassify Class 1 Creditor Select Portfolio Servicing, Inc. for the ongoing mortgage to Class 4, to be paid outside of the Plan. The supporting Motion, Dckt. No. 199, page 4, Line 11, states that "Debtors are currently working with their mortgage lender to modify their mortgage loan." According to the Trustee's records, there are no documents to support that this action is actually happening.

The supporting Memorandum of Points and Authorities, Dckt. No. 203, page 2, lines 115, states:

> Due to change in the mortgage amount, debtors stand the risk of losing their home to foreclosure for inability to comply with the chapter 13 plan. Therefore, debtors are seeking to modify their plan to be able to work directly with the mortgage creditor through a revision of their mortgage loan contract from that of an adjustable rate mortgage to a fixed term mortgage so as to continue to pay the current affordable mortgage.

RESPONSE BY DEBTOR

Debtors respond by enclosing with their reply documentation from the "Mortgage creditor, Select Portfolio Servicing, Inc.," requesting additional documentation from Debtors to enable them to evaluate the Debtors' Application for the Mortgage Loan Modification. Debtors state that they consent to the court's resolution of disputed material factual issues pursuant to Federal Rule of Civil Procedure 43(e), as made applicable to bankruptcy by Federal Rule of Bankruptcy Procedure 9017.

INCORRECT PARTY TO LOAN MODIFICATION

Even though Debtors attempt to assure the Trustee and the court that it is in the process of hammering out a loan modification agreement with the entity that it identifies as its mortgage creditor, the court can already determine that, based on the evidence related to the pending loan modification, and pleadings presented, the court will not approve a loan modification agreement entered between Debtors and the Specialized Loan Servicing, LLC.

Debtors seek modify the loan “held” by “Select Portfolio Servicing, Inc.” However, it has been repeatedly represented in this court that loan servicing companies including Select Portfolio Servicing, Inc. are not creditors (as that term is defined by 11 U.S.C. § 101(10)), but are mere loan servicing agents with no ownership of or in the secured claim. To state that the subject loan “held by Select Portfolio Servicing, Inc.,” indicates that Debtors have no knowledge of who the actual creditor in interest is.

This court has made it clear on many occasions that it can and will only issue orders against parties properly named in motions and for which there is a colorable basis for the court issuing an order effecting the rights of such party. The Debtors provide no evidence for the court to determine who the proper creditor is on this loan. The Debtors do not testify that they borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred from a certain creditor to Select Portfolio Servicing, Inc. The Debtor does not provide the court with any discovery conducted to identify the creditor holding the claim secured by the second deed of trust.

In most cases where Debtors have filed a Motion to Approve Loan Modifications naming a loan servicing agent as a creditor on a claim, no motions are filed seeking to value the claim of the actual creditor, no service is attempted on the actual creditor, and no effort is made to afford the actual creditor any due process rights. In these situations, all orders issued by the court would be void as to the actual creditor. These

circumstances would prove highly inconvenient to the moving debtors as well. After performing under a plan for 3 to 5 years, the debtor would then have a rude awakening that their still remains a creditor, having a debt that was never modified.

Debtors provide no exhibits showing that Select Portfolio Servicing, Inc. is the actual owner of the underlying obligation. There are no references to Select Portfolio Servicing, Inc. in Debtors' originally filed and amended schedules. No assignment or transfer of claim appears on the docket transferring any interest to Select Portfolio Servicing, Inc. The court is not certain how Debtors can name Select Portfolio Servicing, Inc. as the actual lender for an obligation that appears to be owed to another originating entity. The court will not approve an loan modification that will not be effective against the actual owner of the obligation. The court will not issue an order valuing the secured claim that will not be effective against the actual owner of the obligation.

Additionally, no Proof of Claim has been filed in the case by Select Portfolio Servicing, Inc., which may assert that it is the holder of the Note secured by the deed of trust, or any other party claiming that it is the actual owner of the subject claim. No claim on the claims registrar has yet asserted a claim with a balance of $92,778.00 owed. The real creditor of interest in possession of the Note may not have received notice of the Debtor's bankruptcy, and may not have been served notice and the pleadings in this Motion that fundamentally affects its right as a Creditor in this case.

There have been multiple instances in which different loan servicing companies have misrepresented to the court, debtors, Chapter 13 Trustee, U.S. Trustee, creditors, and other parties in interest that the loan servicing company is the "creditor" as that term is defined in 11 U.S.C. § 101(10). In each of those cases, the loan servicing company was merely an agent with very limited authority to service the loan. The servicer was not granted a power of attorney to modify the creditor's rights, was not authorized to contract in its own name to bind the creditor, or was the authorized agent for service of process for the creditor. FN. 1

FN.1. This court has previously addressed this issue with multiple servicing agents the requirement that it accurately identify its status in a bankruptcy case – whether creditor, loan servicer for the creditor, agent of the creditor, or holder of a power of attorney authorized to act for the creditor in legal proceedings or in executing documents in the name of the creditor. In the *Edwin L. and Cynthia Crane* bankruptcy case, Bankr. E.D. Cal. 11-27005, Dckt. 124, the court entered an order requiring Green Tree Servicing, LLC to correctly identify the creditor in cases, and for Green Tree Servicing, LLC not to identify itself as the creditor,

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

service of process for any claims for which Green Tree Servicing, LLC asserts it is a creditor."

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

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

This court will not issue "maybe effective, maybe not effective" orders. The residential mortgage market has already suffered serious black eyes from incorrectly identified lenders, transferees, nominees, robo-signing of declarations and providing false testimony under penalty of perjury, and documents which do not truthfully and accurately identify the parties to the transaction. It is not too much for least sophisticated consumer debtors to have the true party with whom they are purportedly contracting identified in the written contract.

Loan Modification Negotiations

The Proposed Modified Plan (Dckt. 204) identifies Select Portfolio Servicing as having a Class 1 Claim, for which there is a $29,643.12 arrearage, and is provided for in the Additional Provisions to the Plan. Additional Provision, Section 2, Class 1 Secured Claim for Arrearage states that "Bank of America, N.A. now Select portfolio Servicing, Inc.'s" claim is provided for with a $6,004.05 monthly dividend through October 2012. The Dividend drops to $0.00 for two months, and then is $291.24 for the remainder of the Plan.

Section 4 of the Additional Provisions provides that "Bank of America, now Select Portfolio Servicing, Inc." shall receive $2,482.00 on-going monthly payments outside the plan. Debtors state that they are "working on" a loan modification with the creditor.

On its face, the Additional Provisions show that the Bank of America, N.A./Select Portfolio Servicing, Inc. claim cannot qualify for Class 4 plan treatment. When an arrearage exists, it must be provided for as a Class 1 Claim, paid through the Plan and Trustee. This is not a plan were a debtor, who is already in default, can confirm a plan based on a "trust me, I'll pay in the future and work out the arrearage."

Additionally, it appears on the face of the Plan that the Debtor (and Debtor's counsel) are ignorant of who the actual creditor (as defined in 11 U.S.C. § 101(10) and (5)) in this case. Bank of America, N.A. has not been turned into or merged into Select Portfolio Servicing, Inc. (at least to the best of the court's knowledge, with Bank of America, N.A. continuing to appear regularly in this court and no business publications, such as the

Wall Street Journal, not reporting that Bank of America, N.A. is now Select Portfolio Servicing, Inc.).

The Debtors, while stating that they are attempting to negotiate a loan modification agreement with some entity, that may or may not be a creditor, no motion has been filed. The Bankruptcy Code precludes a Debtor from modifying the claim of a creditor secured only by the Debtor's residence, without the consent of the creditor. 11 U.S.C. § 1322(a)(2). That is what the Debtor is attempting to unilaterally do here.

DENIAL OF MOTION

Given that Debtors have not completed (or possibly even started) negotiating their loan modification negotiations and the terms of the proposed plan are not yet finalized, the reclassification of this entity (which may or may not be the correct creditor on the claim) is too contingent on: (1.) whether a modification will be achieved; and (2.) if the correct creditor is being named and is entitled to execute the desired modification agreement. Debtors' listing of the modified claim in Class 4 is premature and in violation of the Bankruptcy Code, precluding confirmation. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010).

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

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.

19. 12-27387-E-13 ERROL/MELANI LAYTON
Mary Ellen Terranella

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, N.A.
5-23-12 [30]

CONT. FROM 6-3-14

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 Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2012. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was not 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). Creditor JPMorgan Chase Bank, N.A., did not correctly set the motion for hearing. Pursuant to Local bankruptcy Rule 3015-1(c)(4) objections to confirmation must be set for hearing in compliance rule Local Bankruptcy Rule 9014-1(a)-(e), (f)(2), and (g)(1). Though the notice of hearing states that written opposition must have been filed 14 days before the hearing, no written opposition was required. This matter must be set for hearing under Local Bankruptcy Rule 9014-1(f)(2) which does not require written opposition. The court will consider the matter brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). FN.1.

FN.1. The moving party is also reminded that the Local Rules require the use of a new Docket Control Number with each motion or objection. Local Bankr. R. 9014-1(c). Here the moving party did not assign a Docket Control Number. This is improper. The Court will consider the motion, but counsel is

reminded that noncompliance with the Local Rules is grounds, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

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 set the Evidentiary Hearing for the Objection to Confirmation for xxxxx x.m. on ---------, 2014.

JPMorgan Chase Bank, N.A., the Objecting Creditor in this matter ("Creditor") holds a deed of trust secured by the Debtor's residence, real property commonly known as 106 Suisun Court, Vacaville, California.

On July 13, 2005, Creditors made a loan in the amount of $440,00.00 to Debtors. In exchange for the loan, the Debtors executed and delivered a note in the original principal amount of $44,000.00 to Creditor. As additional consideration, and security for repayment of the loan, Debtor made, executed, and delivered to Creditor as beneficiary a Deed of Trust dated July 13, 2005.

Creditor filed a timely proof of claim, in which it asserted $52,376.21 in pre-petition arrearages. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

OPPOSITION BY DEBTORS

Debtors' Opposition, filed on June 5, 2012, Dckt. No. 36, disputes the amount of arrearages claimed by Creditor, specifically arguing that the tax advances were not properly accounted for. Debtors state that Creditor's Proof of Claim dated June 1, 2012, indicating that Debtors owe pre-petition arrears in the amount of $52,376.21, of which $35,669,.46 is tax advances, cannot possibly be accurate. Debtors state that the Creditor's Transaction History shows that Debtors made mortgage payments, including an impound for taxes and insurance, through December 2011, and possibly more, given that some entries on the transaction history are not clear.

Debtors argue that only $33,502.00 in property taxes have come due since Debtors purchased the property. The advance is almost the exact same number that Creditor filed in its proof of claim in Debtors' previous Chapter 13 case, Case No. 08-28167. As of June 2008, only $13,734.00 in property taxes had come due. Debtors objected to the Proof of Claim filed by Creditor in the previous case, and the court determined that the correct pre-petition arrearage was $18,186.75. Civil Minute Order, January 16, 2009, Exhibit F. Dckt. No. 38.

Debtors also point to the Objection to Claim that they failed against Chase Home Finance, LLC, in the previous bankruptcy case (Case No.

08-28167-B-13J, Dckt. Control No. MET-4). Debtor states that Creditor Chase Home Finance, LLC, acknowledged that as of the hearing date on Debtors' objection to claim, Debtors were current on pre-petition and post-petition payments, and the only pre-petition claim was for a tax advance. Through the Debtors' previous Chapter 13 case, Creditor Chase Home Finance, LLC, received payments from the Trustee on its claim in the approximate amount of $11,790.00. Debtors question why there would be any advanced for taxes when their payment includes an impound, and Debtors were supposedly current on their payments as of June, 2008.

Additionally, during their previous Chapter 13 case, Debtors were notified by the Creditor that they had escrow surplus in the amount of $29,368.42. Exhibit G, Chase Annual Escrow Account Disclosure Statement, dated April 13, 2010, Dckt. No. 38. Debtors state that no response to the inquiry regarding this surplus was ever provided, and Debtors point to this as a basis for its assertion that there are serious discrepancies in the accounting of Debtors' loan by Chase Home Finance, LLC, and its assignee, JPMorgan Chase Bank, N.A.

PROCEDURAL HISTORY

At the court's initial hearing on the Objection on June 19, 2012, the court continued the matter to allow both parties to file and serve status reports and updates on the matter by July 18, 2012. Civil Minutes, Dckt. No. 40.

On July 18, 2012, Dckt. No. 45, the Debtors and JP Morgan Chase Bank, N.A. filed a joint status report concerning the Objection to Confirmation. The statement acknowledged that the dispute between the parties related to the computation of the arrearage asserted by the creditor and alleged advances for taxes. Though not resolved, the parties reported,

> "Creditor and Debtors are very hopeful that an informal settlement and stipulation with regard to the proper amount of arrearages can be reached without the need for an evidentiary hearing. Counsel for both parties have already participated in fruitful discussions of the issues to be resolved, and Creditor is currently looking into the matter of the tax advances. Creditor and Debtors respectfully request that the court continue the status conference for at least sixty (60) days in order to allow Creditor and Debtors sufficient time to work out a settlement and stipulation."

The parties represented that they were actively engaged in settlement discussions, that they are effectively communicating, and that further time extended to the parties would be consistent with the proper administration of this case. The hearing on the Objection to Confirmation was continued to October 17, 2012.

On October 3, 2012, the parties filed a second status report, stating that Creditor's counsel anticipated that an amended proof of claim will be filed that resolves the issue of arrearages resulting from escrow advances before the hearing date. The report stated that Creditor's counsel spoke with Debtors' counsel on October 2, 2012 to inform her that Creditor's counsel was in the process of receiving final approval to amend the proof of

claim. Dckt. No. 51.

On May 24, 2013, the court issued a scheduling order setting a status conference date for September 24, 2013. Dckt. No. 72. Throughout the months of May to July of 2013, the parties filed various orders and joint stipulations to extend the discovery cut-off dates set out in the court's scheduling orders, in order to "informally resolve their disputes relating to Chase's proof of claim." Dckt. No. 77.

An order granting a stipulation to continue the hearing on the confirmation of Debtors' Plan from December 17, 2013 to March 25, 2014, was signed and filed on November 2, 2013. Dckt. No. 90. The parties entered into their self-described Fourth Joint Stipulation to again extend the cut-off and related deadlines for the discovery stage of their litigation was signed and filed on February 18, 2014. Dckt. No. 94. The hearing on the matter was continued to this hearing date, with the discovery cut-off dates in connection with the Objection and Debtor's Plan extended to April 30, 2014.

On May 27, 2014, Creditor's Counsel filed a Notice of Continuance of the "Confirmation Hearing on Debtors' Chapter 13 Plan" (although this matter concerns Creditor's Objection the Chapter 13 Plan, and not a Motion to Confirm the Plan), confirming that the confirmation hearing on Debtors' Plan is set for this date. Nothing further on this matter and relating to the issue of the pre-petition arrearage on Creditor's loan has been filed on the docket, however, since the initial submission of Creditor's Objection and Debtors' responsive pleadings to Creditors' arguments concerning the plan's failure to cure the pre-petition arrearage specified on its Proof of Claim.

The Creditor filed Proof of Claim No. 3, on October 9, 2012, asserting a claim of $431,779.28. The amount of arrearage that is currently claimed by the Creditor is $28,370.95. The party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). The Proof of Claim includes a Mortgage Proof of Claim Attachment, showing the Creditor's calculation of the total fees, expenses, and charges owed by Debtors, as well as the subject deed of trust, and a Corporate Assignment of the Deed of Trust.

Debtors filed Exhibits on June 5, 2012 in this matter, Dckt. Nos. 37 and 38, but did not file declarations or testimony to authenticate the offered exhibits under Federal Rule of Evidence 901. Debtors did not provide declarations testifying that the exhibits are what they purport to be. Thus, the court does not have admissible evidence from the Debtors to challenge and meet the burden of proof in overcoming the prima facie validity of Creditor's listed values for the arrearage owed by Debtors in this case.

There exists a clear evidentiary dispute concerning the amount of arrearage owed on the Creditor's claim, and the court lacks sufficient evidence to determine the amount at this time. The court cannot yet determine whether the Debtors' Chapter 13 Plan, filed in April 17, 2012,

complies with 11 U.S.C. §§ 1322 and 1325(a).

This matter will be resolved only through an Evidentiary Hearing. The court has on multiple occasions, on the Stipulation of the Parties, extended the discovery in this Contested Matter. Discovery has now closed. Final Order Extending Discovery, Dckt. 96.

The "factual disputes" which are the subject of the discovery in this Contested Matter are ones that should be readily determinable. This Objection to Confirmation was originally filed on May 23, 2014. Now two years later these Parties are lumbering through discovery.

The court shall issue an Evidentiary Hearing Order substantially in the following form holding that:

a. Jurisdiction exists for this Contested Matter pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding arising under 11 U.S.C. § 1325 and pursuant to 28 U.S.C. § 157(b)(2)(L).

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

c. On or before ----------, 2014, Errol Layton and Melani Layton, ("Debtors") shall file and serve on JPMorgan Chase Bank, N.A. and the Chapter 13 Trustee a list of witnesses which Debtor will present as their witnesses for their case in chief (excluding rebuttal witnesses).

d. On or before ----------, 2014, JPMorgan Chase Bank, N.A. ("Creditor")shall file and serve on Debtors and the Chapter 13 Trustee a list of witnesses which Creditors will present as their witnesses for their case in chief (excluding rebuttal witnesses).

e. Debtors, shall lodge with the court and serve their Testimony Statements and Exhibits on or before ----------, 2014.

f. Creditor, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 2014.

g. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 2014.

h. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before —----------, 2014

i. The Evidentiary Hearing shall be conducted at -------.m. on ----------, 2014.

20. 14-22789-E-13 JME-2 — DAVID COTA AND KAREN SLAVICH-COTA — Julius Engel — MOTION TO VALUE COLLATERAL OF WELLS FARGO HOME MORTGAGE — 6-30-14 [38]

Final Ruling: No appearance at the July 29, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, parties requesting special notice, the respondent creditor, and Office of the United States Trustee on June 30, 2014. By the court's calculation, 30 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 Wells Fargo Home Mortgage, "Creditor," is granted.

The Motion to Value filed by David Brian Cota and Karen Louise Slavich-Cota, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtors are the owner of the subject real property commonly known as 7984 Keith Winney Circle, Sacramento, California, "Property." Debtors seek to value the Property at a fair market value of $267,000.00 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 senior in priority first deed of trust secures a claim with a balance of approximately $352,470.00. Creditor's second deed of trust secures a claim with a balance of approximately $49,084.32. 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 should 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 David Brian Cota and Karen Louise Slavich-Cota, "Debtors," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Home Mortgage secured by a second in priority deed of trust recorded against the real property commonly known as 7984 Keith Winney Circle, Sacramento, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $267,000.00 and is encumbered by a senior lien securing claims in the amount of $352,470.00, which exceed the value of the Property which is subject to Creditor's lien.