UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 5, 2014 at 3:00 p.m.

NOTICE – CALLING OF L.B.R. 9014-1(f)(2) NOTICED MATTERS

The court will call at the start of the calendar the following Matters: Items # 17, 18, 22, 23, 24, 37, 38, 50.

These appear to be matters noticed pursuant to L.B.R. 9014-1(f)(2) which do not *appear to the court* to be contested. If the matter is called and an opposition is to be asserted, advise the court only that an opposition is asserted. The court will then call that matter in the order that it is set out on the calendar.

If your L.B.R. 9014-1(f)(2) matter is not listed above, *do not request that the court call it* out of order.

As previously permitted, Parties or Counsel with specific calendar or personal matter conflicts may notify the Courtroom Deputy Clerk and request that the matter be specially called.

1. 11-43701-E-13 LEAH MEJIA — **ORDER TO SHOW CAUSE**
Julius M. Engel — **7-15-14 [63]**

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on the parties on July 15, 2014. 21 days notice of the hearing was provided.

The Order to Show Cause is sustained and Counsel shall pay $393.00 in corrective sanctions.

BACKGROUND

On July 1, 2014, the court granted the Debtor's "Motion For Order Authorizing the Debtor to Negotiate a Loan Modification."to Approve Loan Modification" (as titled by the Debtor). The court determined from the various pleadings that the Debtor did not seek authorization to negotiate, but actually was requesting approval of a loan modification (post-petition secured credit). The court addressed these issues in detail in the Civil Minutes from the July 1, 2014 hearing on the Debtor's Motion. The court's findings as set forth in the Civil Minutes are incorporated herein by this reference, and in pertinent part include the following.

"The Motion to Approve Loan Modification filed by Leah Mejia ("Debtor") seeks court approval for Debtor to negotiate a loan modification. The Motion states with particularity the following grounds and relief requested (Fed. R. Bank. P. 9013):

A. This Chapter 13 case was commenced on September 30, 2011.

B. Schedule A discloses the Debtor's interest in property commonly known as 100 Lofas Pl. in Vallejo, California.

C. As disclosed in Schedule D Wells Fargo Bank, N.A. holds a security interest in the Property.

D. The Debtor now desires to enter into negotiations with Wells Fargo Bank, N.A. to modify the terms of the Note and Deed of Trust.

E. Wells Fargo Bank, N.A. has requested that the court issue an order "authorizing" the Debtor to "negotiate" a loan modification prior to Wells Fargo Bank, N.A. commencing any such "negotiations."

F. Debtor's counsel has advised the Debtor on the ramifications of such "negotiations."

Motion, Dckt. 53.

The Motion also states with particularity (Fed. R. Bankr. P. 9013) the following specific relief sought by Debtor [emphasis added]:

> "Debtor moves this court for an Order **Authorizing the Debtor to Negotiate** a Loan Modification."

The Motion does not present the court with the terms of any loan modification or any post-petition credit transaction for which Debtor seeks court approval.

...

DISCUSSION

Though the Motion only seeks "authority" to "negotiate," as opposed to entering into a post-petition credit transaction, Exhibit A filed in support of the Motion is titled "**HOME AFFORDABLE MODIFICATION AGREEMENT**." (All capital letters and bold font in original.) Dckt. 56. This Exhibit A is not referenced in the Motion and, from the face of the Motion, would not appear to be the subject of any relief requested in the Motion.

Though not stated in the Motion, the Debtor's declaration sheds some light on the true transaction in which she is engaged, not merely the "please allow me to negotiate" relief stated with particularity in the Motion. Declaration, Dckt. 55. In the Declaration Debtor testifies under penalty of perjury,

A. She desires to enter into negotiations with Wells Fargo Bank, N.A.

B. She is "anxious" to commence these negotiations, but Wells Fargo Bank, N.A. has requested that prior to any negotiations that the Debtor obtain authorization to so negotiate.

C. Exhibit A filed in support of the Motion is the proposed contract for the Modification of the loan, with the Debtor testifying as to her personal knowledge of the terms of the Modification.

D. The Debtor has already commenced making mortgage payments pursuant to the terms of the Loan Modification Agreement filed as Exhibit A.

This testimony not only is internally inconsistent, but stands in start contrast to the "authorize me to commence negotiations" stated in the Motion. The Debtor has already "commenced," and appears to have completed all of the negotiations for a post-petition loan modification. Additionally, the Debtor has already begun making reduced mortgage payments [in an unstated amount] since October 2013.

Exhibit A is a formal Loan Modification Agreement with all of the specific terms, conditions, and modifications one would expect for a post-petition credit transaction by the Debtor in this Chapter 13 case. Beginning with January 1, 2014, the Debtor's monthly payment has been reduced to $942.71. (Under the confirmed Chapter 13 Plan, the Debtor listed her monthly mortgage payment, being paid directly by her as a Class 4 Claim, to be $1,120.38. Plan, Dckt. 5.)

Wells Fargo Bank, N.A. has provided the Debtor and the court with a Loan Modification Agreement form which states all of the terms and conditions to modify this loan. This Loan Modification Agreement clearly identifies Wells Fargo Bank, N.A. as the creditor who is entering into the contract with Debtor and is to be signed by a representative of Wells Fargo Bank, N.A. (not merely a loan servicing company not disclosing the identity of the actual creditor,

an ambiguous entity name, or MERS as the "nominee" of a loan servicer). In many respects, having provided a complete Loan Modification Agreement form to be presented to the court, Wells Fargo Bank, N.A. may well be viewed as having "saved the day" for Debtor.

It appears that the Debtor has already negotiated the loan modification – exercising her rights and powers as a Chapter 13 Debtor pursuant to 11 U.S.C. § 1303 relating to property of the estate and claims, and 11 U.S.C. §§ 1322, 1325, and 1329 to provide for treatment of claims through a confirmed Chapter 13 Plan. No "authorization" is required from the court for the Chapter 13 Debtor to "negotiate" with creditors, Debtor and her counsel to address claims and determine how to properly provide for them, or to then seek orders from the court authorizing post-petition credit transactions, confirming or modifying Chapter 13 plans, or disallowing claims.

If the court were to grant the relief as stated in the Motion, the order would merely state, "IT IS ORDERED that the Debtor is authorized to negotiate with Wells Fargo Bank, N.A. the terms of a possible loan modification, and then after the negotiations are completed, the Debtor must file a motion for the court to authorize the Debtor to enter into a specific proposed post-petition credit transaction to modify the loan."

It appears evident that the Debtor does not need, or want, "authorization to negotiate" a possible loan modification, for which none of the terms are currently know, but seeks this court to authorize the Debtor to enter into the Loan Modification which is embodied in the Loan Modification Agreement which is presented as Exhibit A."

Civil Minutes, Dckt. 61.

ORDER TO SHOW CAUSE - CORRECTIVE SANCTIONS

Upon review of the pleadings, the court issued an Order to Show Cause why counsel should not pay $393.00 in corrective sanctions to the Clerk of the Bankruptcy Court, for deposit into the United States Treasury, for the Motion, Notice, and prosecution of this Motion. Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposes under Rule 9011, the bankruptcy court may

impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemptor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058.

Here, the Motion clearly misstates not only the relief sought, but the underlying facts which have transpired. Counsel appears to have either intentionally, or through the use of stock forms and para-professionals who do not understand the (1) the rights and obligations of Chapter 13 debtors, (2) the rights and powers of Chapter 13 debtors and their attorneys to address claims, communicate with creditors, and negotiate terms of proposed credit transactions, (3) the obligations of Chapter 13 debtors to obtain authorization to use property of the estate other than in the ordinary course of business and enter into post-petition credit transactions, to misrepresent to the court this Loan Modification Transaction.

If it was intentional, while Wells Fargo Bank, N.A. has provided a copy of the actual Loan Modification Agreement which clearly states, the terms, counsel may have been "testing the waters" to determine if the court would just blindly sign orders for whatever relief he would request for some "poor less sophisticated consumer debtor." It is only slightly better if this gross misstatement of the facts and relief requested arose because through the use of forms and inadequately trained para-professionals inaccurate pleadings were presented to the court.

Additionally, the declaration signed by the Debtor under penalty of perjury misstates the facts. On its face, the Declaration is internally inconsistent. It appears that (1) the Debtor did not read the Declaration before signing it, (2) the Debtor read, but did not understand the Declaration before signing it under penalty of perjury, (3) the Debtor did not understand the Declaration and Counsel did not provide legal services to Debtor to insure that testimony being provided that the Debtor's statements under penalty of perjury were truthful, or (4) the Debtor never read and did not sign the Declaration, and it is a fraudulently prepared and filed document.

COUNSEL'S RESPONSE

On July 22, 2014, Counsel filed a response, stating that there was

great difficulty in obtaining an actual contract from the bank, Wells Fargo and that they would only give him a letter with terms. Counsel states that he has not been compensated for his services in contacting the bank and that the corrective sanction should not be imposed. Counsel states that this is the first time he has attempted such a motion with his new software and erred on the side of caution by approaching the issue from a negotiations standpoint. Counsel states he was not being deceptive and that the court's prior ruling will be sued as a template for further motions.

AUGUST 5, 2014 HEARING

While counsel "explains" the difficulties in preparing the Motion, he does not address why or how the Motion fails to request the simple relief – authorization to enter into post-petition credit, the loan modification. Counsel does not address why or how the Debtor could sign a declaration which is internally inconsistent, and on its face has the Debtor making inaccurate statements under penalty of perjury.

Too many consumer attorneys, which much less experience than counsel, are able to clearly and simply obtain the authorization for post-petition credit – the loan modifications. Laying off the reason for the pleadings on "new software" is not credible.

This is not the first time that counsel has presented declarations under penalty of perjury by clients which are internally inconsistent or make little sense. At a prior hearing the court questioned whether the client had ever read the declaration as it made no sense. Counsel attempted to explain that the client did not read English – indicating that the debtor in that case signed the declaration without reading the text.

The contention that because counsel has not yet been paid for the services provided corrective sanctions should not be issued does not have merit. If counsel wants to provide pro bono services, the client is entitled to receive proper legal services. Pro bono services is not an excuse to have the court "provide legal services" to a debtor. Additionally, consumer attorneys providing such services to client commonly request the allowance of additional attorneys' fees in Chapter 13 cases. 11 U.S.C. § 2016-1(c)(3).

The Motion clearly misstates the grounds and the relief requested. The "software excuse" is not credible. Rather than showing the court that counsel merely made an error, the excuses presented indicate that such practices for inaccurate pleadings and inconsistent declarations may be part of a systemic intentional practice or sloppy office practices where pleadings are prepared and signed without any meaningful involvement of counsel.

The court orders that counsel pay $393.00 in corrective sanctions to the Clerk of the Bankruptcy Court on or before August 22, 2014. Hopefully these corrective sanctions have the desired effect and counsel will not be filing further inaccurate motions and internally inconsistent declarations.

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

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

The Order to Show Cause as to why Julius Engel, counsel for 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 Julius Engel shall, on or before August 22, 2014, pay $393.00 in corrective sanctions to the Clerk of the United States Bankruptcy Court for the Eastern District of California, for deposit by the Clerk into the United States treasury.

2. 11-25363-E-13 THOMAS SAKAOKA
PGM-6 Peter G. Macaluso

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

CONT. FROM 7-29-14

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) who filed conflicting testimony under penalty of perjury to achieve their then current goal to 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 expressly 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.

The Motion to Modify the Chapter 13 Plan was filed on June 11, 2012. Dckt. 81. It states that due to a review of the filed claims the Debtors cannot complete a Chapter 13 Plan as previously confirmed by the Order filed on October 26, 2011 (eight months earlier). The government claims bar date in

this case is August 30, 2011 and the non-governmental creditor claims bar date is July 6, 2011. Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors & Deadlines, Dckt. 9. The last proof of claim filed in this bankruptcy case was that by Colonial Pacific Leasing, Corp. on August 11, 2011.

The Debtors' Second Amended Plan was filed on August 16, 2011, (Dckt. 63) and it is not unexpected that in the whirlwind of plan filing activity a proof of claim filed five days earlier would not have been identified. However, the confirmation hearing was not conducted until October 4, 2011, two months later.

The inconsistent information under penalty of perjury was provided by the Debtors in response to the Trustee's objection that no then current financial information (such as income and expenses) was provided. Thus, it is not surprising that the Trustee did not state in his written opposition that current financial information provided by the Debtors under penalty of perjury was inconsistent with prior testimony under penalty of perjury.

In denying the Motion to Confirm the Modified Plan the court stated,

> "On its face, the Motion states that the court may properly confirm the proposed Chapter 13 Plan because (1) the Debtors filed bankruptcy, (2) the Debtors will pay $150.00 a month to the Trustee, (3) the plan will last for 60 months, and (4) "any" secured creditor's rights will be modified. These three allegations are not sufficient to state grounds under 11 U.S.C. § 1325 for confirmation of a plan. At best, the Motion is a direction to the court to employ its legal resources to provide counsel with law clerk services to state the necessary grounds for confirmation in this case, analyze the plan and schedules to determine the necessary and proper treatment, organize and state such grounds, assemble the evidence, present those grounds for the Debtors, and then rule on such legal work done by the court.
>
> It could be argued that this is a simple case so the law and rules shouldn't apply to these Debtors. First, no debtor is afforded special treatment and exempted from the law and rules. Second, if it is so simple, the proper motion could easily be prepared and presented to the court, using a standard confirmation motion template addressing the necessary elements for confirmation based upon the facts of this case and this specific plan. FN.2.
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> FN.2. The facts of this case highlight the difficulty in providing all attorneys with a clear set of rules governing the judicial process. While this appears to be a simple case and one in which the court can let the rules slide, such would only beget an expansion of the "simple exception." What one attorney is allowed to do, all attorneys must be allowed. Experience has taught that each new "simple case" will be progressively more complex until attorneys will slide back into the practice of not complying with Federal Rule of Civil Procedure 7(b) and Federal Rules of Bankruptcy Procedure 9014,

9013, and 7007, handing over to the court a mess of pleadings in which the court, creditors, U.S. Trustee, Chapter 13 Trustee, and other parties in interest have to guess as to what basis there is for the motion, dig up other pleadings in the file, and do the legal work for movant's counsel. The court cannot condone or authorize such practices.

...

The Chapter 13 Trustee also opposes confirmation on the basis it is uncertain of the Debtors' ability to pay because Debtor is a self-employed concrete contractor, the last statement of income and expenditures was filed on August 17, 2011, **and Debtors now propose to surrender equipment that was used in their business. Debtor's offer Exhibits in support of their reply, which show net income of $7,066.17 for the months of April through June 2012**.

The exhibits offered in support of confirmation, however, prove too much because **Debtors' gross income doubled, while their expenses increased quite a bit as well. The Debtors offer no explanation for these changes.**

The court also addresses the Debtors' contention that the form of the motion used by counsel has been sufficient in the past, so it should be good now. For a year the court has addressed with various counsel, including counsel for the Debtor who regularly appears in this court, the minimum requirements for proper pleading under Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 9013. The court has carefully explained the requirement, first addressing the issue with creditors' counsel more than two years ago and then with consumer counsel.

Counsel is correct that prior to 2 ½ years ago when the current judge in Department E came onto the bench, Rules 7(b) and 9013 were honored in their breach and motions routinely stated nothing more than 'Movant requests [type of relief] and interested parties need to read the other pleadings to determine what grounds and why such relief may be granted.' This judge quickly addressed these defects and attempted to provide counsel with a reasonable time to bring their practices up to the minimal requirements of the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

Counsel should not rely upon, or believe that stating that 'all the other judges didn't make us comply with the rules' will be grounds in this court for special exemption. Such arguments are the last refuge for attorneys who don't know the rules, don't want to know the rules, or have no intention to comply with the rules – not a situation which the court believes exists for present counsel.

However, this contention is the cause for the court to revisit its strategy in attempting to bring all attorneys in compliance with the Rules. It may be that the court's

incremental approach has allowed the attorneys to believe that there really isn't a need to know the rules since they can continue to get away with not complying. It may be better for the court to just apply the rules swiftly and coldly, leaving the attorneys to address with their clients the situations arising from motions being denied and why they didn't know the Rules."

In comparing the original testimony in Schedules I and J under penalty of perjury filed in support of confirming the Chapter 13 Plan in 2011 and then the Amended Schedules I and J under penalty of perjury filed in support of the 2012 Modified Chapter 13 Plan shows the great discrepancy in the testimony.

	August 17, 2011 Filed Schedules I and J	July 10, 2012 Filed Amended Schedules I and J, Dckt. 90	Dollar Increase/ Decrease	Percentage Increase/ Decrease
Business Income (Debtor)	$10,000	$20,934	$10,934	109.34%
Unemployment (Co-Debtor)	$700	$705	$5	0.71%
EXPENSES				
Mortgage, Taxes, Insurance	($1,200)	($1,200)	$0	0.00%
Electricity	($160)	($160)	$0	0.00%
Telephone	($25)	($25)	$0	0.00%
Security	($36)	($36)	$0	0.00%
Cabl/Internet	($100)	($100)	$0	0.00%
Home Maintenance	($19)	$0	($19)	-100.00%
Food	($300)	($300)	$0	0.00%
Clothing	($10)	($10)	$0	0.00%
Laundry	($60)	($50)	($10)	-16.67%
Medical/Dental	($5)	($5)	$0	0.00%
Transportation	($150)	($150)	$0	0.00%
Recreation	($8)	($0.77)	($7)	-90.38%
Charitable	($9)	$0	($9)	-100.00%
Life Ins	($308)	($308)	$0	0.00%
Health Ins	($400)	($400)	$0	0.00%

Auto Ins	($100)	($100)	$0	0.00%
Business Expenses	($7,665)	($18,644.23)	$10,979	143.24%
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Total Expenses	($10,555)	($21,489)	$10,934	103.59%
	==========	==========		
Net Monthly Income	$145	$150	$5	3.45%

If the court had accepted the unexplained changes as true, the Debtors' statements under penalty of perjury that they were working twice as hard, to incur twice as many expenses, and make no more income during the year. The testimony, if accepted as truthful, is that the Debtors actually lost money, having to decrease several personal expenses to lose more money on their business. The court did not find these changes, the losses, and how the Debtors were able to "magically end up" with exactly the same monthly net income amount to not be credible and not be truthful.

Allowance of Fees For Conversion to Chapter 7

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.

Disallowance of Fees Relating to Modified Chapter 13 Plan

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. While counsel does not have to prevail on a motion, other contested matter, or adversary proceeding to be allowed fees in a bankruptcy case, the legal services must be provided in connection with a bona fide, good faith attempt to assert bona fide rights and interests of the Debtors. Here, no such effort was made, and the Debtors' own testimony demonstrated that such amended income and expenses was not credible, and on its face, not truthful. The filing and prosecution of the Motion to Modify and

presenting the Debtors' statements are not services, under these facts, for which counsel will be allowed additional fees.

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. All other requested fees in the Motion are disallowed.
>
> **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.

3. 09-46305-E-13 WILFRED/JUNE OWENS **MOTION TO VALUE COLLATERAL OF**
LC-2 Lorraine W. Crozier **CITIMORTGAGE, INC.**
7-1-14 [33]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 1, 2014. By the court's calculation, 35 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 CitiMortgage, Inc., "Creditor," is granted.

The Motion to Value filed by Wilfred and June Owens, "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 336 Ohio Street, Vallejo, California, "Property." Debtor seeks to value the Property at a fair market value of $169,000.00 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 $239,216.00. Creditor's second deed of trust secures a claim with a balance of approximately $163,751.00. 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 Wilfred and June Owens, "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 CitiMortgage, Inc. secured by a second in priority deed of trust recorded against the real property commonly known as 336 Ohio Street, Vallejo, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $169,000.00 and is encumbered by senior liens securing claims in the amount of $239,216.00, which exceed the value of the Property which is subject to Creditor's lien.

4.	**09-41608-E-13 SDB-3**	**TERRY/CHRISTINE VANDERLINDEN W. Scott de Bie**	**MOTION TO VALUE COLLATERAL OF NATIONSTAR MORTGAGE, LLC 6-25-14 [88]**

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on June 25, 2014. By the court's calculation, 41 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 Nationstar Mortgage, LLC, "Creditor," is granted.

The Motion to Value filed by Terry and Christine VanDerLinden, "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 2600 Vista Grande, Fairfield, California, "Property." Debtor seeks to value the Property at a fair market value of $265,000.00 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 $395,789.29. Creditor's second deed of trust secures a claim with a balance of approximately $50,079.43. 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 Terry and Christine VanDerLinden, "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 Nationstar Mortgage, LLC secured by a second in priority deed of trust recorded against the real property commonly known as 2600 Vista Grande, Fairfield, 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 $265,000.00 and is encumbered by senior liens securing claims in the amount of $395,789.29, which exceed the value of the Property which is subject to Creditor's lien.

5. 14-23416-E-13 MARIO/CHRISTINE BORREGO
WW-1 Mark A. Wolff

CONTINUED MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE
6-10-14 [28]

CONT. FROM 6-24-14

The Appearance of Michael R. Gonzales, for the Law Office of Buckley Madole, P.C., Attorneys For "Capital One Auto Finance" Is Required for the August 5, 2014 Hearing.

Michael R. Gonzales and the Law Office of Buckley Madole, P.C. Shall Address for the Debtors, Chapter 13 Trustee, Creditors, U.S. Trustee, and Court the Identity of "Capital One Auto Finance," Whether Such an Entity Legally Exists, and Whether Such Entity is Authorized to Do Business in California

See Item 35 (14-25561 Marcelo and Hazel Lopez) and Item 49 (14-25585 Scott Olney) on the August 5, 2014 3:00 Calendar

Tentative Ruling: The Motion to Value secured claim 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 - Final Hearing.

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 10, 2014. By the court's calculation, 14 days' notice was provided. 14

days' notice is required.

The Motion to Value secured claim 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.

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

AUGUST 5, 2014 HEARING

Creditor filed on July 21, 2014 a Condition Report completed by appraiser Chad Wessling valuing Vehicle at $14,614.48 (Dckt. No. 51), which is authenticated by appraiser's declaration (Dckt. No. 52).

PRIOR HEARING

The Motion filed by Mario and Christine Borrego, "Debtor," to value the secured claim of Capital One Auto Finance, "Creditor," is accompanied by Debtor's declaration. Debtor is the owner of a 2010 Toyota Corolla, VIN ending in 45692, "Vehicle." The Debtor seeks to value the Vehicle at a replacement value of $8,762.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

OPPOSITION

Creditor filed opposition to the motion, asserting that according to the NADA Used Car Guide, the retail value of the Vehicle is $12,625.00. In the alternative, Creditor requests the Debtors' cooperation to make the Vehicle available for appraisal or other expert valuation.

DISCUSSION

Creditor had not properly authenticated the *N.A.D.A. Official Used Car Guide* exhibit in order for the court to consider it as evidence. However, the motion having been brought pursuant to Local Bankruptcy Rule 9014-1(f)(2) the court set the final hearing to allow the parties to obtain appraisals of the Vehicle and file their final hearing pleadings.

Creditor filed an authenticated appraisal report valuing the vehicle at $14,614.48. Debtor has not filed any additional opposition to the motion. Weighing the evidence currently before the court, the court finds the value of the vehicle to be $14,614.48. The appraisal presents the court with more credible evidence of value than the Declaration of the Debtors.

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 Mario

and Christine Borrego, “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 Capital One Auto Finance, “Creditor,” secured by an asset described as 2010 Toyota Corolla LX, “Vehicle,” is determined to be a secured claim in the amount of $14,614.48, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $14,614.48 and is encumbered by liens securing claims which exceed the value of the asset.

6. 14-23416-E-13 MARIO/CHRISTINE BORREGO
DPC-1 Mark A. Wolff

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
5-21-14 [24]

CONT. FROM 6-24-14

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 Debtor and Debtor's Attorney on May 21, 2014. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan relies on a pending motion to value for Capital One Auto Finance, which is set to be heard the same date as this Objection.

The court having valued the vehicle at an amount higher than the Debtor has provided for in the proposed plan, the plan cannot be confirmed.

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

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

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

IT IS ORDERED that the Objection to confirmation the Plan is sustained and the plan is not confirmed.

7. 14-23416-E-13 MRG-1 — MARIO/CHRISTINE BORREGO — Mark A. Wolff — CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY CAPITAL ONE AUTO FINANCE — 4-15-14 [16]

CONT. FROM 6-24-14

The Appearance of Michael R. Gonzales, for the Law Office of Buckley Madole, P.C., Attorneys For "Capital One Auto Finance" Is Required for the August 5, 2014 Hearing.

Michael R. Gonzales and the Law Office of Buckley Madole, P.C. Shall Address for the Debtors, Chapter 13 Trustee, Creditors, U.S. Trustee, and Court the Identity of "Capital One Auto Finance," Whether Such an Entity Legally Exists, and Whether Such Entity is Authorized to Do Business in California

See Item 35 (14-25561 Marcelo and Hazel Lopez) and Item 49 (14-25585 Scott Olney) on the August 5, 2014 3:00 Calendar

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

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

resolution of the matter.

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 15, 2014. By the court's calculation, 70 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Capital One Auto Finance opposes confirmation of the Plan on the basis that Debtor has provided for its claim in the amount of $8,762.00 but had not filed a motion to value pursuant to 11 U.S.C. § 506(a). Creditor argues the full amount of its claim, $13,787.72 should be provided for in the plan.

On June 10, 2014, Debtor filed a Motion to Value the secured claim of Capital One Auto Finance.

The court having valued the vehicle at an amount higher than the Debtor has provided for in the proposed plan, the plan cannot be confirmed.

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

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

8.	**14-24616-E-13 JGD-2**	**NICOLE GOLDEN AND STEPHEN ALTER John G. Downing**	**MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A. 7-1-14 [31]**

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 1, 2014. By the court's calculation, 35 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 Bank, N.A., "Creditor," is granted.

The Motion to Value filed by Nicole Golden and Stephen Alter, "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 5407 Caledonia Circle, Carnelian Bay, California, "Property." Debtor seeks to value the Property at a fair market value of $450,000.00 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 $458,598.64. Creditor's second deed of trust secures a claim with a balance of approximately $124,940.03. 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 Nicole Golden and Stephen Alter, "Debtor," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 5407 Caledonia Circle, Carnelian Bay, 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 $450,000.00 and is encumbered by senior liens securing claims in the amount of $458,598.64, which exceed the value of the Property which is subject to Creditor's lien.

9. 10-39217-E-13 CK-6 STEPHEN/ELIZABETH DICKSON Catherine King CONTINUED MOTION TO MODIFY PLAN 4-4-14 [93]

CONT. FROM 6-24-14

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 4, 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 Rule 3015-1(d)(2), 9014-1(f)(1), and Federal

Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the motion on the basis that there has been no substitution of parties or suggestion of death filed by Debtor.

Additionally, the Trustee states that there is no current statement of income and statement of expenses on file. According to the Trustee's records, the most current statement of income was filed on 5-17-11, Dckt. 83, and the most current statement of expenses was filed on 5-18-11, Dckt. 84.

The Trustee also argues that the order confirming plan, Dckt. 87, reflects attorney fees $726.00 paid prior to filing and an amount of $2,774.00 to be paid through the plan. The proposed plan lists attorney fees as $1,000.00 paid prior to filing, and an amount of $2,226.00 to be paid through the plan.

Lastly, Trustee states that Debtor's modified plan proposes to reduce the commitment period from 60 months to 45 months. However, Trustee argues that Debtor's Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, Form B22C, indicates Debtors are above median income and the commitment period is 5 years. The Trustee has objected to the proposed loan modification.

The court having ordered Wells Fargo Bank, N.A. to appear on June 24, 2014, the court continued the hearing on confirmation.

However, it does not appear that the Debtors have addressed the issues raised by the Trustee. No current statement of income and expenses have been filed to date. Counsel has not clarified the attorney fees conflicting amounts of attorneys fees listed in the order confirming and the proposed plan. Furthermore, Debtors have not provided legal authority that enables Debtors to reduce the commitment period to 45 months when Debtors are above median income.

JUNE 26, 2014 HEARING

The Debtors and Trustee requested that the court continue the hearing to allow the Debtors to resolve the remaining issues now that the court has authorized the Debtors to enter into the Loan Modification with Wells Fargo Bank, N.A.

AUGUST 5, 2014 HEARING

The Chapter 13 Trustee filed a response to the Motion, stating that Debtor has filed documents with the court that have resolved most of the

Trustee's objections. Trustee states the discrepancy of the attorneys fees remains. The order confirming plan reflects attorney fees $726.00 were paid prior to filing and an amount of $2,774 is to be paid through the plan. The Trustee will not have an objection if this is cured in the order confirming.

The Trustee also states the amount of any life insurance proceeds appears to be a possible issue. The current Schedule I, reflects, "Draw from life insurance proceeds" of $675.00. The Debtor has not disclosed the total amount of life insurance proceeds received, and because the proceeds are potentially property of the estate, the Trustee cannot determine if the plan pass the liquidation test of 11 U.S.C. § 1325(a)(4) is met.

Movant not having provided sufficient information regarding insurance proceeds regarding the deceased co-debtor and the court having denied the Motion to Substitute Party, the motion is denied.

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

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

10. 10-39217-E-13 CK-6 STEPHEN/ELIZABETH DICKSON Catherine King
MOTION FOR EXEMPTION FROM FINANCIAL MANAGEMENT COURSE 7-21-14 [156]

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

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

Below is the court's tentative ruling, rendered on the assumption that

there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 21, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The Motion for Exemption from Financial Management Course 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 for Exemption from Financial Management Course is granted.

Debtors move the court for an order waiving the requirement of a Debtor Education Certificate in granting a discharge to Elizabeth Dickson, now deceased.

Section 109(h) states,

> (h) (1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

Pursuant to 11 U.S.C. § 1328(g),

> (g) (1) The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.

Therefore, in order to receive a discharge in a chapter 7 or chapter 13 case, an individual debtor must complete a personal financial management course after the petition is filed unless certain exceptions apply. 9 COLLIER ON BANKRUPTCY ¶ 1007.03[vi] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) The exceptions excuse debtors who are incapacitated, disabled, or on active military duty in a combat zone. *Id.*

Here, Co-Debtor Elizabeth Dickson passed on November 14, 2013, before being able to complete the Debtor Education course. Therefore, the court waives the requirement as to Elizabeth Dickson to complete the Debtor Education Course.

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 Exemption from Financial Management Course filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and co-debtor Elizabeth Dickson is exempted from completing the Financial Management Course as required by 11 U.S.C. § 1328.

11. 10-39217-E-13 CK-7 STEPHEN/ELIZABETH DICKSON Catherine King

MOTION TO APPROVE NOMINATION OF DEBTOR'S REPRESENTATIVE 7-21-14 [152]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 21, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Approve Nomination of Debtor's Representative 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 Approve Nomination of Debtor's Representative is denied without prejudice.

Debtors move for an order approving the nomination of Debtor's representative. Debtor Stephen Dickson has consented to act as the representative of the deceased Debtor, Elizabeth Dickson, who passed away on November 14, 2013, in this Bankruptcy proceeding. A Notice of Death was filed on July 21, 2014. Debtor Stephen Dickson is the spouse of the deceased debtor.

TRUSTEE'S OPPOSITION

Trustee opposes the motion, stating that while Stephen Dickson is the spouse of the decedent, he has not provided sufficient information to allow the court to find that he is a proper representative for the deceased. The Trustee also states that the current schedule of income reflects an amount of $675.00 listed as "draw form life insurance proceeds" and is unsure if this is the total amount of insurance entitled to surviving debtor. Trustee states movant has not indicated if the decedent left a will or if she died intestate or whether the decedent had any assets not previously scheduled or if any other assets have appeared, such as insurance or a cause of action.

DISCUSSION

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

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by

the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

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

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with**

Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...

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

In this case, the court does not have sufficient information to determine if co-Debtor Stephen Dickson is a proper representative for the deceased. Furthermore, the amount of any life insurance proceeds appears to be a possible issue. The current Schedule I, reflects, "Draw from life insurance proceeds" of $675.00. Movant has not disclosed the total amount of life insurance proceeds received, or if any other assets have appeared, such as additional insurance or a cause of action. Based on the insufficient information provided, the motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Nomination of Debtor's Representative 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.

12. 13-30919-E-13 BUN AUYEUNG AND SOO TSE — MOTION FOR COMPENSATION FOR
PGM-6 Peter G. Macaluso — PETER G. MACALUSO, DEBTORS' ATTORNEY
7-2-14 [174]

Final Ruling: The moving party having filed a Notice of Withdrawal, the withdrawal consistent with the opposition filed to the Motion, no prejudice to the responding party appearing by the dismissal of the Motion, the court construing the written request for the motion to be denied or dismissed and the written withdrawal to be a joint request for the motion to be dismissed, the parties having the right to agree to dismiss the motion pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) and Fed. R. Bank. P. 9014 and 7041, and no issues identified by the court with respect to dismissal of this Motion, the court removes the Motion from the calendar.

13. 10-37127-E-13 BARRY/COLLEEN PAGE — MOTION TO MODIFY PLAN
SS-8 Scott D. Shumaker — 7-1-14 [127]

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 July 1, 2014. By the court's calculation, 35 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 grant the Motion to Confirm the Modified Plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the motion on the basis that Court claim #9, Travis Credit Union, is not provided for in the proposed plan. The Trustee has disbursed $1,173.27 in principal and $160.08 in interest on this claim under the previous plan, which is not authorized in the proposed plan.

Additionally, the Trustee argues the previous confirmed plan, provided the creditor was to be paid 100% per the additional provisions. The Trustee has paid the creditor $4,271.42. The debtor's proposed plan appears to pay unsecured creditors 2% which would entitle the creditor to payments totaling $85.43. The debtor has not authorized payments made to the creditor under the previously authorized plan.

Lastly, the Trustee states Section 2.06 reports additional fees of "$ See Add'l Provisions" and that under the confirmed plan $1,500.00 was previously approved. Trustee argues that the Court should limit Debtor's Counsel to $3,500.00 for any work done prior to the hearing on this modification, (the $2,000.00 paid prior to filing, and the $1,500.00 approved previously to be paid through the plan). Trustee states no estimate of any amount has been given, so the plan may not pay claims as proposed, (11 U.S. C. § 1325(a)(6).)

DEBTOR'S REPLY

Counsel for Debtor responds, stating that the issues raised by the Trustee can be addressed and modified in the Order Confirming the Plan.

At the hearing Debtor stated the following plan amendments which shall be stated in the order confirming the plan:

A.

B.

C.

D.

Debtor having addressed the issue raised by the Trustee in the Order Confirming Plan, the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

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

granted, Debtor's Chapter 13 Plan filed on July 1, 2014, as amended at the hearing to provide (A) , (B) , (C) , 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.

14. 10-37127-E-13 SS-9 BARRY/COLLEEN PAGE Scott D. Shumaker MOTION TO VALUE COLLATERAL OF DEUTSCHE BANK NATIONAL TRUST CO. 7-1-14 [133]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 1, 2014. By the court's calculation, 35 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 Deutsche Bank National Trust Company, Trustee, "Creditor," is granted.

The Motion to Value filed by Barry and Colleen Page, "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 1932 Tyndrum Way, Folsom, California, "Property." Debtor seeks to value the Property at a fair market value of $420,000.00 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 $438,719.00. Creditor's second deed of trust secures a claim with a balance of approximately $107,477.00. 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 Barry and Colleen Page, "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 Deutsche Bank National Trust Company, Trustee secured by a second in priority deed of trust recorded against the real property commonly known as 1932 Tyndrum Way, Folsom, 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 $420,000.00 and is encumbered by senior liens securing claims in the amount of $438,719.00, which exceed the value of the Property which is subject to Creditor's lien.

15. 14-25528-E-13 TED/MICHELLE CURRY
CAH-1 Aaron C. Koenig

MOTION TO VALUE COLLATERAL OF HOUSEHOLD FINANCE CORPORATION OF CALIFORNIA
6-27-14 [18]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on June 27, 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 Household Finance Corporation of California, "Creditor," is granted.

The Motion to Value filed by Ted Curry, Jr. and Michelle Curry, "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 885 Farley Court, Folsom, California, "Property." Debtor seeks to value the Property at a fair market value of $445,000.00 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 $549,984.57. Creditor's second deed of trust secures a claim with a balance of approximately $107,140.68. 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 Ted Curry, Jr. and Michelle Curry, "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 Household Finance Corporation of California secured by a second in priority deed of trust recorded against the real property commonly known as 885 Farley Court, Folsom, 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 $445,000.00 and is encumbered by senior liens

securing claims in the amount of $549,984.57, which exceed the value of the Property which is subject to Creditor's lien.

16. 14-25528-E-13 TED/MICHELLE CURRY — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
DPC-1 Aaron C. Koenig — 7-3-14 [24]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 3, 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to sustain the Objection.

David P. Cusick, Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor can only afford to make the necessary Plan payments if Debtor's pending Motion to Value Collateral of Household Finance Corporation of California is not granted. The court having granted the motion, this objection is overruled.

Further, Trustee states that Debtor's plan may not be their best

effort under 11 U.S.C. §1325(b). Debtor's Schedule I lists monthly wages for Debtor Michelle Curry of $6,231.72, but her paystub for the period of April 27, 2014 through May 10, 2014 shows a year to date bonus of $7,824.21, which is not listed on Schedule I. Trustee would not oppose the Order Confirming to specify that bonus income shall be paid into the Plan if Debtor receives it, and shall provide pay stubs annually.

Debtor not having replied to the Trustee's objection regarding best efforts, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

17. 14-25534-E-13 DPC-1 — PORCHE DARBY — Rabin J. Pournazarian — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 7-3-14 [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 Debtor and Debtor's Attorney on July 3, 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). 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 overrule the Objection.

David Cusick, Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Plan (Dckt. No. 5) was not signed or dated by the Debtor, nor the Debtor's Counsel. The plan may be stricken under Federal Rule of Bankruptcy Procedure 9011(a) if not signed.

Furthermore, the attorneys fees mentioned in Debtor's pleadings are inconsistent. The Plan states that Debtor paid $419.00 prior to filing the petition, and $3,500 outstanding to be paid through the plan, for a total of $3,919.00. Whereas the Rights and Responsibilities filed on May 27, 2014 (Dckt. No. 7) indicate $3,500 total fees to be charged, less the $419.00 already paid by the Debtor. Trustee objects based on this discrepancy.

Debtor's Response

Debtor apologized for inadvertently filing the Chapter 13 Plan without a signature and agreed to file a declaration explaining the filing error, with a signed Chapter 13 Plan attached. Further, Debtor clarified that the total sum of attorney's fees to be paid in this case are $3,500.00. Since Debtor has already paid $419.00 prior to filing, this leaves $3,081.00 outstanding to be paid through the Plan.

Trustee's Final Response

Trustee acknowledges that Debtor has filed an Exhibit (Dckt. No. 19) showing the original Plan with signatures. Trustee does not oppose a provision in the Order Confirming the Plan that resolves the inconsistency in attorney fees. Therefore, Trustee's objections have been resolved.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good

cause appearing,

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on May 27, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, with the amendment stating that the total set fees for Debtor's counsel is $3,500.00, of which $3,081.00 are to be paid through the 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.

18. 14-25740-E-13 MARIO RILEY
DPC-1 Aaron C. Koenig

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-10-14 [15]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 10, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to continue the hearing on the Objection to 3:00 p.m. on August 26, 2014.

David P. Cusick, Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor cannot afford to make the Plan payments required under 11 U.S.C. § 1325(a)(6). Debtor admitted at the First Meeting of Creditors on July 3, 2014 that he purchased a 2013 Honda Accord, which adds a monthly auto payment of $443.00 and is not listed on Schedule J. Furthermore, Debtor has listed the Department of Motor Vehicles in Class 5 of the Plan, but has failed to list the nature of the priority. Trustee is not certain if this debt is entitled to be paid in Class 5 of the Plan.

Debtor's Response

Debtor states that his father will be making the monthly car payments and that a Motion to Incur Debt has been filed and set for hearing. Debtor has attached his father's declaration as Exhibit A. Debtor explains that the debt owed to the Department of Motor Vehicles is a priority taxing/penalty debt that was the result of Fast Trac toll violations. Debtor alleges that the claim is entitled to priority, because as a government fine or debt it is excluded from discharge. Debtor states that the filing of a proof of claim determines the nature of the debt, i.e. priority or unsecured claim.

Based on the foregoing, the hearing on the Objection is continued to August 26, 2014 to be heard concurrently with the Motion to Incur Debt.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is continued to 3:00 p.m. on August 26, 2014.

19. 14-25845-E-13 J.T./AVALINE ELLIS — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
DPC-1 Mikalah R. Liviakis — 7-10-14 [18]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 10, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

David P. Cusick, Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Debtor's attorney has failed to attend the First Meeting of Creditors held on July 3, 2014. Debtors appeared at the meeting, but not examined by the Trustee as their attorney was not there to represent them. The Meeting has been continued to July 31, 2014.

The Trustee's Report of the July 31, 2014 First Meeting of Creditors is that the Debtors and counsel appeared, and the meeting has been concluded. July 31, 2014 Docket Entry. This resolve this portion of the Trustee's objection.

Furthermore, Trustee states the Plan is not Debtor's best effort

under 11 U.S.C. § 1325(b). The Debtor lists $200.00 income on Schedule I as a dividend from inheritance, but fails to list this income on Form B22C and does not explain the source of the income, as the debtor has no inheritance listed on Schedule B.

The Trustee also argues the Plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtor's non-exempt assets total $21,428.00 and the Debtor is proposing an 18% dividend to unsecured creditors, which totals $17,265.00. There are $21,428.57 in exempt assets from trust property located at 7700 Barton Rd, Granite Bay, California listed on Schedule A.

Lastly, the Trustee states that the Plan may not have been proposed in good faith under 11 U.S.C. § 1325(a)(3). The Debtor's 2013 income tax return reflects that Debtor received $30,528.00 from social security, but has failed to list this income on Schedule I. The Schedule shows $0 in the appropriate column (line 8e). If this amount is inaccurate, the Court shall not rely on the documents filed by Debtor.

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

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

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

20. 11-30546-E-13 WILLIAM/DENISE NISSEN — CONTINUED MOTION TO INCUR DEBT
LC-3 Lorraine W. Crozier — 5-30-14 [41]

CONT. FROM 7-1-14

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

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 May 30, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Incur Debt is denied.

PRIOR HEARING

The motion seeks permission for approval of debt, which they have already incurred, to purchase a 2013 Honda Fit for $20,049.89. Debtors mistakenly believed that they could finance the purchase of the new vehicle by borrowing money from their 401K plans without first obtaining permission from the court to do so. Debtors state they searched to secure vehicle financing after her employer no longer provided a vehicle, but could not obtain any financing. Debtors state they restructured their 401K loans, Denise incurring a second 401K loan in the amount of $11,740.00, and Greg incurring a $23,493.33 loan, used to purchase the vehicle, a refrigerator and tires for Greg's vehicle. Debtors state at the inception of the case, Debtors 401K loan repayments totaled $610.19 and after above referenced financing the loan payments are now $440.87 for Denise and $467.50 for Greg for a total of $908.37 per month (a difference of $298.18 per month). The interest rate on the 401K loans is 4.25%.

DISCUSSION

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

The Debtor does not address the reasonableness of incurring debt to purchase a brand new vehicle while seeking the extraordinary relief under Chapter 13 to discharge debts. The Debtor also proceeded to borrow from their 401K loans, after already owing a substantial amount.

Most troubling, however, is the fact that Debtor completed the purchase of the vehicle without court approval and in direct violation of the bankruptcy code and confirmed plan. Debtor was not authorized to make such a purchase, and electing to do so calls into question whether the Plan in this case was properly confirmed, the statement made under penalty of perjury in the Schedules and to confirm the plan were truthful, and if the Debtor filed and is prosecuting this case and Plan in good faith.

STATUS OF CHAPTER 13 PLAN

An issue of the Debtors' good faith may exist in this case. Under the existing confirmed Plan Debtors are obligated to make $297.00 a month payment for 60 months. Chapter 13 Plan, Dckt. 5. That monthly plan payment was premised on the Debtors' Monthly Net Income as computed on Schedule J. Dckt. 1 at 29. Though the Debtors have gross monthly income of $9,555.83, their income was reduced by $392.00 a month for 401K contributions and $610.19 for 401K loan payments.

The expenses listed on Schedule J include $1,980.00 for monthly mortgage payment (including property taxes and insurance), $800.00 for food, $425.00 for medical expenses, $140.00 for Health Savings Account, $825.00 for transportation. It was disclosed that Mrs. Nissen has a medical condition which limits her ability to work and causes them to incur higher than average monthly out of pocket medical expenses.

Schedule J also explained that the transportation expenses were high because the Debtors needed to have a 100,000 mile service on a vehicle and purchase new tires.

Under the confirmed Plan, the $297.00 a month payment were used to make a 10% dividend to creditors holding general unsecured claims. This was projected on $141,072.00 of general unsecured claims – which equals $14,107.00 to be paid creditors holding general unsecured claims.

Proposed Modified Plan

The Debtors have filed a proposed Modified Chapter 13 Plan. Dckt. 60.

Under the Modified Plan the monthly payments will be $297.00 for the first 37 months and then double to $600.00 a month for the last 23 months. The change to the Plan, in addition to increasing the payments, is that creditors holding shall receive a 25% dividend based on there being $81,665.00 in general unsecured claims – which equals $20,416.25 to be disbursed for these general unsecured claims. The Debtors explain that they have had some modest increases in income.

While such could appear positive on its face, when looking at the Debtors' current expenses have ballooned. These include: (1) increasing the food expense to $950.00 a month, (2) clothing to $120.00, and (3) transportation to $1,216.00 (notwithstanding the Debtors having purchased a 2013 vehicle). On top of this, Debtors increase their 401K contributions to $522.00 a month and their 401K loan payments to $908.37 (to pay for purchase of the 2013 car and other personal purchases).

Though the Debtors decided to purchase a 2013 vehicle, their declaration in support of confirmation states that even more repair expenses will be required to the Debtors' 2004 Dodge Truck. FN.1.

FN.1. On the current statement of income Mr. Nissen states that he continues to be employed as a Store Manager for Kelly Moore Paint Co. No explanation is provided as to why he has to retain, repair, and maintain a 2004 Dodge Truck which requires significant repairs as a store manager. Ms. Nissen identifies her employment as a training manager for Kelly Moore Paint Co. No explanation is provided why the Debtors had to purchase a brand new car for Ms. Nissen rather than a newer car that was 2-4 years old and had already suffered from the rapid depreciation which occurs during the first three model years after purchase of a new car.

One way of looking at the proposed Modified Plan is that Debtors' counsel anticipates a need for the Debtors to rehabilitate themselves for having incurred credit without authorization to buy new consumer goods and a new car. Alternatively, it could well be that the Debtors thought that the Trustee may have caught wind of their increased income, and getting a $1,000.00 tax refund for 2013, and preemptively filed a "look good" plan to divert the court's and creditors' attention from the diversion of current income to pay for the consumer purchases that the Debtors wanted to make – with or without court authorization.

SUPPLEMENTAL DECLARATION

Debtor William Nissen filed a supplemental declaration on July 24, 2014. Debtor states that in 2013 his wife needed another vehicle, as the vehicle provided by her employer was taken away. Debtor states his wife has multiple sclerosis and other health problems that cause difficulty in performing every day tasks including getting out of a chair, walking and getting in and out of a vehicle. Debtor states the seat height in the Honda Fit makes it easier for her to enter and exit the vehicle. Debtor states that her job requires significant travel and the Honda gets good mileage, averaging 30 miles per gallon. Debtor states they considered the following in determining to purchase the new 2013 Honda Fit which is a sport model:

(1) affordability of purchase price, the vehicle was $18,273.83

without taxes and insurance which made it a good value compared to the other vehicles we felt we could afford. It was a new car and would require little upkeep and had a warranty;
(2) reliability, which is essential given Denise's physical condition, the distance and the amount of time she spends driving;

(3) ease of use, Denise spends a lot time in the car and must be able to get in and out of the vehicle safely.

Declaration, Dckt. 72. Debtor states the research of prices of Honda Fits in the area show that the vehicle purchased, which is not a luxury vehicle, does tend to hold its value.

AUGUST 5, 2014 HEARING

After a review of the Debtor's response and supporting declaration, the court still has an outstanding issue. The Debtors took two 401K loans totaling $35,233.33, and paid $20,049.89 for a 2013 Honda Fit, $11,740.00 to payoff an existing 401K loan, and an undisclosed amount on tires and a new refrigerator. Debtor has not accounted for the $3,443.49 remaining in funds.

Debtors have not provided any credible explanation why they needed to expend estate assets and commit income to pay for a brand new car, rather than a vehicle two to four model years old which would be significantly less expensive (a substantial portion of the new car appreciation getting burned off in the first three years of new car ownership).

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

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

21. 11-30546-E-13 WILLIAM/DENISE NISSEN MOTION TO MODIFY PLAN
LC-4 Lorraine W. Crozier 6-24-14 [55]

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 June 24, 2014. By the court's calculation, 42 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.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee opposes the plan on the basis that Debtors may not be able to make the proposed plan payment. Debtors' plan payments under the confirmed plan are $297.00 for 60 months with 10% to unsecured creditors. Debtor's modified plan proposes plan payments of $297.00 for 37 months, then $600.00 for 23 months with 25% to unsecured creditors. Debtors are current under the proposed modified plan, but Debtors' modified plan depends in part on two motions: a motion to approve a loan modification and a motion to incur debt.

The Debtors' motion to approve loan modification was denied on July

1, 2014 due to there being no credible evidence that Ocwen Loan Servicing, LLC is the creditor or that it is authorized as the named principal to modify the loan. Trustee states that under the loan modification, Debtor's mortgage payment decreased from $1,882.19 to $1,093.60. This adjustment as well as various other adjustments in Debtor's budget pursuant to Debtor's amended Schedules I and J filed as Exhibits A and B allow for Debtor's proposed increase in plan payments from $297.00 to $600.00 and an increase in the percentage to unsecured creditors from 10% to 25%. Debtor's mortgage under the confirmed plan is a Class 4 creditor paid directly by Debtor with arrears having been reduced from $20.49 to $0.00 based on creditor's amended claim filed January 30,2012. Debtor's proposed modified plan does not change the treatment of this creditor.

Trustee states that without the loan modification, Debtor's would not have the ability to afford an increased plan payment of $600.00. Debtors have not filed another Motion to Approve a Loan Modification, but the Trustee believes the creditor will abide by the proposed modification and the Debtor may take some time in locating the responsible party where potentially four different sets of attorneys may be involved.

The Debtors' Motion for Order Allowing Debtor To Incur Debt seeks approval for actions already taken: the Debtor took two 401K loans totaling $35,233.33, and paid $20,049.89 for a 2013 Honda Fit, $11,740.00 to payoff an existing 401K loan, and an undisclosed amount on tires and a new refrigerator, (apparently equal or less than the $3,443.49 remaining.) The Debtor indicates that the 401K loans are to be repaid at $908.37 per month with 4.25% interest. The original Schedule I reflected 401K loan payments of $610.19 per month, so this represents an increase of $298.18 per month over the original schedule. The modification proposes a plan payment increase of $300.00 per month.

Where the borrowed money was spent to replace a vehicle with a reasonable replacement vehicle, and the borrowed money is largely accounted for, and where the Debtor is proposing to increase the plan payment by an amount equal to the additional amount required by the loan, the Trustee is not opposed to the modified plan based on the pending motion to incur debt.

Additionally, the Trustee opposes the motion on the basis that Debtors' proposed modified plan provides for GMAC Mortgage regarding Debtor's second deed of trust as a Class 2 claim not reduced based on value of collateral, Section A. Debtor's filed a Motion to Value their second deed of trust at $0.00 on May 18, 2011. The motion was heard and granted June 28, 2011, with the Court's order valuing filed on July 6, 2011. Dckt. 25. The Trustee believes this creditor should be provided for in Class 2 as a claim reduced to $0 based on value of collateral, Section C. The Trustee would not object to this being corrected in the order confirming.

Lastly, the Trustee states Debtors' amended Schedules I and J filed as Exhibits A and B were not filed using Official Form B 6I and B 6J effective December 2013. The Official Form allows for income and expenses as of a certain date, and can be used for amended Schedules.

DEBTOR'S REPLY

Debtors filed a reply addressing many of the issues raised by the

court in the prior Motion to Incur Debt, Motion to Approve Loan Modification, and the Trustee's Opposition.

First, Counsel for Debtors state that they have been in contact with Ocwen Loan Servicing regarding the loan modification. Counsel states that they have been informed that the payment is actually $1,333.61 with taxes and insurance and will hopefully have written confirmation within 10 days.

Debtors state they have addressed the issues with the Motion to Incur Debt with their supplemental declaration with that motion.

Debtors state that they agree to provide for the Class 2 claim of GMAC as a claim which is reduced to $0 based upon the motion to value secured claim.

Counsel states that in the future, the new Schedule I and J forms will be used when debtors propose modified plans.

Debtors also provide explanations for their increases in expenses for food, clothing and vehicle expenses. Debtor states that as the store manager he delivers paint, which requires a truck. Debtor states the truck is in need of repairs and maintenance, with a rebuilt transmission, a rear brake drum and rotor assembly repairs, with routine maintenance and fuel costs all totaling $680.00 per month. Debtor states that the $1,800 projected for new tires should not have been included, as the plan will be completed at that time. The air conditioning repairs were also reduced to $300.00, which was anticipated at $1,000.

Debtors state that the Honda Fit requires $235.00 per month in operating costs and the registration expenses for the 5th wheel and motorcycle are $16.00 per month. A total combined transportation expense is $931.00 per month with the adjustments made.

Debtors state that they can budget on $950.00 per month for food and household supplies. They have explained the reasons their expenses have increased because of health and medical concerns of Denise Nissen as well as the increased costs of food and supplies in general in the past three years.

Debtors also state their medical plan at work changed, and they each have a deductible of $2,000.00. Denise's prescriptions cost in excess of $2,000 per month. Debtors state that the flare ups which Denise has experienced in the past year with her MS have actually increased the medical expenses. The amounts stated in the budget included routine costs for co-pays.

The debtors state they are willing to reduce their retirement contributions to only $100.00 each per month (2%). Debtors propose to commence making the modified plan payment totaling $961.00 in August 2014.

DISCUSSION

Prior Hearing from Motion to Incur Debt

An issue of the Debtors' good faith may exist in this case. Under the existing confirmed Plan Debtors are obligated to make $297.00 a month

payment for 60 months. Chapter 13 Plan, Dckt. 5. That monthly plan payment was premised on the Debtors' Monthly Net Income as computed on Schedule J. Dckt. 1 at 29. Though the Debtors have gross monthly income of $9,555.83, their income was reduced by $392.00 a month for 401K contributions and $610.19 for 401K loan payments.

The expenses listed on Schedule J include $1,980.00 for monthly mortgage payment (including property taxes and insurance), $800.00 for food, $425.00 for medical expenses, $140.00 for Health Savings Account, $825.00 for transportation. It was disclosed that Mrs. Nissen has a medical condition which limits her ability to work and causes them to incur higher than average monthly out of pocket medical expenses.

Schedule J also explained that the transportation expenses were high because the Debtors needed to have a 100,000 mile service on a vehicle and purchase new tires.

Under the confirmed Plan, the $297.00 a month payment were used to make a 10% dividend to creditors holding general unsecured claims. This was projected on $141,072.00 of general unsecured claims – which equals $14,107.00 to be paid creditors holding general unsecured claims.

The Debtors have filed a proposed Modified Chapter 13 Plan. Dckt. 60. Under the Modified Plan the monthly payments will be $297.00 for the first 37 months and then double to $600.00 a month for the last 23 months. The change to the Plan, in addition to increasing the payments, is that creditors holding shall receive a 25% dividend based on there being $81,665.00 in general unsecured claims – which equals $20,416.25 to be disbursed for these general unsecured claims. The Debtors explain that they have had some modest increases in income.

While such could appear positive on its face, when looking at the Debtors' current expenses have ballooned. These include: (1) increasing the food expense to $950.00 a month, (2) clothing to $120.00, and (3) transportation to $1,216.00 (notwithstanding the Debtors having purchased a 2013 vehicle). On top of this, Debtors increase their 401K contributions to $522.00 a month and their 401K loan payments to $908.37 (to pay for purchase of the 2013 car and other personal purchases).

Though the Debtors decided to purchase a 2013 vehicle, their declaration in support of confirmation states that even more repair expenses will be required to the Debtors' 2004 Dodge Truck. FN.1.

FN.1. On the current statement of income Mr. Nissen states that he continues to be employed as a Store Manager for Kelly Moore Paint Co. No explanation is provided as to why he has to retain, repair, and maintain a 2004 Dodge Truck which requires significant repairs as a store manager. Ms. Nissen identifies her employment as a training manager for Kelly Moore Paint Co. No explanation is provided why the Debtors had to purchase a brand new car for Ms. Nissen rather than a newer car that was 2-4 years old and had already suffered from the rapid depreciation which occurs during the first three model years after purchase of a new car.

One way of looking at the proposed Modified Plan is that Debtors'

counsel anticipate a need for the Debtors to rehabilitate themselves for having incurred credit without authorization to buy new consumer goods and a new car. Alternatively, it could well be that the Debtors thought that the Trustee may have caught wind of their increased income, and getting a $1,000.00 tax refund for 2013, and preemptively filed a "look good" plan to divert the court's and creditors' attention from the diversion of current income to pay for the consumer purchases that the Debtors wanted to make – with or without court authorization.

August 5, 2014 Hearing

Even after consideration of Debtor's supplemental response and declaration, the current proposed plan does not appear to be confirmable at this time.

The Motion to Approve Loan Modification has been denied. Without the loan modification, Debtors do not have the ability to afford an increased plan payment of $600.00, let alone $961.00. Debtors have not filed another Motion to Approve a Loan Modification to date.

Furthermore, the Debtors' Motion for Order Allowing Debtor To Incur Debt has not been approved. The Debtors took two 401K loans totaling $35,233.33, and paid $20,049.89 for a 2013 Honda Fit, $11,740.00 to payoff an existing 401K loan, and an undisclosed amount on tires and a new refrigerator. Debtor has not accounted for the $3,443.49 remaining.

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.

22. 14-25048-E-13 JOHN/BRENDA CHAPMAN
Scott A. CoBen

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY COUNTY OF SIERRA, TAX COLLECTOR VAN MADDOX
6-10-14 [16]

CONT. FROM 7-22-14

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 Debtor, Debtor's Attorney, and Chapter 13 Trustee on June 13, 2014. By the court's calculation, 39 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection pursuant to the Parties Stipulation, Dckt. 37.

County of Sierra, a political subdivision of the State of California ("Movant") opposes confirmation of the Plan on the basis that there are secured property taxes totaling $9,841 on property located in the County of Sierra which are not correctly identified in the Debtors' plan. Movant sates the Debtors do not identify future or contingent tax claims, including taxes for the fiscal year that became owing as of January 1, 2014 under the California state lien date. These taxes are due and owing in the amount of $1,690.00. Furthermore, Movant states that under California State Law Code Section 4103, the California statutory interest rate is 1.5% per month. FN.1.

FN.1. The objecting party filed the objection and proof of service in this matter as one document as well as the notice, proof of service and exhibits as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other

supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

A review of the Claim Registrar shows the Sierra County Tax Collector has filed Proof of Claim No. 7 for a secured claim of $11,531.00. The proposed plan does not provide for the full amount of the secured claim. Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for the respondent creditor's full secured claim, raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). This is reason to sustain the objection.

Furthermore, the interest due on delinquent California real property taxes is set by statute. The statutory interest rate payable on delinquent real property taxes is 18% per annum. See Cal. Rev. & Tax. Code § 4103(a). Debtors have not provided for the statutory interest rate for Movant's claim.

However, the parties filed a Stipulation Resolving Objections to Confirmation Filed by Nevada County and Sierra County, Dckt. 37, stating that the property tax claims shall be paid the interest rate of 18 percent per annum and that Debtor shall remain current on all future property taxes.

Based on the Stipulation, the Creditor's objection has been resolved and is therefore overruled without prejudice. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Sierra County Tax Collector having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is overruled and Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, including the amendments as agreed in the Stipulation with this Creditor (Dckt. 37), which upon approval by the Trustee shall be lodged with the court.

23. 14-25048-E-13 JOHN/BRENDA CHAPMAN CONTINUED OBJECTION TO

Scott A. CoBen **CONFIRMATION OF PLAN BY NEVADA COUNTY TAX COLLECTOR**
6-17-14 [21]

CONT. FROM 7-22-14

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 Debtor, Debtor's Attorney, Chapter 13 Trustee, on June 17, 2014. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection pursuant to the Parties Stipulation, Dckt. 37.

Nevada County Tax Collector ("Movant") opposes confirmation of the Plan on the basis that Debtors owe past due property taxes on two Nevada County Properties totaling $27,584.48, as evidenced by Movant's Proof of Claim, which fails to apply the correct annual interest rate on delinquent property taxes. Movant states pursuant to California Revenue and Taxation Code section 4103 the annual interest rate must be 18%, while Debtor provides for an interest rate of 4.75%.

The interest due on delinquent California real property taxes is set by statute. The statutory interest rate payable on delinquent real property taxes is 18% per annum. See Cal. Rev. & Tax. Code § 4103(a). Debtors have

not provided for the statutory interest rate for Movant's claim.

However, the parties filed a Stipulation Resolving Objections to Confirmation Filed by Nevada County and Sierra County, Dckt. 37, stating that the property tax claims shall be paid the interest rate of 18 percent per annum and that Debtor shall remain current on all future property taxes.

Based on the Stipulation, the Creditor's objection has been resolved and is therefore overruled without prejudice. The Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Nevada County Tax Collector having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is overruled and Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order, including the amendments as agreed in the Stipulation with this Creditor (Dckt. 37), confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

24. 14-25048-E-13 JOHN/BRENDA CHAPMAN
DPC-1 Scott A. CoBen

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK
6-18-14 [26]

CONT. FROM 7-22-14

Final Ruling: No appearance at the August 5, 2014 hearing is required.

The Chapter 13 Trustee having filed a Notice of Withdrawal on **July 31, 2014**, Dckt. 41, no prejudice to the responding party appearing by the dismissal of the Objection to Confirmation, the court construing the Notice of Withdrawal as an *ex parte* motion to dismiss the Objection to Confirmation without prejudice, the parties, having the right to dismiss the motion pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7041, the dismissal consistent with the opposition filed by the Debtors, the ex parte motion is granted, the Trustee's Objection to Confirmation is dismissed without prejudice, and the court removes this Objection from the calendar.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation of the Chapter 13 Plan filed by Trustee having been presented to the court, the Trustee having requested that the Objection itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 7041 and 9014, **Dckt. 41**, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Trustee's Objection to Confirmation of the Chapter 13 Plan filed on May 13, 2014, is dismissed without prejudice. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order, including the amendments as agreed in the Stipulation with Nevada and Sierra Counties (Dckt. 37), confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

25. 14-23554-E-13 PAULA CAMPBELL
DEF-1 David Foyil

MOTION TO VALUE COLLATERAL OF CITI FINANCIAL
6-19-14 [31]

Final Ruling: No appearance at the August 5, 2014 hearing is required.

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on June 19, 2014. By the court's calculation, 47 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 El Dorado Savings Bank, "Creditor," is granted.

The Motion to Value filed by Paula Campbell, "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 19270 Black Oak Drive, Fiddletown, California, "Property." Debtor seeks to value the Property at a fair market value of $80,000.00 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 $88,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $52,656.00. 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 El Dorado Savings Bank, "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 El Dorado Savings Bank secured by a second in priority deed of trust recorded against the real property commonly known as 19270 Black Oak Drive, Fiddletown, 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 $80,000.00 and is encumbered by senior liens securing claims in the amount of $88,000.00, which exceed the value of the Property which is subject to Creditor's lien.

26. 11-26156-E-13 ROBERT/BARBARA BUTLER MOTION FOR SUBSTITUTION
MTM-6 Michael T. McEnroe 7-1-14 [74]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 1, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Substitution 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 Motion for Substitution is denied without prejudice.

Movant Barbara Butler moves to substitute herself, as spouse of the deceased, Robert Butler. Counsel for Movant states that no party will suffer prejudice by this substitution as the case will remain as if the death had not occurred. Counsel Movant provides that $318.00 remains to be paid into the plan and the insurance policy listed on Schedule B, Symetra Financial, lapsed two years ago due to non-payment. Counsel for Movant states there is no death benefits and that she holds possession and control of the assets and obligations of the deceased. Counsel Movant states there are no assets released or otherwise removed by the death of Robert Butler.

However, no evidence has been presented in support of the pleadings. No declaration has been filed by Movant to support the allegations made in the Motion, nor has the exhibit been authenticated. Therefore, the court has no evidence to consider and must deny the motion without prejudice.

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

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

The Motion for Substitution 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.

27. 14-26456-E-13 JUANITA BRAMASCO
MC-1 Muoi Chea
MOTION TO AVOID LIEN OF BENEFICIAL CALIFORNIA, INC.
7-3-14 [16]

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 - No Opposition Filed.

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Beneficial California, Inc. ("Creditor") against property of Juanita Bramasco ("Debtor") commonly known as 821 Meladee Lane, Galt, California (the "Property").

Service Issues

The lien holder on the abstract of judgment (Exhibit D) is listed as Beneficial California, Inc. However, Debtor's Proof of Service shows that the law firm Paris and Paris, LLP was served, rather than the actual Creditor subject to this Motion. Another party named Beneficial/Household Finance was served, which does not appear to be the creditor with the secured claim.

The California Secretary of State website (attached to Proof of Service) lists Beneficial California, Inc. with its address at 26525 North Riverwoods Blvd, Mettawa, Illinois, 60045, or, alternatively, its agent for service of process: C T Corporation System, 818 West Seventh St 2nd Floor, Los Angeles, California, 90017. Neither address was served with this Motion and accompanying documents. Service is therefore insufficient to grant this Motion.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the 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 Avoid Lien of Beneficial California, Inc. is denied without prejudice.

28. 14-26456-E-13 JUANITA BRAMASCO
MC-2 Muoi Chea

MOTION TO AVOID LIEN OF MIDLAND FUNDING, LLC
7-3-14 [22]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

This Motion requests an order avoiding the judicial lien of Midland Funding, LLC ("Creditor") against property of Juanita Bramasco ("Debtor") commonly known as 821 Meladee Lane, Galt, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $2,367.69. An abstract of judgment was recorded with Sacramento County on September 13, 2012, which encumbers the Property.

The Motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $145,000.00 as of the date of the petition. The unavoidable consensual liens total $217,781.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Midland Funding, LLC, California Superior Court for Sacramento County Case No. 34-2011-00114888-CLCLGDS, recorded on September 13, 2012, Book 20120913 and Page 1197 with the Sacramento County Recorder, against the real property commonly known as 821 Meladee Lane, Galt, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

29. 14-26456-E-13 JUANITA BRAMASCO **MOTION TO AVOID LIEN OF MIDLAND**
MC-3 Muoi Chea **FUNDING, LLC**
7-3-14 [27]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

This Motion requests an order avoiding the judicial lien of Midland Funding LLC ("Creditor") against property of Juanita Bramasco ("Debtor") commonly known as 539 Bernier Circle, Galt, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $4,554.93. An abstract of judgment was recorded with **Sacramento** County on August 2, 2012, which encumbers the Property.

The Motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $180,000.00 as of the date of the petition. The unavoidable consensual liens total $166,087.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $13,913.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Midland Funding, LLC, California Superior Court for Sacramento County Case No. 34-2012-00121985, recorded on August 2, 2012, Book 20120802 and Page 1517 with the Sacramento County Recorder, against the real property commonly known as 539 Bernier Circle, Galt, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

30. 14-26456-E-13 JUANITA BRAMASCO
MC-4 Muoi Chea
MOTION TO AVOID LIEN OF MIDLAND FUNDING, LLC
7-3-14 [32]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

This Motion requests an order avoiding the judicial lien of Midland Funding LLC ("Creditor") against property of Juanita Bramasco ("Debtor") commonly known as 539 Bernier Circle, Galt, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $2,888.84. An abstract of judgment was recorded with **Sacramento** County on September 21, 2011, which encumbers the Property.

The Motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $180,000.00 as of the date of the petition. The unavoidable consensual liens total $166,087.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $13,913.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

IT IS ORDERED that the judgment lien of Midland Funding LLC, California Superior Court for Sacramento County Case No. 34-2011-00101195 recorded on September 21, 2011, Book 20120323 and Page 1670 with the Sacramento County Recorder, against the real property commonly known as 539 Bernier Circle, Galt, California, is avoided in its entirety to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

31. 14-26456-E-13 JUANITA BRAMASCO
MC-5 Muoi Chea
MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, N.A.
7-3-14 [37]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 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 JPMorgan Chase Bank, N.A., "Creditor," is granted.

The Motion to Value filed by Juanita Bramasco, "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 821 Meladee Lane, Galt, California, "Property." Debtor seeks to value the Property at a fair market value of $145,000.00 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 $217,781.00. Creditor's junior deed of trust

secures a claim with a balance of approximately $29,160.00. 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 Juanita Bramasco, "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 JPMorgan Chase Bank, N.A. secured by a junior deed of trust recorded against the real property commonly known as 821 Meladee Lane, Galt, 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 $145,000.00 and is encumbered by senior liens securing claims in the amount of $217,781.00, which exceed the value of the Property which is subject to Creditor's lien.

32. 14-26456-E-13 JUANITA BRAMASCO
MC-6 Muoi Chea
MOTION TO VALUE COLLATERAL OF CACH, LLC
7-3-14 [42]

Final Ruling: No appearance at the August 5, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 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 Cach LLC, "Creditor," is granted.

The Motion to Value filed by Juanita Bramasco, "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 821 Meladee Lane, Galt, California, "Property." Debtor seeks to value the Property at a fair market value of $145,000.00 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 $217,781.00. Creditor's junior deed of trust secures a claim with a balance of approximately $8,180.77. 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 Juanita Bramasco, "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 Cach LLC secured by a junior deed of trust recorded against the real property commonly known as 821 Meladee Lane, Galt, 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 $145,000.00 and is encumbered by senior liens securing claims in the amount of $217,781.00, which

exceed the value of the Property which is subject to Creditor's lien.

33. 14-24258-E-13 AEB-2 | **BARNEY GAXIOLA** / **Andrew E. Bakos** | **AMENDED MOTION TO CONFIRM PLAN** / **6-19-14 [43]**

Final Ruling: The moving party having filed a Notice of Withdrawal, the withdrawal consistent with the opposition filed to the Motion, no prejudice to the responding party appearing by the dismissal of the Motion, the court construing the written request for the motion to be denied or dismissed and the written withdrawal to be a joint request for the motion to be dismissed, the parties having the right to agree to dismiss the motion pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) and Fed. R. Bank. P. 9014 and 7041, and no issues identified by the court with respect to dismissal of this Motion, the court removes the Motion from the calendar.

34. 13-32861-E-13 PGM-2 | **JAMES/BETH FRY** / **Peter G. Macaluso** | **CONTINUED MOTION TO CONFIRM PLAN** / **5-15-14 [66]**

CONT. FROM 7-1-14

Tentative Ruling: The Motion to Confirm Plan 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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 15, 2014. By the court's calculation, 47 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 motion on the basis that Class 4 of Debtors' plan indicates that Debtors are in a trial loan modification effective May 2014. Debtors have filed a Motion to Approve Loan Modification, but the plan does not contain any provisions for the mortgage in the event the trial modification does not become permanent. The motion does not indicate any alternative provision for the mortgage or indicate what the terms of the permanent modification would be.

The court notes that the loan modification was approve as a Trial Loan Modification at the June 24, 2014 hearing.

Additionally, the Trustee argues that the Debtors' plan may not be the Debtors best effort. Trustee states the Debtors are below median income. The amended plan calls for payments of a total of $7,500 through April 2014 and then $850.00 per month for the remainder of the plan. The most recently filed Schedule J, Dckt. 77, indicates combined monthly income from Schedule I of $4,660.26 per month. Expenses on Schedule J total $3,809.75, leaving net income of $850.51 per month. Item #24 indicates that "Debtor wife has new single job ... ". Debtors Declaration in Support of the Motion to Confirm indicates that Debtors are employed by Sacramento City Unified School District and Hallmark Rehab Group but the Declaration does not indicate any changes to the Debtors income.

The most recently filed Schedule I, Dckt. 29, filed on December 2, 2013 indicates Beth Fry is employed by HCR Manor Care, her gross income is $4,742.05 and the net income on the Schedule is $5,627.48 (not $4,660.26 as indicated on the most recent Schedule J). The Trustee is not aware of any other amended Schedule I to date. Debtors may have more than the net income of $850.51 which may be paid into the plan for the benefit of unsecured creditors.

DEBTOR'S RESPONSE

Debtor responds, stating that additional time is needed to address the Trustee's concerns, to provide the Trustee with statements and the financial effect on the disposable income funding the plan.

Based on the foregoing, the court continued the hearing to allow the Debtor to provide the Trustee with the requested documentation and for the Trustee to file additional opposition, if any.

On July 30, 2014, the Chapter 13 Trustee filed a supplemental declaration stating that no additional information had been provided to the

Trustee. Nothing has been filed with the court as of the August 1, 2014, review for this hearing.

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

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

35.	**14-25561-E-13** **SJS-1**	**MARCELO/HAZEL LOPEZ** **Scott J. Sagaria**	**MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE** **7-2-14 [26]**

Parties Are Directed to Review Items 5 and 7, 14-23416-E-13 Mario and Christine Borregoon, and Item 49 14-25585-E-13 Scott Olney, on the August 5, 2014, 3:00 Department E Calendar Relating to the Identity of Capital One Auto Finance

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 - 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, 34 days' notice was provided. 28 days' notice is required.

The Motion to Value 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).

The Motion to Value secured claim of Capital One Auto Finance, "Creditor" is denied without prejudice.

SERVICE OF PROCESS ISSUES

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

The California Secretary of State reports that Capital One Auto Finance, Inc. surrendered its corporate status in 1996. http://kepler.sos.ca.gov/, Entity No. C1990207. A Google search for Capital One Auto Finance leads the court to the webpage for Capital One Bank. https://www.capitalone.com/. While one may "guess" that this is the creditor, neither Debtors nor the court should have to guess the legal identity of a creditor.

Proof of Claim No. 1 lists Capital One Auto Finance (not Inc., L.L.C., Partnership, or L.P.) as the creditor. One post office box number is given for notices and another for payments. The email address tied on the Proof of Claim for both post office boxes is "pocquestions@nbsdefaultservices.com." A Google search for "nbsdefaultsevices.com" leads one to the website for NBS Default Services of Dallas, Texas. See http://nbsdefaultservices.com. It's services in the consumer finance sector are described as follows.

> "Our Mission
> We strive to improve the bottom line performance of our clients' bankruptcy portfolios through careful, efficient and client-specific management of each individual case. NBS provides our proven, industry-leading solutions to the following types of organizations:
>
> Residential Mortgage Lenders
> Automobile Finance Companies
> Banks and Financial Institutions
> Consumer Lending Organizations

Portfolio Servicers, Owners and Investors"

http://nbsdefaultservices.com/why-nbs/about-us/.

It is clear that NBS Default Services is not the "creditor," as defined by 11 U.S.C. § 101(10), (5). Rather, it is merely a third-party servicer.

The Proof of Claim is executed by LynAlise K. Tannery, as the authorized agent for Buckley Madole, P.C. The court recognizes the law firm as one in Texas which represents third-party servicers and possibly the actual creditor. Previously, the court issued an order to show cause and required the Buckley Madole attorney appear to identify who was the actual creditor and who was that law firm's client.

It appears that the proof of claim being filed has (whether inadvertently or intentionally) been completed in a manner to hide the true identity of the creditor and preclude the Debtors from effecting service of process.

The Debtors' counsel shall contact the person identified at Buckley Madole, P.C. identified on the Proof of Claim, or such other attorney as said law firm as responsible for the Proof of Claim No. 1, to address the identity of the creditor, the agent for service of process, and the actual physical address of the creditor. Counsel for Debtors shall provide a copy of these Civil Minutes to the attorney at Buckley Madole, P.C. along with the request for written confirmation of the creditor, physical address for service, and agent for service of process. If Buckley Madole, P.C. fails to provide the information in writing so that Debtors' counsel can file a new motion, then Debtors' counsel may file an ex parte motion for the issuance of an order to show cause (supported by properly authenticated evidence of efforts to communicate with the attorneys at Buckley Madole, P.C.) by the court for LynAlise K. Tannery and the Managing Partner of Buckley Madole, P.C. to appear (no telephonic appearances permitted), address why monetary corrective sanctions should not be imposed, and why the Claim should not be disallowed, and the lien expunged based on the proof of claim filed. This is in addition to the fines up to $500,000.00 or imprisonment of up to five years, or both, pursuant to 18 U.S.C. §§ 152 and 3571.

Therefore, the motion is denied without prejudice.

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

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

36. 14-21662-E-13 ANN-MARIE SCOTT MOTION TO CONFIRM PLAN
RS-3 Richard L. Sturdevant 6-23-14 [48]

Final Ruling: No appearance at the August 5, 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, all creditors, parties requesting special notice, and Office of the United States Trustee on June 23, 2014. By the court's calculation, 43 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 June 23, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so

approved, the Chapter 13 Trustee will submit the proposed order to the court.

37. 14-25265-E-13 SHERYL WOLHART
DPC-1 Pro Se
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-10-14 [22]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on July, 2010. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Trustee opposes confirmation of the Plan on the basis that, Sheryl Wolhart, ("Debtor") failed to appear at the First Meeting held on July 3, 2014, the Meeting has been continued to July 31,2014 at 10:30 a.m. The Trustee does not have sufficient information to determine whether or not the case is suitable for continuation with respect to 11 U.S.C. § 1325.

The Trustee reports that the Debtor did not appear at the July 31, 2014 continued First Meeting of Creditors. July 31, 2014 Docket Entry.

Additionally, Trustee stats that all sums required by the plan have not been paid, and Debtor is $100.00 delinquent in plan payments to the Trustee to date with the next scheduled payment of $100.00 is due on August 25,2014 11 U.S.C. §1325(a)(2). The Debtor has paid $0.00 into the plan to date.

Furthermore, Trustee asserts that the Debtor has failed to provide the Trustee with a copy of their Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, specifically, the 2013 Tax Return, there is no written statement that such documentation exists. 11 U.S.C. § 521(e)(2)(A); FRBP 4002(b)(3). This is required 7 days before the date set for the first meeting, 11 U.S.C. §521(e)(2)(A)(I).

Also, Trustee argues that the Debtor's current plan payment is insufficient to fund the plan. In Class 1 of the Plan, Debtor lists ongoing mortgage payments to Wells Fargo Bank in the amount of $1,180.00, yet, Debtor proposes a plan payment of only $100.00 per month.

In addition, Trustee states that the Debtor has not complied with 11 U.S.C. § 1325(a)(2). On June 23, 2014, the Court issued an Order to Show Cause re Dismissal of Case (dckt. 20), which was set for hearing on July 9, 2014. The Court's notice indicates that Debtor has failed to pay one or more installments according to the schedule specified in the order granting leave to pay filing fees in installments entered on May 19,2014 (dckt.7). Debtor has failed to make a payment of $70.00 that was due on June 18,2014.

Further, Trustee argues that it appears that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). Based on Schedule J the Debtor's projected disposable monthly income is negative $655.00 and the Debtor proposes a plan payment of $100.00. Debtor's expenses on Schedule J total $1,855.00 and Debtor's income totals $1,200.00 leaving a negative balance of $655.00 on Schedule J.

Lastly, Trustee states that the Debtor has deducted $1,180.00 on Schedule J for ongoing mortgage payments but also proposes the plan pay ongoing mortgage in Class 1. The Debtor's plan indicated in Class 1 that Debtor owed $18,000.00 in arrears, therefore the mortgage should be paid by the Trustee in Class 1.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

38. 14-25265-E-13 MDE-1 SHERYL WOLHART Pro Se — OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 7-10-14 [26]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on July 10, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Wells Fargo Bank, N.A. ("Creditor"), opposes confirmation of the Plan on the basis that the plan fails to provide for curing the default on Creditor's secured claim. 11 U.S.C. § 1322(b)(5).

Additionally, Creditor claims the current plan does not adequately provide for the full amount of the on-going monthly payment due under the Secured Creditor's Class 1 claim.

Lastly, Creditor opposes confirmation since the plan fails to provide how the Debtor will have the ability to comply with the plan and make all payments. 11 U.S.C. § 1325(a)(6).

The objecting creditor holds a deed of trust secured by the Debtor's residence. The creditor has filed a timely proof of claim in which it asserts pre-petition arrears. The Plan does not propose to cure these arrears. 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 arrears, the plan cannot be confirmed.

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

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

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

39. 11-20868-E-13 ACW-2 | **WAYNE WILKINSON AND DENISE ARMENDARIZ**
Andy C. Warshaw | **CONTINUED MOTION TO APPROVE LOAN MODIFICATION**
5-22-14 [169]

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 the respondent creditor, affected lienholders, the Chapter 13 Trustee, and Office of the United States Trustee on May 22, 2014. By the court's calculation, 33 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, with the parties to the Loan Modification as presented to the court to be Wayne Wilkinson and Denise Armendariz, the Debtors, and U.S. Bank, N.A., As Trustee for MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3, acting through its agent, Ocwen Loan Servicing, LLC.

AUGUST 5, 2014 HEARING

PROCEDURAL HISTORY

At the June 24, 2014 hearing, this matter was continued to July 22, 2014 to allow Debtors and Ocwen Loan Servicing, LLC, to file before July 15, 2014 documents identifying Ocwen Loan Servicing, LLC, as the actual creditor on the subject loan as defined by 11 U.S.C. § 101(10).

On July 15, 2014, the court approved a stipulation between Debtors Wayne Roy Wilkinson and Denise Anette Armendariz, and Ocwen Loan Servicing, LLC, to continue the hearing on the motion to approve the loan modification. The hearing on the Debtors' Motion to Approve the Loan Modification was accordingly continued to August 5, 2014 at 3:00 pm. **Order, Dckt. No. 189.**

REVIEW OF THE MOTION

The Motion to Approve Loan Modification filed by Wayne Roy Wilkinson and Denise Annette Armendariz ("Debtors") seek court approval for Debtors to incur post-petition credit. Debtors state that they have entered into a loan modification agreement with Ocwen Loan Servicing, LLC, to change Debtors' mortgage payments from $2,186.00 to $2,595.42. The modification will capitalize the pre-petition arrears and provide for stepped increases in the interest rate from 1.250% to 4.750%

The Motion is supported by the Declaration of Wayne Roy Wilkinson and Denise Annette Armendariz. Dckt. No. 171. The Declaration affirms the Debtors' desire to obtain the post-petition financing and provides evidence of Debtors' ability to pay this claim on the modified terms.

Onewest Bank, FSB filed Proof of Claim No. 16 on the claims registry, claiming a debt owed for money loaned in the amount of

$497,821.24. The Proof of Claim lists OneWest Bank, FSB, as the creditor on this claim. A Deed of Trust identifying Debtors as the borrower, and MortgageIt, Inc. As the Lending Corporation.

The Debtors identify Ocwen Loan Servicing, LLC, as the current servicer of their primary home loan. The Debtors have not, however, provided credible evidence that Ocwen Loan Servicing, LLC is the creditor or that it is authorized as the named principal to modify this loan. The Debtors have not demonstrated that Ocwen Loan Servicing, LLC, is obligation that appears to be owed to Onewest Bank, FSB. The court will not approve an loan modification that will not be effective against the actual owner of the obligation, which here appears to be Onewest Bank, FSB.

The Loan Modification Agreement identifies Ocwen Loan Servicing, LLC as the "Servicer," and does not indicate that it is the actual creditor to enter into a contract to modify the Loan. While the Loan Modification Agreement clearly identifies and requires proof of identity for the Debtors, the signature block for the "creditor" who has the claim only lists "Mortgage Electronic Registration Systems, Inc. – Nominee for Servicer" as signing the contract. The court does not know what it means to be "nominee of servicer," what agency powers such a "nominee" may have, and how the nominee of the servicer is the creditor or authorized to bind the creditor (who is not disclosed in the Loan Modification Agreement).

The court has now been presented with multiple instances of different loan servicing companies misrepresenting 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 case the loan servicing company was merely that, 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.

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 that this loan servicing company is a creditor in this case. Declaration, Dckt. 171. The Debtors do not testify that they have borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred to Ocwen Loan Servicing, LLC. FN.1.

FN.1. The misidentification of creditors for purposes of § 506(a) and loan modification approval motions continues to mystify the court. Obtaining an order approving a loan modification of the "mortgage" of a loan servicing company may not be approved by the actual creditor. Any order issued by the court would be void as to the actual creditor. After performing under a plan for 3 to 5 years, the Debtors would then have a rude awakening that there still remains a creditor, having a debt secured by a third deed of trust (in this case) which has never been valued and for no lien-strip may be possible.

On June 30, 2014, the court issued an order to Debtors and Ocwen Loan Servicing, LLC to file on or before July 15, 2014, any and all properly authenticated documents identifying that Ocwen Loan Servicing, LLC is the actual creditor, as defined in 11 U.S.C. § 101(10). The court continued the hearing to 2:00 p.m. on July 22, 2014, 2014, to allow the parties to file the appropriate documentation, which was later stipulated by the parties to be further continued to this hearing date. FN.2.

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

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

See Civil Minutes of the November 8, 2011 hearing in the *Crane* case in which the court addressed and rejected the contention that a mere agent or loan servicer may present itself as the actual creditor with a claim. *Id.*, Dckt. 111. In addition, Specialized Loan Servicing, LLC and U.S. Bank, N.A. have also addressed this issue. The servicers and this bank have altered their practices and are not improperly listing or identifying the loan servicing company as the creditor when it is not a creditor as defined by 11 U.S.C. § 101(10).

BRIEF IN SUPPORT OF MOTION TO APPROVE LOAN MODIFICATION

Ocwen Loan Servicing, LLC submits a brief in support of Debtors Wayne Roy Wilkinson and Denise Annette Armendariz's ("Debtors") Motion to Approve the Loan Modification Agreement. Ocwen Loan Servicing, LLC states that it is currently the servicer of a loan secured by a deed of trust against the property located at 9925 Valgrande Way, Elk Grove, CA (the "Property"). This is the deed obligation that the proposed loan modification seeks to modify.

The Brief states that the "investor" of this loan is U.S. Bank National Association, As Trustee For MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3. On November 1, 2013, Ocwen took over the servicing of this loan from IndyMac Mortgage Services, a division of OneWest Bank, FSB. Flannigan Decl., ¶ 5, Dckt. No.

192. As part of the transfer, Ocwen Loan Servicing, LLC took possession of all documents in the loan file.

On January 12, 2011, the Debtors filed their Chapter 13 bankruptcy. On May 18, 2011, OneWest Bank, FSB filed its proof of claim as to the loan. Proof of Claim 15-1. On June 25, 2014, Ocwen filed a notice of transfer of claim from OneWest to Ocwen Loan Servicing, LLC. Dckt. No. 174. Shortly thereafter, the Brief states that Ocwen Loan Servicing, LLC transferred the claim to the investor, US Bank. Dckt. No. 183. On May 22, 2014, Debtors filed their motion to approve this loan modification. Dckt. No. 169. The matter was continued in order that Ocwen could provide authority for its right to modify the loan.

Limited Power of Attorney

In support of its contention that it may modify the subject loan, Ocwen Loan Servicing, LLC provides a Limited Power of Attorney for Ocwen Loan Servicing, LLC, dated November 12, 2013. The Power of Attorney provides that

> [t]his Limited Power of Attorney is being issued in connection with Servicer's responsibilities to service certain mortgage loans (the "Loans") held by the Trustee. These loans are secured by collateral comprised of Mortgages, Deeds of Trust, Deeds to Secure Debt and other forms of Security instruments (collectively the "Security Instruments") encumbering any and all real and personal property delineated therein (the "Property") and the Notes secured thereby. Please refer to Schedule A attached hereto.

One of the loans listed in Schedule A is "U.S. Bank National Association, As Trustee For MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3," which Ocwen Loan Servicing, LLC, states applies to this loan in question.

Ocwen Loan Servicing, LLC, states that the power of attorney grants Ocwen the power of attorney to execute the loan modification agreement on behalf of US Bank. Ocwen Loan Servicing, LLC, states that this power of attorney grants Ocwen the power to, "in its name . . . execute and acknowledge in writing or by facsimile stamp all documents customarily and reasonably necessary and appropriate for the tasks described in the items (1) through (11) below." Paragraph 3 provides Ocwen the power to "[e]xecute . . . loan modification agreements."

Under the Uniform Power of Attorney Act, which has been adopted by California, "a principal may grant authority to an attorney-in-fact to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, or any other matter." Cal. Prob. Code § 4123. Further, a limited power of attorney grants not only the power to do any act specifically granted in its terms, but to do any act "incidental, necessary, or proper to carry out the granted authority. Cal. Prob. Code § 4262.

"The purpose and effect of a power of attorney of this kind are to vest in the attorney full authority to transact any and all kinds of business for the principal." *Roth v. Schaaf*, 148 Cal. App. 2d 662, 666, 307 P.2d 421, 424 (Cal. Ct. App. 1957). Accordingly, "[a] third person may rely on, contract with, and deal with an attorney-in-fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision by the attorney-in-fact." Cal. Prob. Code § 4301.

This includes allowing a loan servicer to execute documents on behalf of the owner of the loan through a duly appointed power of attorney. *See Beecroft v. Deutsche Bank Nat. Trust Co.*, 798 N.W.2d 78, 84-85 (Minn. Ct. App. 2011) "[o]ur careful review of the record, including the documentation of the election and the limited powers of attorney, establishes that there is no genuine issue of material fact as to whether Green and Thomas had authority to act on behalf of Citi Residential with respect to the powers granted in the limited power of attorney"); *In re Samuels*, 415 B.R. 8, 20 (Bankr. D. Mass. 2009); *In re Almeida*, 417 B.R. 140, 150 (Bankr. D. Mass. 2009).

Disclosure of Creditor Identity

Additionally, Ocwen Loan Servicing, LLC argues that it may not modify a HAMP agreement to disclose the name of the investor. The subject modification agreement was made pursuant to the Home Affordable Modification Program ("HAMP"). Ocwen Loan Servicing states that, while it is aware of the preference of this Court to disclose the name of the investor in the loan modification agreement, under the terms of HAMP, it "may not do so."

Ocwen Loan Servicing, LLC, states that the application of HAMP by servicers is governed by the Handbook for Servicers of Non-GSE Mortgages, Version 3.3 (the "Handbook"). *See Graybill v. Wells Fargo Bank, N.A.*, 953 F. Supp. 2d 1091, 1107 (N.D. Cal. 2013). Pursuant to the Handbook, a servicer, with limited non-applicable exceptions, must use the standard HAMP modification agreement available at http://www.HMPadmin.com, unless it receives specific permission to modify them. Exhibit B, Handbook for Servicers of Non-GSE Mortgages, Dckt. No. 193 at 9. FN.3.

FN.3. Section 10 and 10.1 of the Handbook states:

> Servicers are strongly encouraged to use the HAMP documents available on www.HMPadmin.com. A single set of model modification documents is provided for all loans regardless of investor. These documents may need to be customized for certain situations that are unique to a particular investor's loan program. Should a servicer decide to revise HAMP documents or draft its own HAMP documents, it must obtain prior written approval from the Program Administrator with the exception of the circumstances for document revisions set forth below. To obtain approval, servicers should contact their Servicer Integration Team lead. 10.1 Amending HAMP Documents.

> Servicers must amend the Modification Agreement and TPP Notice as necessary to comply with applicable federal, state and local law. Servicers may, and in some instances must, make the applicable changes to the Modification Agreement as set forth in the Document Summary available on www.HMPadmin.com. In addition, servicers may amend HAMP documents as follows without prior written approval.

Exhibit B, Handbook for Servicers of Non-GSE Mortgages, Dckt. No. 193 at 9.

Ocwen Loan Servicing, LLC, states that the HAMP agreement provides for either the servicer or the lender to execute the agreement, but does not provide for disclosure of the investor. Model Home Affordable Modification Agreement, Exhibit C, Dckt. No. 193.

Similarly, the Handbook simply requires that "[a]ll documentation must be signed by an authorized representative of the servicer and reflect the actual date of signature by the servicer's representative." Exhibit B, Handbook for Servicers of Non-GSE Mortgages, § 9.1. Due to the rules provided by HAMP, the servicer must sign the model agreement as written.

Ocwen Loan Servicing states that because of the Handbook's restrictions on the agreements that may be presented, Ocwen Loan Servicing, LLC, cannot vary from the terms of the agreement already provided to Debtor. Accordingly, there is no requirement under HAMP, nor can the agreement be modified under HAMP, to disclose the name of the investor.

FAILURE TO IDENTIFY CREDITOR PARTY TO LOAN MODIFICATION NOT PROHIBITED BY HAMP GUIDELINES

While Ocwen argues long and hard that it can hide the identify of the party entering into the Loan Modification from the court, it's arguments both miss the mark and do not have support in the authorities it has cited. There are several key factors which are not in dispute:

A. The court does not take exception to a loan servicer exercising agency powers for the creditor having the claim in the bankruptcy case which is being modified.
B. The court does not take exception to an agent executing a contract for its principal.

What has troubled the court is that Ocwen had insisted on keeping the identity of the principal secret, until that information has bene pried out of it by the court. Additionally, that Ocwen wants this court to authorize the Debtors to enter into a contract with does not name the actual party to the contract, but merely a fungible, replaceable, place holder loan servicer.

Ocwen has presented the court with the Fannie Mae and Freddie Mac Loan Modification Agreement Forms, though this is not a GSE mortgage. That form provides for the name of either the "Lender" or the "Servicer" to be placed on the contract. While the Guidelines define what is a "Servicer" (someone who works for the person to whom the secured debt is owned), no

effort has been made by Ocwen to provide the court with any definition for the term “Lender.”

It appears that Ocwen contends that U.S. Bank, N.A., As Trustee, is the “Investor,” who has acquired the claim from OneWest Bank, FSB. No definition is provided for the term “Investor.” From the Handbook For Services or Non-GSE Mortgages relied upon by Ocwen in its response (not merely the excepts provided), it appears that the terms “Investor” is intended to mean the successor to the “Lender” who made the original loan. The term “Investor” is not used in this Handbook as a reference to people who invest money in a limited partnership, corporation, or trust and have only equitable interests in such entity which then goes out and buys secured debts (such as mortgages).

The Handbook defines “Servicer” as an entity which has a direct contractual obligation to the investor. The Handbook is 184 pages in length and uses the word “lender” in only 7 sections times,

1. Reference to “servicers and lenders” not violate fair lending laws when engaging in loan modifications. §§ 1.6, 4.1.2.1.

2. Reference to possible refinance through FHA’s HOPE for Homeowners program. § 6.2.

3. Capitalization of interest under a loan modification. § 6.2.1.

4. Personal obligation on the loan having been discharged in bankruptcy. § 10.1.

5. Short sale approval. § 7.7.

6. Servicer offered lender placed insurance. § 7.3.4.

7. MERS serving as nominee for Lender or successor. § 7.3.5.

Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Version 3.3, as of September 1, 2011. https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_33.pdf

The term “Investor” is prominently used throughout the Handbook in making reference to the person who currently owns the obligation which is to be modified. These include,

The Home Affordable Foreclosure Alternative Program providing financial incentives to servicers, investors, and borrowers to conduct short sales or deeds in lieu of foreclosure. Pg. 12.

1. Incentives provided under FHA2LP to servicers and investors whether there is a partial or full extinguishment of a second lien mortgage as part of a FHA refinance. Pg. 13.

2. Servicer has a contractual obligation to investor to provide loan servicing functions. § 1.1.

3. Servicer to solicit investor to participate in the HAMP program. § 1.3.

4. Description of funds available to pay servicer, borrower, and investor compensation in connection with servicer's services. § 1.5.

5. Investor willingness to participate in home loan modification programs. § 2.2.

6. Documentation of equity share agreements between investor and borrower.

7. Whether the HAFA foreclosure alternatives were denied by the Investor. § 2.2.3.

8. Accuracy and timeliness of remittance by Servicer of Investor incentive payments. § 2.5 (FHA12LP).

9. Documentation of Investor specific requirements for all MHA programs. § 2.7.2.

10. Name of Investor if denial based on investor not participating in modification program. § 3.1.

11. Investor who owns the first lien or subordinate lien mortgage loan. § 3.3.2.

The "Investor" identified by Ocwen is the successor to the "Lender" who originally made the loan.

Contrary to Ocwen's contention that a "modification" of the HAMP loan modification document is required, rather, Ocwen merely need to type the name of successor to the original lender into the Loan Modification Agreement. Then, Ocwen merely needs to execute the Loan Modification Agreement for that "Lender."

Consideration of Evidence

After considering the evidence presented, however, the court determines that Ocwen Loan Servicing, LLC has not demonstrated that it has any interest in the note, no interest (other than acting as a loan servicer) in the claim, and is not a creditor, as that term is defined in 11 U.S.C. § 101(10).

The Limited Power of Attorney states that U.S. Bank, National Association appoints Ocwen Loan Servicing, LLC (as "Servicer") as Attorney-In-Fact to execute and acknowledge in writing all documents customarily and reasonably necessary and appropriate for the tasks described. The Power of Attorney appears to constitute and appoint Ocwen Loan Servicing the ability to "in its [U.S. Bank, N.A.'s] name, aforesaid Attorney-In-Fact, by and through any officer appointed by the Board of Directors of Servicer, to execute and acknowledge in writing or by facsimile stamp all documents customarily and reasonably necessary and appropriate for

the tasks described in the items (1) through (11) below." Dckt. No. 193 at 2, Exhibit A.

The court does not read the Power of Attorney for Ocwen Loan Servicing, LLC, to act in its own name, place and stead, but that of U.S. Bank, N.A.'s. A Power of Attorney allows one party (here, Ocwen Loan Servicing, LLC) to act in the name of another party (here, U.S. Bank, N.A.'s), not in its own name.

Furthermore, on its face, the Power of Attorney does not provide Ocwen Loan Servicing the authority to modify promissory notes, but only the mortgage or deed of trust. Note that in Paragraph 4 of the Power of Attorney, U.S. Bank, N.A., clearly distinguishes between mortgages, deeds of trust, and promissory notes. Paragraph 4 empowers Ocwen Loan Servicing, LLC to execute, complete, indorse or file "bonds, notes, mortgages, deeds of trust and other contracts, agreements and instruments regarding the Borrowers and/or the Property."

DECISION

Notwithstanding Ocwen Loan Servicing, LLC's failure to make its case that the identify of the "Lender" (successor of the original lender who now stands in the original lender's shoes) should be hidden from the court and merely a generic loan servicer listed on the contract with the consumer debtors, the court grants the motion. In doing so, the court approves a Loan Modification Agreement between asserts it is not the creditor, but rather is acting as the servicing agent through a Limited Power of Attorney with U.S. Bank, N.A., the court grants the Motion to Approve Loan Modification as between Wayne Wilkinson and Denise Armendariz, the Debtors, and U.S. Bank, N.A., As Trustee for MASTR Adjustable Rate Mortgagew3s Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3.

The Home Affordable Modification Agreement form (Exhibit B, Dckt. 193) shall identify U.S. Bank, N.A., As Trustee for MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3 as the "Lender or Servicer ("Lender")" with whom the Debtors are entered into th e Home Affordable Modification Agreement. If Ocwen Loan Servicing, LLC is executing the Agreement as the agent of U.S. Bank, N.A. Trustee, then it shall expressly disclose that in the signature block for the Agreement.

The court shall issue an order (not a minute order) substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the Debtors are authorized to enter into a Loan Modification with U.S. Bank, N.A., As Trustee for MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates,

Series 2007-3 (the current owner of the obligation as identified by Ocwen Loan Servicing, LLC, the stated loan servicer), on the terms stated in Exhibit A, Dckt. 172.

IT IS FURTHER ORDERED that the Home Affordable Modification Agreement form (Exhibit B, Dckt. 193) shall identify U.S. Bank, N.A., As Trustee for MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through Certificates, Series 2007-3 as the "Lender or Servicer ("Lender")" with whom the Debtors are entered into the Home Affordable Modification Agreement. If Ocwen Loan Servicing, LLC is executing the Agreement as the agent of U.S. Bank, N.A. Trustee, then it shall expressly disclose that in the signature block for the Agreement.

40. 14-26368-E-13 JH-1 **JAMES HAYES** **Pro Se** **MOTION TO EXTEND AUTOMATIC STAY AND/OR MOTION TO IMPOSE AUTOMATIC STAY** **7-17-14 [30]**

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

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 all creditors, Chapter 13 Trustee, and Office of the United States Trustee on July 17, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. That requirement was met.

The Motion to Extend Automatic Stay 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 court's decision is to grant the Motion to Extend the Automatic Stay.

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (Case No. 14-20584) was dismissed on March 31, 2014, within one year of the filing of this case. *See* Notice of Entry of Order of Dismissal, Bankr. E.D. Cal. No. 2014-20584, Dckt. 30, April 9, 2014. Debtor filed his current Chapter 13 bankruptcy case on June 18, 2014. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtors failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(c).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors – including those used to determine good faith under §§ 1307(c) and 1325(a) – but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?

2. What has changed so that the present plan is likely to succeed?

Elliot-Cook, 357 B.R. at 814-815.

GROUNDS STATED BY DEBTOR FOR RELIEF

Debtor's Motion and Declaration illustrates the potential pitfalls of Debtors electing to represent themselves. More often than not Debtors who are not prepared to carry out the responsibilities of Chapter 13 Debtors do not adequately fulfill the tasks of managing their case or properly communicate and cooperate with the Chapter 13 Trustee, and subsequently fail to abide by the law in conducting their case.

The Debtor states that his prior case was dismissed because was and continues to be *pro se*, and could not afford the benefit of a lawyer so therefore made mistakes filling out the schedules and plan and other documents, "all of which have been corrected now." Debtor states that "all

things were corrected/cured before the meeting," but that Debtor ended up in a traffic jam and was late to the hearing to dismiss, and "the court would not take that into account and continued with the dismissal. Debtor states that he has since consulted with an attorney and has filed the current case in good faith.

In Debtor's prior case, the Chapter 13 Trustee moved the court for an order dismissing the case pursuant to 11 U.S.C. § 1307, on the basis that Debtor did not provide the Trustee with a tax transcript or copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists under 11 U.S.C. § 521(e)(2)(A); FRBP 4002(b)(3). The Trustee noted that this is required seven days before the date first set for the meeting of creditors, 11 U.S.C. § 521(e)(2)(A)(1), which was held and concluded on March 6, 2014. Trustee's Motion to Dismiss, Bankr. E.D. Cal. No. 2014-20584, Dckt. 22, March 17, 2014.

Additionally, Debtor did not provide the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Trustee also stated that Debtor failed to file, set for hearing, and serve a motion to confirm the Chapter 13 Plan proposed under 11 U.S.C. § 3015-1(c)(3) and 3015-1(d)(1). The court was also unable to conduct a timely confirmation hearing because the 45-day deadline set by 11 U.S.C. § 1324 to set a confirmation hearing no earlier than 20 days and no later than 34 days after the date of Meeting of Creditors had expired, and that Debtor could not give adequate notice to parties in interest to oppose confirmation of the Plan.

The Trustee, in its Motion to Dismiss, also noted that the Debtor owes more than $383,175 in non-contingent, liquidated, and unsecured debts, and therefore is not eligible for Chapter 13 Relief pursuant to 11 U.S.C. § 109(e). According to Debtors' Schedules E and F in his prior case, the Debtor owes a total of $548,957.00 in non-contingent, liquidated, and unsecured debts.

In this case, Debtor lists the amount owed to creditors holding unsecured priority claims as $4,104 in total, and creditors holding unsecured nonpriority claims in Debtor's Schedule F as holding $31,804.00. Debtor's unsecured debts are less than the $383,175 cap imposed by 11 U.S.C. § 109(e).

Changed Circumstances

Debtor states that his circumstances have "substantially changed" so that the reason for the dismissal of his prior case is not likely to recur. Debtor assures the court that this case can be completed. Debtor states that he has obtained all of his papers from the places where they were stored so as to have this information readily available. Debtor has filed all schedules and other documents as required, and Debtor can pass along this information to the Trustee during the Meeting of Creditors.

Debtor states that he has since researched the bankruptcy laws and rules applicable to his case, to be better prepared in carrying out his duties in this Chapter 13 case. There is no Motion for Relief filed in his previous case that resulted in the termination, conditioning, or limiting of

the automatic stay. Debtor states that, with his irregular work schedule as an RN, it has been difficult for him to have time to get to a law library during open hours.

DISCUSSION

11 U.S.C. § 362(c)(3)(B) states that,

> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707 (b)—
>
> > (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

11 U.S.C. § 362(c)(3)(B) makes clear that upon the motion of a party in interest (in this case, the Debtor) for continuation of the automatic stay, and **only after a notice and hearing completed before the expiration of the 30-day period**, can the court consider extending the automatic stay in particular case as to any or all creditors. Independent of the good faith analysis that must be conducted to determine that the Debtor is demonstrating good faith in filing his later case, the Motion to Extend the Stay and hearing must be completed within the 30 days of filing of the recent case in order for the court to extend the stay under 11 U.S.C. § 362(c)(3)(B).

In this case, Debtor filed the current case on June 18, 2014. The Motion itself was not filed until July 17, 2014, which is 29 days after the petition was filed. Dckt. No. 30. The Motion hearing date is scheduled for August 5, 2014, which is 48 days after the present case was filed. The court therefore cannot consider extending the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B), and the Motion is denied.

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion To Extend the Automatic Stay pursuant to 11 U.S.C. § 362(c)(3)(B) is denied.

41. 14-25670-E-13 CHARLES/TAMMY RAETZ
CAH-2 C. Anthony Hughes

MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
7-7-14 [26]

Final Ruling: No appearance at the August 5, 2014 hearing is required.

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 respondent Creditor, Creditor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 7, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Value 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Value secured claim of Wells Fargo Bank, N.A., "Creditor" is granted, pursuant to the stipulation of the parties.

The Motion filed by Charles and Tammy Raetz, "Debtors", to value the secured claim of Wells Fargo Bank. N.A., "Creditor," is accompanied by the Debtors' declaration. FN.1. Debtors are the owner of a 2007 Honda Accord, "Vehicle." The Debtor seeks to value the Vehicle at a replacement value of $7,540.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. In the last paragraph of the Motion, Debtors state,

> Debtors and petitioners herein respectfully requests an order that the allowed secured claim of the collateral held by the Golden 1 Credit Union be valued at $7,540.00.

Dckt. No. 26. Presumably the identification of "Golden 1 Credit Union" as the respondent creditor was a typographical error. The rest of Debtors' Motion, and the creditor's responsive pleadings refer to the holder of the subject claim as Wells Fargo Bank, N.A.

OPPOSITION BY CREDITOR

Wells Fargo Bank N.A. dba Wells Fargo Dealer Services and Wells Fargo Auto Finance ("Creditor"), states that it is the holder of the subject claim. Creditor states that it has a perfected security interest in Debtor's 2007 Honda Accord, pursuant to a Motor Vehicle Contract and Security Agreement executed by the Debtors and Creditor on April 25, 2011.

Creditor states that the net payoff under the Debtors' Contract, as of the petition date, was $11,193.24, while the Debtors' Motion proposes to value the Vehicle at $7,540.00, payable at 5.20% with a monthly payment of $142.98.

Creditor opposes the Motion to Value on the basis that Creditor believes that the Motion fails to provide the Creditor with the "full value" of its claim under 11 U.S.C. § 1325(a)(5)(B)(ii).

Under 11 U.S.C. § 506(a)(2) the replacement value for the vehicle is statutorily defined as follows,

> (2) If the debtor is an individual in a case under chapter 7 or 13 [11 USCS §§ 701 et seq. or 1301 et seq.], such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

Creditor states that the NADA Used Car Guide "clean retail value" is $10,650.00 for a vehicle of like make, model, and condition, comparable to the specifications of the subject vehicle. Creditor attaches a copy of what it purports to be a "NADA Used Car Guide printout" as Exhibit "C" in support of the Motion. Exhibit C, Dckt. No. 39. In this case, Creditor asserts that the NADA Used Car Guide serves as the best indicator of the Vehicle's replacement market value. The Debtor is an individual who proposes to retain the Vehicle for personal use. Creditor contends that the NADA Used Car Guide retail value, which is $10,650.00 for this Vehicle, supplies the best evidence of value and price of the vehicle, as would be assigned in a market place for vehicles for personal purchase. Creditor argues that the valuation of the subject vehicle should be higher than the Debtors' opinion of value, and that the value of this claim should be determined to be in an amount of at least $10,650.00.

Wells Fargo Bank, N.A. provides the court with evidence that the retail sale value, if the Debtor sought to replace the vehicle, is $10,650.00 as set forth in the NADA Used Car Guide (which the court accepts as a guide used in the automobile industry for the determination of value of vehicle, in the same manner as the Kelley Blue Book). However, this does not take into account any of the repairs or work which must be made to the

vehicle to get it to a “retail replacement value.” On its face, the NADA valuation is for “Clean Retail” value.

The Declaration of Debtors Charles Norton Raetz and Tammy Lynn Raetz in support of the Motion, Dckt. No. 28, merely attests to the Debtors' ownership of the 2007 Honda Accord, which has $127,379.00 miles on it and is encumbered by a "line" held by Wells Fargo Bank, N.A., doing business as Wells Fargo Financial Services. Debtors simply state that, based on their opinion, the property's fair market value at the time of the filing of the bankruptcy was $7,540.00. ¶ 3, Declaration of Charles Norton Raetz and Tammy Lynn Raetz, Dckt. No. 28.

STIPULATION

Debtors Charles Norton Raetz and Tammy Lenn Raetz have stipulated with Creditor Wells Fargo Bank N.A. dba Wells Fargo Dealer Services; successor by merger to Wells Fargo Dealer Services, Inc., fka Wachovia Dealer Services, Inc., as follows:

1. Creditor has a perfected security interest in Debtors' 2007 Honda Accord, Vehicle Identification Number ending in the last four digits, #0721, pursuant to a Motor Vehicle Contract and Security Agreement dated April 25, 2014, entered into between Debtors and the Creditor's predecessor in interest.

2. Debtors shall provide for a collateral value of the vehicle in the amount of $8,650.00 to be paid to the Creditor at 5.20%. This shall be reflected in an Amended Plan, or alternatively, in the order confirming Debtor's Chapter 13 Plan.

3. Subject to the terms and conditions of this Stipulation, the Creditor hereby withdraws its Opposition the Debtors' Motion to Value, filed on July 21, 2014, and the Objection to Confirmation of the Debtors' Chapter 13 Plan filed on June 23, 2014.

Stipulation, Dckt. No. 54. Pursuant to the Creditor and Debtors’ Stipulation, filed on July 30, 2014, Dckt. No. 54, the replacement value of the subject 2007 Honda Accord is $8,650.00.

The lien on the Vehicle’s title secures a purchase-money loan incurred in April 25, 2011, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $11,193.24. Therefore, the Creditor’s claim secured by a lien on the asset’s title is under-collateralized. Pursuant to the terms of the Debtors’ and Creditor’s stipulation agreement, the secured claim is determined to be in the amount of $8,650.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted by stipulation.

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 Charles and Tammy Raetz, "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 Bank N.A. dba Wells Fargo Dealer Services and Wells Fargo Auto Finance, "Creditor," secured by an asset described as 2007 Honda Accord, "Vehicle," is determined to be a secured claim in the amount of $8,650.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $10,650.00 and is encumbered by liens securing claims which exceed the value of the asset.

42. 14-25670-E-13 DPC-1 CHARLES/TAMMY RAETZ C. Anthony Hughes

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-10-14 [31]

No 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 and Debtors' Attorney on July 10, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to continue the Objection to XXXX at XXXXX.

The Trustee opposes confirmation of the Plan on the following grounds:

1. It appears that the Debtor cannot afford to make the payments or comply with the plan, 11 U.S.C. § 1325(a)(6). Debtors' plan relies on the Motion to Value the Secured Claim of Sierra Central Credit Union, which is set for hearing on July 22, 2014. The matter has been set for an evidentiary hearing on October 16, 2014, at 9:30 am. Debtors' plan does not have sufficient monies to pay the claims in full.

2. The Debtor has a pending Motion to Value the Secured Claim of Wells Fargo Bank that is set to be heard on this date. 11 U.S.C. § 1325(a)(6). Debtor proposes to value the secured claim of WFS Financial in Class 2, but has not filed a motion to value for that claim. The Motion to Value the Secured Claim of Wells Fargo Bank, N.A., CAH-2, has been granted pursuant to the terms of the Debtors' and that Creditor's stipulation, thus resolving this part of the Trustee's Objection.

3. Trustee argues that the plan is not Debtor's best effort, under 11 U.S.C. § 1325(b). According to the Trustee, Debtor is under the median income with proposed plan payments of $342.00 for 60 months and a 0% dividend to the unsecured creditors. Debtors admitted at the First Meeting of the Creditors held on July 3, 2014, that their 26 year old son listed on Schedule J is employed at Best By full time. The Debtors failed to list son's income on their Schedule I or Form B22C despite listing him on their Schedule J and claiming a household of 3 on Form B22C, Line 24, which states: Son live with debtors. Earns his own money and pays his own expenses.

RESPONSE TO TRUSTEE'S OBJECTION

Debtors request the confirmation hearing to be continued with either the briefing schedules or the evidentiary hearings that will be set in order to determine the value of their property.

Additionally, the Debtor has filed a declaration and response addressing their 26 year old son. The Debtors testify that their 26 year old son lives with them and works at Best Buy. Debtors state that over the past 6 months, they received a total of $100 from their son, but that "this is not regular or expected income and cannot be relied upon." Currently Debtors' son uses his money to pay for his own expenses, therefore Debtors did not list their son's expenses on their Schedule J.

The evidentiary hearing for the Motion to Value the Secured Claim of Sierra Central Credit Union has been set for October 16, 2014, at 9:30 am.

The court will continue the Trustee's Objection so that the Motion to Value the Secured Claim of Sierra Central Credit Union may be resolved before the court determines whether the Debtors' plan is or is not confirmable and complies with 11 U.S.C. §§ 1322 and 1325(a).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is continued to XXXX at XXXXX.

43. 14-25670-E-13 SW-1 — CHARLES/TAMMY RAETZ — C. Anthony Hughes — OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 6-23-14 [19]

Final Ruling: No appearance at the August 5, 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, Debtor's Attorney, and the Chapter 13 Trustee on June 23, 2014. By the court's calculation, 43 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

Wells Fargo Bank, N.A. ("Creditor"), opposes confirmation of the Plan on the basis that it fails to provide the present value of secured Creditor's Claim. The Creditor asserts a claim of $11,193.24 in this case. The Debtor's Schedule D, estimates the amount of the creditor's claim as $11,034.00 and indicates it .is secured by a purchase money lien on the Debtor's 2007 Honda Accord ("Vehicle").

The creditor alleges that the plan is not feasible, *See* 11 U.S.C. § 1325(a)(6), and violates 11 U.S.C. § 1322(b)(2) because it contains an insufficient payment of the creditor's obligation, which is secured by the Debtor's vehicle.

Creditor states that the NADA Used Car Guide "clean retail value" is $10,650.00 for a vehicle of a similar make, model, and condition to the subject vehicle. Creditor attaches a copy of what it purports to be a "NADA Used Car Guide printout" as Exhibit "A" in support of the Motion. Exhibit A, Dckt. No. 21.

Creditor asserts that the NADA Used Car Guide serves as the best indicator of the Vehicle's replacement market value. The Debtor is an individual who proposes to retain the Vehicle for personal use. Creditor contends that the NADA Used Car Guide retail value, which is $10,650.00 for this Vehicle, supplies the best evidence of value and price of the vehicle, as would be assigned in a market place for vehicles for personal purchase. Creditor argues that the valuation of the subject vehicle should be higher than the Debtors' opinion of value, and that the value of this claim should be determined to be in an amount of at least $10,650.00.

STIPULATION

In the Motion to Value the Secured Claim of the Objecting Creditor, Wells Fargo Bank, N.A., Debtors and Creditor have reached an agreement, stipulating to the resolution of the Motion to Value, as well as the present Objection. Dckt. No. 45.

The Agreement states that Debtors, Charles Norton Raetz and Tammy Lenn Raetz, have stipulated with Objecting Creditor Wells Fargo Bank N.A. dba Wells Fargo Dealer Services; successor by merger to Wells Fargo Dealer Services, Inc., fka Wachovia Dealer Services, Inc., as follows:

1. Creditor has a perfected security interest in Debtors' 2007 Honda Accord, Vehicle Identification Number ending in the last four digits, #0721, pursuant to a Motor Vehicle Contract and Security Agreement dated April 25, 2014, entered into between Debtors and the Creditor's predecessor in interest.

2. Debtors shall provide for a collateral value of the vehicle in the amount of $8,650.00 to be paid to the Creditor at 5.20%. This shall be reflected in an Amended Plan, or alternatively, in the order confirming Debtor's Chapter 13 Plan.

3. Subject to the terms and conditions of this Stipulation, the Creditor hereby withdraws its Opposition the Debtors' Motion to Value, filed on July 21, 2014, and the Objection to Confirmation of the Debtors' Chapter 13 Plan filed on June 23, 2014.

Stipulation, Dckt. No. 54. Pursuant to the Creditor and Debtors' Stipulation, filed on July 30, 2014, Dckt. No. 54, the replacement value of the subject 2007 Honda Accord is $8,650.00.

As a result of this stipulation signed by both parties, the court granted the Motion to Value, CAH-2, and determined that the Creditor's claim secured by a lien on the asset's title is under-collateralized. Pursuant to the terms of the Debtors' and Creditor's stipulation agreement, the secured claim was determined to be in the amount of $8,650.00. S11 U.S.C. § 506(a).

The Debtors and Creditor having agreed to the secured claim amount of $8,650.00; the valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) having been granted stipulation; the present Objection being withdrawn pursuant to the parties stipulation, Dckt. No. 45, the Objection is overruled.

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

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

44. 09-46476-E-13 SDB-3 — TERRY/CHERYL CARROLL — W. Scott de Bie — MOTION TO VALUE COLLATERAL OF J.P. MORGAN CHASE BANK, N.A. — 6-20-14 [57]

Final Ruling: No appearance at the August 8, 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, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 20, 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). 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 J.P. Morgan Chase Bank, N.A., "Creditor," is granted.

The Motion to Value filed by Terry and Cheryl Carroll, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtors are the owners of the subject real property commonly known as 119 Dover Way, Vacaville, California, "Property." Debtors seek to value the Property at a fair market value of $175,000.00 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 $192,865.47. Creditor's second deed of trust secures a claim with a balance of approximately $50,046.46. Therefore, Creditor's second 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 in the secured amount of the second claim 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 Terry and Cheryl Carroll, "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 J.P. Morgan Chase Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 119 Dover Way, Vacaville, California, is determined to be a secured claim in the amount of $0.00, and the balance of the second claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $175,000.00 and is encumbered by senior liens securing claims in the amount of $192,865.47, which exceed the value of the Property which is subject to Creditor's lien.

45. 11-44679-E-13 JAMES GEORGIS — **MOTION TO MODIFY PLAN**
PGM-1 Peter G. Macaluso — **6-30-14 [35]**

Final Ruling: No appearance at the August 5, 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, all creditors, parties requesting special notice, and Office of the United States Trustee on June 30, 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 Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on June 30, 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.

46. 14-20181-E-13 DANTE THOMAS
MHL-3 Michael H. Luu

MOTION TO RECONSIDER DISMISSAL OF CASE
7-7-14 [53]

CASE DISMISSED 5/28/14

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 July 7, 2014. By the court's calculation, 29 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 Debtor in this case, Dante E. Thomas ("Debtor"), moves 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 May

28, 2014. The Motion states with particularity (Fed. R. Bank. P. 9013) the following grounds and relief requested:

A. Debtor, Dante Thomas, by and through his attorney of record requests that he Order on Trustee's Motion to Dismiss be reconsidered, and that the Order Dismissing the Case entered on May 28, 2014 be vacated.

B. This motion is brought pursuant to 11 U.S.C. § 350 and Federal Rules of Civil Procedure 59 and 60.

C. Debtor provides a brief history of his case. Debtor filed his petition under a Chapter 13 on January 9, 2014. On January 9, 2014, the Debtor filed the original Chapter 13 Plan with the court. On February 13, 2014 at 9:30 am, the Debtor's Meting of Creditors was conducted and concluded.

D. On February 20, 2014 the Trustee filed an Objection to Plan addressing the following issues: (1) Debtor's failure to file a Motion to Avoid Lien for Second Deed of Trust Holder, Bank of America, N.A.; (2) the failure to provide for a secured claim by the IRS; (3) failure to provide monthly dividend for attorney's fee, and (4) failure to report the Debtor's wife self employment income. On March 25, 2014, the Chapter 13 Trustee's Objection to confirmation was heard and sustained.

E. Debtor filed a Motion Avoid Lien for the Second Deed Holder for the Debtor's primary residence on April 2, 2014 and set it for hearing on April 29, 2014. The Court granted the Motion on May 1, 2014.

F. On April 2, 2014, the Chapter 13 Trustee brought a Motion to Dismiss the Debtor's Case for Unreasonable Delay that is Prejudicial to Creditors, which was set for hearing on May 28, 2014.

G. Debtor filed with the Court on May 2, 2014 a First Amended Schedule I, listing the spouse' income, and First Amended Chapter 13 Plan as Dckt. Nos. 39 and 42, respectively. Debtor states that he provided the Chapter 13 Trustee with evidence of Debtor's wife self employment income.

H. Debtor filed on May 2, 2014 a Motion to Confirm the First Amended Plan set for hearing on July 1, 2014. Debtor filed on May 2, 2014 an Opposition to the Chapter 13 Trustee's Motion to Dismiss Case.

I. Debtor claimed that all objections were addressed, and that the Chapter 13 case should have been confirmed.

J. On May 28, 2014, the Motion to Dismiss Case for Unreasonable Delay That is Prejudicial to Creditors was granted, and an Order dismissing the case was entered on May 28, 2014.

K. Debtor claims that said case dismissal was the result of mistake, inadvertence, and excusable neglect; the Debtor's counsel was not timely in filing the Opposition to the Trustee's Motion to Dismiss Case.

L. Debtor argues that no party will be prejudiced where prejudice to creditors can be minimized and/or eliminated in reconsideration motions.

M. The court granted the Motion Avoid Lien for the Second Deed Holder for Debtor's primary residence on May 1, 2014 as Dckt. No. 38. Debtor states that all Chapter 13 issues have ben resolved and all payments to creditors have been addressed by Amended Schedule I and Amended Chapter 13 Plan filed on May 2, 2014 as well as a faxed copy of the Debtor's spouse 2013 profit and loss to the Trustee on May 2, 2014. The Debtor was current on his Chapter 13 plan payments.

N. But for Debtor's Counsel's excusable neglect in prosecuting the case and uploading an untimely Opposition to the Chapter 13. Trustee's Motion to Dismiss Case for Unreasonable Delay That is Prejudicial to Creditors (Debtor's Counsel missed the deadline by 8 days), the case would not be dismissed.

O. Debtor states that he is current on his Chapter 13 Plan payments. If reinstated, Debtor have a reasonable chance of being confirmed and Debtor has resolved all the Trustee's issues and objections to confirmation.

Motion, Dckt. 53.

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.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default" *Falk*, 739 F.2d at 463.

From the above, Debtor fails to state grounds with particularity by which this court may properly reconsider the prior dismissal order. Debtor argues that the dismissal of his case was the result of "mistake, inadvertence, and excusable neglect," but does not include any information on why Debtor filed a late opposition to Trustee's Motion to Dismiss. Debtor states that but for Counsel's error, Debtor would have been allowed to continue prosecuting his case. The Motion does not, however, detail why Debtor's counsel failed to file a response to the Chapter 13 Trustee's Motion to Dismiss case in a timely manner, thereby preventing the court from determining whether Debtor's counsel committed the type of mistake, inadvertence, surprise, or excusable neglect that can serve for a basis for relief and reconsideration of the dismissal order Federal Rule of Civil Procedure 60(b).

Debtor's counsel admits that he missed the deadline to file opposition to the Motion to dismiss by 8 days, and that Debtor should not be penalized for his attorney's "excusable neglect," but fails to inform the court of what made Debtor's counsel's dereliction in his duty to his client "excusable" in the context of this case.

Determination of whether neglect is "excusable," warranting allowing of late filing of claim, is at bottom an equitable one, taking account of all relevant circumstances surrounding party's omission; these include danger of prejudice to debtor, length of delay and its potential impact on judicial proceedings, reason for delay, including whether it was within reasonable control of movant, and whether movant acted in good faith; clients are held accountable for acts and omissions of their attorneys. Federal Rule of Civil Procedure 9006(b)(1), *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed.

2d 74 (1993). Debtor and Debtor's give no facts about the actual "excusable neglect" that resulted in Debtor's counsel late-filings of the Opposition to Trustee's Motion to Dismiss and the improperly noticed Motion to Confirm Debtor's First Amended Plan.

RESPONSE BY TRUSTEE

The Trustee filed a Motion to Dismiss on April 22, 2014, which was set for hearing on May 28, 2014, Dckt. No. 31. The Debtor's last proposed plan was denied confirmation on March 25, 2014, and the Debtor had failed to file a new plan and set it for confirmation.

The Notice of the Hearing concurrently filed with Trustee's Motion to Dismiss, Dckt. No. 32, clearly sets forth that respondents had until May 14, 2014, to file a written opposition to the Motion, Page 1, Lines 21-22. Debtor filed a late opposition to the Trustee's Motion to Dismiss on May 22, 2014, Dckt. No. 45.

The Opposition filed by Debtors stated in part that the debtor filed a First Amended Plan on May 21, 2014, and set the confirmation hearing on July 1, 2014. Dckt. No. 45, Page 2, Lines 22-24. The Debtor's Amended Plan and the Motion to Confirm were actually filed on May 22, 2014. Dckt. No. 40-44. The Debtor failed to provide sufficient notice to creditors, as the Motion did not provide at least 42 days of notice. The court on July 1, 2014, denied the Debtor's Motion to Confirm as moot.

Additionally, while the Debtor now discloses the income of the non-filing spouse as self-employed losing $55 per month, Dckt. No. 39, the Debtor should file a declaration explaining this disclosure. The Trustee agrees that the Debtor, if reinstated, could probably confirm a plan at the current proposed amount.

DISCUSSION

It is troubling to the court that Debtor's attorney, mischaracterizes to the court when Debtor's Opposition to Trustee's Motion to Dismiss, and the Motion to Confirm the First Amended Plan and Amended Schedules were filed with the court. Debtor's counsel's errors appear to be the latest in a pattern of inattention and failure in the prosecution of this case.

On May 22, 2014, Debtor's attorney filed a late Opposition to the Trustee's Motion to Dismiss (eight days after the response deadline stated in Trustee's Notice of Hearing"), and failed to properly set Debtor's Motion to Confirm the First Amended Plan on the 42 days' notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Dckt. No. 45. No leave to file an untimely pleading was sought. While the court posted a "final ruling" on May 27, 2014 (the evening before the hearing), no appearance was made in open court or relief sought for the untimely filing (which it is clear from the Civil Minutes that the court did not "find" for the Debtors). Civil Minutes, Dckt. 48.

Although the Motion has not adequately alleged grounds, specifically information detailing Debtor's counsel's "excusable neglect" under Federal Rule of Civil Procedure 60(b) that warrants the set aside of the order

dismissing Debtor's case, the pleadings justifiably assert that Debtor should not be punished (counsel's choice of words) for the negligence of Debtor's attorney.

In reviewing the evidence in support of confirmation, the court notes that the "declaration" is merely a short, five paragraph statement of the Debtor's personal findings of fact and conclusions of law. There is no personal knowledge testimony provided by Debtor (except with respect to having paid fees. Fed. R. Evid. 601, 602, 901.

The Trustee has stated that Debtor can "probably" confirm at the proposed amount, if the case is reinstated. Reinstating the bankruptcy case would cause minimal prejudice to creditors, which will receive disbursements on their claims under the plan. Most of the grounds for the Trustee's Objection to the Debtor's Plan have been resolved. The court granted the Debtor's Motion to Avoid the Lien on Debtor's residence, and Debtor's First Amended Plan addresses the issues raised in the Trustee's Objection to Confirmation (namely, that the Plan did not provide for the secured claim of the Internal Revenue Service, did not provide a monthly dividend for counsel's attorney's fees, and the failure to file a Motion to Avoid a Lien for the holder of the second deed of trust against Debtor's property, Bank of America).

While the Motion filed by Debtor fails to state any "excusable neglect" grounds, the court has reviewed the declaration of Counsel. In it Counsel makes reference to some health issues which may have disrupted his law practice. While Counsel has used bold font for that paragraph of his declaration, the content is general in nature and not made more credible by the bold font.

This is the Debtor's second bankruptcy case. In his prior case, 12-24742, ("Prior Bankruptcy Case") he was also represented by the same attorney who is pleading "excusable neglect" in this case. The Prior Bankruptcy Case was dismissed by an order filed on September 30, 2013. 12-24742 Dckt. 171. The Prior Bankruptcy Case was dismissed due to the Debtor's failure to prosecute that case. Though the Prior Bankruptcy Case had been pending for 17 months, no Chapter 13 Plan was confirmed. No opposition was filed by the Debtor to the Trustee's motion in the Prior Bankruptcy Case.

The Debtor filed a motion to vacate the dismissal in the Prior Bankruptcy Case (which motion is very nearly identical to the current motion). 12-24742 Dckt. 176. It is asserted that it was Counsel's scheduling conflict that prevented him from attending the hearing which resulted in the Prior Bankruptcy Case being dismissed. Counsel asserts that he believed that the court would adopt the tentative decision (which was based on the Debtor accepting proposed amendments to the Chapter 13 Plan to resolve the Trustee's objection) and thereon did not attend the hearing. The Debtor not appearing to propose the necessary amendments to the Chapter 13 Plan, confirmation was denied. For the want to prosecution, the Prior Bankruptcy case was dismissed.

In opposing the motion to vacate the dismissal of the Prior Bankruptcy Case, the Trustee noted that the Prior Bankruptcy Case had been dismissed for Debtor's failure to comply with a conditional dismissal order.

That dismissal was vacated – in effect the Debtor having the Prior Bankruptcy Case dismissed two times. During the 17 months the Prior Bankruptcy Case was pending, the Debtor proposed five plans, none of which were confirmed.

This Debtor has been in bankruptcy during the period of March 11, 2012 through September 30, 2013 (second dismissal of Prior Bankruptcy Case) and January 9, 2014 through May 28, 2014 (dismissal of the present bankruptcy case). During the period November 7, 2013 through December 16, 2013, the Debtor was prosecuting the motion to vacate the second dismissal of the Prior Bankruptcy Case. In effect, this Debtor had the two bankruptcy cases pending for twenty-six months — without confirming one Chapter 13 Plan. During that time the two bankruptcy cases have been dismissed three times.

On its face, the Debtor's proposed Chapter 13 Plan is quite simple. Dckt. 42. He merely makes a $370.00 projected disposable income payment monthly for sixty months. From that he pays his counsel $2,500.00, the Chapter 13 Trustee administrative expenses (assume at 6%), $13,500.00 secured tax (IRS) claim (with 4% interest), $1,052.91 priority unsecured claims, and a 6% dividend to creditors holding $270,205.18 in general unsecured claims (projected to be an aggregate $16,212.30 minimum dividend). All totaled, this would require $33,265.21 in Plan funding, which over 60 months is $554.42 a month. On its face, the Plan is underfunded.

The Chapter 13 Plan makes no provision for any Class 2 treatment of creditor claims, other than paying the IRS secured claim. No additional provisions are attached to the Plan. Section 6, Additional Provisions, of the required Chapter 13 Plan form expressly states that all additional provisions shall be set forth on separate attachment pages to the Plan. Further, that any alternation to the Chapter 13 Plan form (other than as set forth on the attached additional provisions) shall be of no force and effect.

Buried above the signature line on the Chapter 13 Plan form, and not non attached pages, is added text relating to a Bank of America, N.A. secured claim. This provision is of no force and effect.

Though not explained in the declaration in support of the motion to confirm, the Debtor states that their (Debtor and non-filing Spouse) has gross income of $498,169 annually – which averages $41,514.00 per month. However, that business incurs ($41,569.00) a month in expenses, causing the Debtor and his spouse to lose ($55.00) a month. Amended Schedule I, Dckt. 39. As part of the Chapter 13 Plan the Debtor proposes to continue to subsidize this money losing business with his income as a sewer maintenance worker.

On Original Schedule I the Debtor failed to disclose the income and expenses from the Non-Debtor Spouse's business. Dckt. 1. The Value of the business was listed at $5,000.00 on Schedule B. *Id.* On the Statement of Financial Affairs the Debtor states under penalty of perjury that the gross income from the Non-Debtor Spouse's business was $0.00 in 2012, 2013, and 2014.

Even if the court were to find that the Debtor's and Counsel's lack of prosecution of this case was "excusable negligence," there is not a likelihood of Debtor advancing a "meritorious claim." On its face, the Plan is under funded. The Statement of Financial Affairs incorrectly states the gross income from the Non-Debtor Spouse's business. If truthful, Amended Schedule I states that the Non-Debtor Spouse generates almost $500,000.00 a year in gross income, but that all of the gross income and a little more ($55.00 a month) has to go to "necessary business expenses." The Debtor proposes to subsidize this money losing business with his income.

There is no effective reorganization being prosecuted or confirmable Chapter 13 Plan being presented. Further, the Debtor has not provided the court with any information to support a contention that the Non-Debtor Spouses $500,000.00 a year gross revenue business loses money and should be subsidized by the Debtor.

The Debtor having failed to provide the court with proper grounds for either excusable neglect or any other grounds upon which vacating the order dismissing this case would be proper, the Motion is denied.

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

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

47. 11-30983-E-13 JAY/MARIBEL ASH
PGM-5 Peter G. Macaluso

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTORS' ATTORNEY
7-2-14 [76]

Final Ruling: No appearance at the August 5, 2014 hearing is required.

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 2, 2014. By the court's calculation, 34 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.

The Law Offices of Peter G. Macaluso, Counsel for Debtor, seeks additional attorney fees in the amount of $1,210.00. Counsel argues that these additional fees are actual, reasonable, necessary and unanticipated as post-confirmation work required.

The Chapter 13 Trustee issued his statement of non-opposition to the Motion. July 9, 2014 Docket Entry.

Description of Services for Which Fees Are Requested

1. Prepared and filed unanticipated Motion to Modify. To address the Motion to Modify, counsel responded to opposition and sent Order to Modify for Trustee to sign. Counsel suggests this was unanticipated as an application to dismiss case was received from the Trustee and;

2. Prepared and filed unanticipated Motion to Approve Loan Modification. To address the Motion to Approve Loan Modification, counsel reviewed and responded to Creditor’s acceptance letter, met with clients and prepared and filed exhibits. Counsel suggests this was unanticipated as Debtors received a loan modification offer from their lender which required Court approval.

The hourly rates for the fees billed in this case are $200.00/hour for counsel for 6.05 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 $1,210.00 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 $ 1,210.00. The Chapter 13 Trustee is authorized to pay these additional fees as provided in the Chapter 13 Plan.

48. 14-24983-E-13 DAVID CARROLL
DPC-1 Tyson Takeuchi

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-3-14 [18]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 3, 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). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

1. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341 on June 26, 2014, which has been continued to July 24, 2014 at 10:30 am. Trustee does not have sufficient information to determine whether or not the cause is suitable for confirmation with respect to 11 U.S.C. § 1325.

The Trustee Reports that the Debtor did not appear at the July 24, 2014 continued First Meeting of Creditors. July 25, 2014 Docket Entry.

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

3. The Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv).

4. All sums required by the plan have not been paid under 11 U.S.C. § 1325(a)(2). Debtor is $426.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $426.00 is due on July 25, 2014. The case was filed on May 12, 2014, and the Plan in § 1.01 calls for payments to be received by the Trustee no later than the 25th day of each month, beginning the month after the order for relief under Chapter 13. Debtor has paid $0.00 into the plan to date.

5. Debtor's Plan indicates in Section 2.06 that Counsel will comply with Local Bankruptcy Rule 2016-1(c) regarding payment of attorney fees. Debtor did not file the Rights and Responsibilities of Chapter Debtors and their Attorneys. The Plan indicates that a total of $4,000.00 has been charged in this case, and that $1,000.00 was paid prior to filing. The Disclosure of Compensation of Attorney for Debtor indicates that $1,000 has been paid and $0.00 is due.

6. Debtor's plan calls for payments of $426.00 for sixty months. Class 1 of Debtor's Plan proposes to pay the ongoing mortgage payment of $2,000 per month, and mortgage arrears of $20,000 at $333.33 per month. The plan will not pay the creditors as proposed. The Class I dividends plus Trustee compensation totals $2,430.00 per month.

7. Section 2.15 of the plan does not indicate the percentage to be paid to unsecured creditors and total unsecured debts. Section 6 does not indicate if any additional provisions are appended to the plan.

8. Debtor's Plan does not provide for the secured debt of American Honda Finance Corporation, which is not disclosed in the plan or schedules. Creditor filed a secured claim for $2,882.15, secured by a 2014 Honda CRF250R. The claim discloses that the debt is for a motorcycle, a 2014 Honda, Crf250r, and the contract was entered into on March 7, 2014. While the treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment could indicate that Debtor either cannot afford the payments called for under the Plan because he has additional debts, or that Debtor wants to conceal the proposed treatment of a creditor.

9. The Plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtor's non-exempt equity totals $300.00, and the

plan is silent as to the percentage to be paid to the unsecured claim holders. According to Debtor's Schedules B and C, non-exempt equity exists in a checking account of $200.00, and a 2007 Honda Civic of $100.00.

10. Debtor's Schedule I indicates that Debtor is employed, but the document does not list Debtor's occupation, employer name and address, as well as the length of employment. The Statement of Financial Affairs, Dckt. No. 11, page 20, lists at Item #1 "estimated" income for year to date, 2013 and 2012. The form calls for the gross annual amounts, not estimated amounts.

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

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

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

49. 14-25585-E-13 SCOTT OLNEY
MRG-1 Lucas B. Garcia

OBJECTION TO CONFIRMATION OF PLAN BY SYSTEMS AND SERVICES TECHNOLOGIES, INC.
6-18-14 [13]

The Appearance of Michael R. Gonzales, for the Law Office of Buckley Madole, P.C., Attorneys For Systems and Services Technologies, Inc. Is Required for the August 5, 2014 Hearing.

Michael R. Gonzales and the Law Office of Buckley Madole, P.C. Shall Address for the Court, Debtor, Chapter 13 Trustee, and U.S. Trustee the True Identity of the Creditor Having the Secured Claim Asserted in this Case.

The Parties Are Instructed to Review Items 5 and 7 (14-23416 Mario and Christine Borrego) and Item 35 (Marcelo and Hazel Lopez) on the August 5, 2014 3:00 Calendar

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 18, 2014. By the

court's calculation, 43 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

Systems & Services Technologies, Inc. ("SSTI"), objects to the confirmation of the Debtor's Chapter 13 Plan. On June 11, 2014, SSTI filed Proof of Claim No. 1 in the amount of $9,722.41, including arrearage in the amount of $9,722.41.

Creditor states that its claim is secured by the personal property commonly described as: 2005 BIG MO BULLDOG, vehicle identification number ending in the last four digits of #0033 (the "Property"). Pursuant to 11 U.S.C. § 1325(a)(5)(B), Creditor states that the value of the property to be distributed is less than the allowed amount of Creditor's claim.

Debtor has provided for Creditor's claim under Class 2 in the plan, but the claim has not been reduced based on value of collateral. Creditor states that the Debtor lists the amount claimed by SSTI as $7,533.92, but that the actual amount of the claim is $9,722.41.

Creditor argues that the plan fails to provide sufficient payments to Secured Creditor for adequate protection. 11 U.S.C. §1325(a)(5)(B). Debtor has provided an interest rate of only 4.00% on Secured Creditor's claim in the Plan. However, the original interest rate on Secured Creditor's claim is 10.99%. In *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the Supreme Court adopted a two part "prime-plus" formula to determine the property interest rate to be paid on the secured claim, in compliance with the "cram down" provisions of the Bankruptcy Code. The current prime rate is 3.25%. As such, Creditor argues that the Debtor should look to the 3.25% and adjust that rate accordingly in order for Secured Creditor to receive a rate incorporating the Debtor's risk of default.

To the extent that Debtor's Plan seeks to pay Secured Creditor a fixed, market rate of interest, the court should also factor the Debtor's risk of default and the nature of the security when assessing a cramdown interest rate. The Property at issue is a depreciating asset, and the risk of default is high due to the Debtor's economic circumstance and the instant bankruptcy. Creditor asserts that the court should find that Creditor must be paid no less than 6.25% (3.25% + 3% for risk adjustments) interest per annum on its secured claim on a fully amortizing loan.

RESPONSE BY DEBTOR

The Debtor responds by stating that Creditor's contention that it has a claim is the amount of $9,722.41 is incorrect, and the true amount of the

claim is $7,533.92. Response, Dckt. 29. Debtor so responds based on a transaction history with a faxed transmission date of May 20, 2014.

The Account Transaction History document consists of six pages, the first page containing the most current information states the following:

A. Contract Date.....April 20, 2005

B. Original Balance.....$29,712.89

C. Interest Rate.....10.99%

D. Original Term.....96 [presumably months]

E. Monthly Payment.....$ 466.58

F. Current Balance.....$7,533.92 [after 3/6/14]

G. Next Due Date.....08/25/2012

H. Transactions After 08/25/2012

1. 11/07/2012 Mult Pmts w/Charge

   a. Principal.....($1,181.97)
   b. Interest.....($ 217.77)
   c. Other .....($ 10.00)

2. 04/12/2013 Investigation Expe.....$ 75.00

3. 03/06/2014 Investigation Expe.....$550.00

Exhibit [unnumbered], Dckt. 30.

However, this Exhibit is not authenticated, but merely filed in connection with Debtor's Counsel's arguments in response to the opposition. Fed. R. Evid. 901, 801, 802, 601, 602, 603. Given that preparing a declaration properly authenticating such an exhibit is so simple, the absence of such declaration causes the court to give the argument and Exhibit little weight.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b).

It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the *prima facie* validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

> "Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they *prima facie* establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more."

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)). The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. *Holm* at 623; *In re Allegheny International, Inc.*, 954 F.2d 167, 173-74 (3rd Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. *In re Knize*, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

In considering the *prima facie* evidentiary value of Proof of Claim No. 1, the court notes that no account summary or transaction statement is included. Rather, the only "evidence" of the $9,722.41 amount is that those numbers are filled in on a line on the proof of claim form.

Proof of Claim No. 1 identifies Systems & Services, Technologies, Inc. as the creditor for the claim. See 11 U.S.C. § 101(10) and (5) for statutory definition of creditor. However, Systems & Services, Technologies, Inc. is not a party to the contract attached to Proof of Claim No. 1, is not identified as an assignee of the contract, is not listed as the secured creditor on the title certificate attached to Proof of Claim No. 1 (GE Capital Consumer Card is identified as the lien holder). Additionally, a "Limited Power of Attorney, Execution Copy" is attached to Proof of Claim No. 1 states the following:

A. GE Captial Retail Bank is the "Seller."

B. SunTrust Bank is the "Buyer."

C. Systems and Services Technologies, Inc. is the agent for Suntrust Bank.

D. GE Captial Retail Bank gives a limited power of attorney to SunTrust Bank and Systems and Services Technologies, Inc. to:

1. Ask, demand, sue for, endorse, recover, receive and collect the "Purchased Assets."

2. To endorse and negotiate promissory notes.

3. To modify, amend, continue, assign, or terminate any UCC financing statements.

4. To endorse and negotiate for benefit of SunTrust Bank any instrument or document relating to the Purchased Assets.

5. The Limited Power of Attorney is solely for the purpose of carrying into effect the transfers contemplated in the Sale Agreement.

From Proof of Claim No. 1 the prima facie evidence shows that Systems and Services Technologies, Inc. is not the creditor, but SunTrust Bank is the creditor.

Proof of Claim No. 1 is not signed by an employee of either SunTrust Bank or its agent, Systems & Services Technologies, Inc., but by LynAlise K. Tannery, with the law firm Buckley Madole, P.C., identified as the agent of Systems & Services Technologies, Inc.

As shown just on the August 5, 2014, the court has identified deficiencies in the proofs of claims and pleadings filed by the Buckley Madole, P.C. law firm, specifically relating to incorrectly identifying (or hiding to preclude a debtor from obtaining effective service of process on) the creditor. On the August 5, 2014 calendar these items include, Items 4 and 6, 14-23416-E-13 Mario and Christine Borrego; and Item 35, 14-25561-E-13 Marcelo and Hazel Lopez.

Though the Debtor could not authenticate its Exhibit, Systems & Services Technologies, Inc. and its agent, Buckey Madole, P.C. have demonstrated through Proof of Claim No. 1 that Systems & Services Technologies, Inc. is not a creditor in this case. Proof of Claim No. 1 is not entitled to prima facie evidentiary value to allow Systems & Services Technologies, Inc. to derail confirmation of the Chapter 13 Plan in this case.

DISCUSSION

The account statements filed as evidence in support of the Opposition by Debtor indicating that the current balance on the claim is $7,533.92. The statements detail different transaction dates, codes, and the amount applied in principal, interest, and late fees in charges and payments made toward the claim. Dckt. No. 30. On the basis of the fax purportedly sent recently to the Debtor, the amount of the claim appears to be Debtor's cited figure of $7,533.92.

Additionally, SSTI argues that this interest rate of 4.00% being paid on its claim through the Debtor's proposed Chapter 13 plan is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing postpetition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. Of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a

preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Additionally, as Debtor has stated in its response to the Objection, the true creditor (once truthfully and accurate disclosed) may repossess the subject vehicle if Debtor defaults on his plan payments, and fails to make the necessary payments on the secured claim. The stay may be modified to allow the actual creditor to seize and sell the vehicle to satisfy the Creditor's claim. Because SSTI has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 3.25%, plus a .75% risk adjustment, for a 4.00% interest rate.

The objection to confirmation of the Plan is overruled.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by Systems & Services, Technologies, Inc. having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on July 11, 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.

50. 14-25885-E-13 BRIAN/MECHELLE CRITES
DPC-1 Mikalah R. Liviakis
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
7-10-14 [16]

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 and Debtors' Attorney on July 10, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on two grounds. First, Counsel for the Debtors did not appear at the First Meeting of Creditors held on July 3, 2014. The Meeting has been continued to July 31, 2014 at 10:30 am. Trustee does not have sufficient information to determine whether or not the cause is suitable for confirmation with respect to 11 U.S.C. § 1325. The Trustee reports that the Debtors appeared and the continued First Meeting of Creditors has been concluded. July 31, 2014 Docket Entry Trustee's Report.

Second, all sums required by the plan have not been paid under 11 U.S.C. § 1325(a)(2). Debtors are $179.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $179.00 is due on August 25, 2014. Debtors have paid $0.00 into the plan to date.

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

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

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

51. 14-25688-E-13 DPC-1 — MIGUEL/DANIELLE SANCHEZ — C. Anthony Hughes — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 7-10-14 [15]

Final Ruling: No appearance at the August 5, 2014 hearing is required.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation of the Chapter 13 Plan filed by Trustee having been presented to the court, the Trustee having requested that the Objection be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(1)(i) and Federal Rules of Bankruptcy Procedure 7041 and 9014, Dckt. 21, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Trustee's Objection to Confirmation is dismissed without prejudice. Counsel for Debtors shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Chapter 13 Plan filed May 30, 2014, which upon approval by the Trustee shall be lodged with the court.

52. 11-32689-E-13 SNM-3 JOSE CHAPA AND ESTHER SWENSEN-CHAPA Stephen N. Murphy

MOTION TO MODIFY PLAN 6-27-14 [48]

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 27, 2014. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of the proposed Plan, on the basis that the Debtors have paid ahead $5,760.00 under the proposed plan. The modified plan proposes plan payments of $2,800 per month for 22 months, $0.00 for 3 months, and $2,320 per month for 35 months.

Under the modified plan, Debtors would have needed to pay to the Trustee through June 2014, a total of $89,440.00. The Trustee's records reflect that Debtors have actually paid a total of $92,200.00, a difference of $5,760.00. Dckt. No. 54.

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.

53. 14-25289-E-13 DPC-1 FRANCISCO/SYLVIA VASQUEZ Anh V. Nguyen

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-10-14 [22]

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' and Debtors' Attorney on July 10, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

1. Debtors are $1,839.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $1,839.00 is due on July 25, 2014. The case was filed on May 19, 0214, and the Plan in § 1.01 calls for payments to be received by the Trustee no later than the 25th day of each month, beginning the month after the order for relief under Chapter 13. Debtor has paid $0.00 into the Plan to date.

2. Debtors admitted at the First Meeting of Creditors held on July 3, 2013, that they had not filed all of their tax returns during the 4-year period preceding the filing of the Petition. Specifically, their 2013 tax returns have not been filed. 11 U.S.C. §§ 1308 and 1325(a)(9). The meeting was continued to July 31, 2014, at 10:30 am for the returns to be filed.

3. Debtor proposes to value the secured claim of GMAC Mortgage in Class 2, but has not filed a Motion to Value the Secured Claim.

4. It appears that the plan may not be Debtor's best efforts under 11 U.S.C. § 1325(b). According to Form B22C, Line #4b, the Debtors listed ordinary and necessary operating expenses of $12,900. Debtors have failed to properly complete boxes 24A through 59 on Form B22C. *Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238, 2008 Bankr. LEXIS 1256, 59 Collier Bankr. Case. 2d (MB) 1103 (B.A.P. 9th Cir. 2008). If business expenses are added back in, there is a resulting annualized increase of $154,800.00, which brings line 15 to $158,950.00 to $158,950, which is greater than the applicable median family income of $76,211 found on line 16. Debtors' 2012 income tax return shows that Debtors received a refund of $7,559.00. Debtors have failed, however to propose to pay any future tax refunds into the Plan or adjust their income tax withholdings so that they will not receive such a large refund.

5. While the plan proposes to pay the attorney $2,000 through the plan under Local Bankruptcy Rule 2016-1(c), the Disclosure of Compensation of Attorney for Debtors, Dckt. No. 10, appears to list in Item 7 that the attorney's services do not include some services required under Local Bankruptcy Rule 2016-1(c), such as relief from stay actions and judicial lien avoidances. The Trustee believes that the Attorney is effective opting out of 2016(c)(1) and will oppose attorney fees being granted under that section, which requires a motion for any attorney fees.

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

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

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

54. 09-33790-E-13 JAMES/CHRISTINA HERRMAN — MOTION FOR ORDER APPROVING USE OF PROPERTY
LC-7 Lorraine W. Crozier — 7-7-14 [96]

Final Ruling: No appearance at the August 5, 2014 hearing is required.

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 and Office of the United States Trustee on July 7, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Order Approving Use of Property is granted.

Debtors James W. Herman and Christina H. Herman (the "Debtors") move the court pursuant to Local Bankruptcy Rule 3015-1(i)(5) for an order permitting the use of property. Debtors wish to cash out their part of their interest in an IRA retirement account.

Debtors filed their Chapter 13 proceeding on June 2, 2009. Debtors scheduled funds contained in Christina Herman's Oppenheimer IRA account at the inception of the case, and claimed these funds as exempt. No objection to the exemption of funds was made.

The Debtors proposes to use $15,000.00 of the funds contained in the Oppenheimer IRA account in the name of Debtor Christina Herman. The funds will be withdrawn in the amount of $15,000.00 in order to pay for unanticipated, necessary medical, surgical and post operative expenses on behalf of the Debtors' two daughters. Debtors explain that one daughter required surgery for physical injury to her knee, caused by a "sole party soccer accident." There will be additional co-pays for post operative treatment, which are specialist co-pays at a higher rate of $50.00 per visit. The out of pocket costs incurred for the surgical treatment were $4,300.00.

Debtors' other daughter will require surgery on her spine, a spinal fusion procedure, in November 2014. The non-insured portions of this surgery alone are expected to total approximately $4,200.00, with additional costs for post operative visits to the doctor and rehabilitation. The remainder of the monies withdrawn will be used to pay the taxes and penalties which the Debtors will incur as a result of the early withdrawal of the funds from the IRA.

Debtors state that they cannot afford to pay the health care payments without withdrawing these funds. Additionally, Debtors are at the end of their 60 month plan, with the final payment due on July 2014.

DISCUSSION

11 U.S.C. § 363(b)(1) provides that,

> (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person....

The Debtors argue that pursuant to their powers under 11 U.S.C. § 1303 that allows Debtors to have, exclusive to the trustee, the rights and powers of a trustee under 11 U.S.C. § 363(b), that the court may authorize the Debtors' use of estate funds (other than in the course of ordinary business).

Here, the Debtors propose to use funds from Joint Debtor Christina Herman's Oppenheimer IRA account to pay for the unanticipated and necessary medical expenses of Debtors' two daughters. Debtors state that they cannot afford to pay the health care expenses of their daughters without drawing these funds. The Chapter 13 Trustee filed a statement of non-opposition to the Motion on July 15, 2014. The Trustee not being opposed to the use of

the retirement funds of Christina Herman, and the court determining that Debtors are requesting the necessary use of the exempted funds to pay for the medical treatments of their daughters in good faith, the court will grant the Motion and authorize the Debtors to withdraw the subject funds.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Order Approving Use of Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion for Order Approving Use of Property is granted, and that Debtors, James W. Herrman and Christina H. Hermann, shall be permitted to withdraw $15,000.00 of funds contained in the asset listed as "Oppenheimer Funds - Retirement Investment Account of Christina" (listed on Debtors' Schedules B and C, Dckt. No. 1) to pay for the medical expenses of Debtors' two daughters.

55. 12-38294-E-13 DMR-2 DAMON/DEBRA DWORAK Michael S. Martin MOTION TO MODIFY PLAN 7-1-14 [36]

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 Not Provided. The Amended 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 July 2, 2014. By the court's calculation, 34 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has not been properly 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.

Local Bankruptcy Rule 3015-1(d)(2) requires that debtors, trustee, or the holder of an allowed unsecured claim who wishes to modify a Chapter 13 plan after confirmation pursuant to 11 U.S.C. § 1329 shall file and serve the modified Chapter 13 Plan together with a motion to confirm it.

Notice of the motion must comply with Federal Rule of Bankruptcy Procedure 3015(g), which requires twenty-one (21) days' of notice of the time fixed for filing objections, as well as Local Bankruptcy Rule 9014-1(f)(1). Local Bankruptcy Rule 9014-1(f)(1) requires twenty-eight (28) days' notice of the hearing and notice that opposition must be filed fourteen (14) days prior to the hearing. Thus, in order to comply with both Federal Rule of Bankruptcy Procedure 3015(g) and Local Bankruptcy Rule 9014-1(f)(1), parties-in-interest shall be served at least thirty five (35) days prior to the hearing.

In this matter, an Amended Proof of Service with a "Corrected Mailing Matrix" was filed on July 2, 2014, indicating that all creditors, the Chapter 13 Trustee, and the Office of the United States Trustee on July 2, 2014. Dckt. No. 42. The Proof of Service indicates that the pleadings and supporting declaration and exhibits were served 34 days prior to the hearing date of August 5, 2014. The pleadings and supporting documentation having been served less than the 35 days required by Local Bankruptcy Rule 3015-1(d)(2), the Motion has been improperly noticed, and the Motion is denied without prejudice.

However, if the Debtor can show that proper notice of the Motion was given to the Chapter 13 Trustee, all creditors, and other parties in interest, the court will issue the following alternative ruling:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Here, the Trustee opposes the confirmation of Debtors' plan on the following grounds:

1. Debtors' modified plan proposes plan payments of $16,815.06 through June 2014, $915 for July 2014, then $1,635.00 beginning on August 2014 until the plan is paid in full. Under the modified plan, Debtors would have needed to pay to the Trustee through June 2014 a total of $17,815.06. The Trustee's records reflect that Debtors have actually paid a total of $26,250.00, a difference of $8,434.94.

2. The amended Schedule J is on the incorrect form. The Debtors have used the Schedule Form that was used starting on December 1, 2007, when a new form became effective on December 1, 2013.

3. The months paid as state in the Debtors' proposed plan differ from the Trustee's records. The additional provisions state: "Total payments received from the Debtors through June 2014 and disbursed by the Trustee amount to $17,815.05. Dckt. No. 37. According to the Trustee's records, Debtor has paid in $26,250 through June 2014, where this case was filed on October 15, 2012. The first payment was due on November 25, 2013. The Trustee previously objected to this issue, Dckt. No. 28. Additionally, the Debtors' supporting Motion, Dckt. No. 36, and Declaration, Dckt. No. 39, both state "As of June 25, 2014, we have paid a total of $26,250.00 to the Chapter 13 Trustee..."

4. There is no current statement of income. According to the Trustee's records, there was a change of address filed for the primary Debtor. Trustee's records now reflect an out of state address, whereas the co-Debtor's address remains the same. The Trustee is unsure of the Debtors' income and if it is sufficient to fund the monthly payments of $1,735.00. Trustee also previously objected to this issue. Dckt. No. 28.

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

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

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

56. 12-41394-E-13 GINA DOMINGUEZ — MOTION TO DISMISS CASE
Peter G. Macaluso — 7-14-14 [68]

Tentative Ruling: The Ex Parte Motion to Dismiss pursuant to 11 U.S.C. § 1307(a) has been set for hearing by order of the court.

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.

The court set the hearing on this Ex Parte Motion because it appeared to have been filed in pro se, notwithstanding Debtor being represented by counsel. Upon review of the Motion, Chapter 13 Trustee's Response, Debtors' Response through her counsel or record, and the files in this case, the

court determines that sufficient notice has been given and that the Ex Parte request for the relief pursuant to 11 U.S.C. § 1307(a) is proper. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

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

REVIEW OF THE MOTION

On July 14, 2014, the Debtor in this case, Gina Dominguez, filed an *ex parte* communication to the court, stating the following:

> Effective immediately, I want to dismiss my Chapter 13 bankruptcy Case. I no longer want to be in bankruptcy and I will pay my creditors myself, not through the plan.

Letter, Dckt. No. 68. The letter was sent to the court and apparently signed by the Debtor. The court construes Debtor's letter as a request to dismiss her case pursuant to 11 U.S.C. § 1307.

However, the Debtor is not prosecuting this case in pro se, but is represented by counsel, Peter G. Macaluso.

The letter, taken as a pleading for purposes of the court's consideration of the matter, merely states that Debtor wishes to dismiss her Chapter 13 bankruptcy case. 11 U.S.C. § 1307(a) authorizes the Debtor to dismiss a Chapter 13 case at any time. This "almost absolute" right of dismissal is subject to the requirement that the Debtor be acting in good faith. See *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007), for a discussion of good faith, and the conversion or dismissal of Chapter 13 cases.

OPPOSITION BY TRUSTEE

The Trustee responds by stating that Debtor is in a confirmed 0% plan that calls for payments of $2,360.00 per month for 60 months. Debtor last paid $1,000 on July 2, 2014. The total amount paid into the plan is $39,260.00. The Debtor is delinquent in $3,220.00 to the Plan. Trustee also states that his records reflect that the debtor is represented by Counsel Peter Macaluso. Dckt. No. 72.

RESPONSE BY DEBTOR

Debtor replies to the Trustee's Response to the Motion to Dismiss the Chapter 13 case by stating that Debtor requests the dismissal of her case. The Debtor states that in this instance, the Debtor's main creditor is a student loan provider, to which the Debtor is indebted in the amount of $75,000. The Debtor states that she will negotiate directly with this creditor hereafter.

The Debtor's response has bee filed by her Counsel. Based on the request for dismissal now being asserted through her counsel of record, the

court's concerns that the Debtor was acting impulsively or without seeking the assistance of her experienced and knowledgeable counsel have been addressed. The Trustee's concerns that the Debtor, having invested $39,260.00 into a Chapter 13 Plan, may be acting impulsively have been addressed.

Further, this is not a debtor who has been filing and having dismissed multiple bankruptcy cases in the past several years. The fact that the Debtor, with her economics having been stabilized and there being other options for resolving her main "debt of concern," has now determined that proceeding outside the protections (and obligations) of bankruptcy is not an indication of bad faith.

The Debtor's Motion to Dismissed, as confirmed by her counsel in the Reply filed by Debtor (Dckt. 74) 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 Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the Chapter 13 case is dismissed.

57. 12-41394-E-13 GINA DOMINGUEZ — CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
DPC-5 Peter G. Macaluso — 5-13-14 [60]

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

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 Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 13, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Objection to Debtor's Claim of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 sustain the Objection to Debtor's Claim of Exemptions.

The court continued the hearing on this matter from June 24, 2014 to this hearing date.

REVIEW OF OBJECTION

Debtor amended Schedules B and C on May 1, 2014, Dckt. No. 59. It is not clear to the Trustee what the Debtor is exempting. **Additionally, Trustee states that it is not clear if the life insurance has matured. Debtor's Schedule B changes the value of the Met Life Insurance-Term** Policy from $1.00 to $100,000.00.

Debtor specifies an exemption under Civ. Proc. Code § 703.140(b)(8) on Schedule C, and it is not clear of the Debtor is entitled to exempt $12,860.00 under this code, which in part states "...in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent."

If the Debtor is exempting a surrender value of the policy, the Debtor should be estopped from exempting a surrender value of the property, as the Plan filed on December 13, 2012 was confirmed on March 18, 2013.

REPLY OF DEBTOR

Debtor responds by acknowledging that the date of filing is the effective date for exemptions. At the time of filing, Debtor had available claims of exemptions for which the exemption had "not been taken," but was available. Debtor states that in this instance, both Civ. Proc. Code § 603.104(b)(8) and (5) had $12,860.00 and $18,280.00 available to exempt. As a result, there is $58,170.54 for which no exemption is available, and $31,140.00 that is exempt.

DISCUSSION

California Civil Code of Procedure § 703.140(b)(8) permits Debtors to claim exemptions on a debtor's aggregate interest,

> not to exceed in value twelve thousand eight hundred sixty dollars ($12,860), in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

The Trustee has expressed the concern that it is not clear whether the insurance policy that Debtor claims as exempt in her Amended Schedule C, which is simply listed as "Met Life Insurance - Term Policy," has matured. The Debtor may not claim an exemption if the policy has matured, or if Debtor is attempting to exempt the surrender value of the policy, as the Plan was confirmed in March of 2013.

The Debtor has not responded to the Trustee's concerns. Rather, Debtor states that the Debtor is now claiming an exemption that was also available to her previously. Debtor has not stated whether the life insurance contract has matured or is owned by the Debtor under which the insured is the Debtor or the Debtor's dependent, pursuant to the requirements of California Civil Code of Procedure § 703.140(b)(8). Debtor has also not clarified whether the exemption is in the surrender value of the property, which would be barred by the confirmation of her Plan. Debtor would not be able to use the exemption provided for in California Civil Code of Procedure § 703.140(b)(5).

Nothing further has been filed on the docket regarding Debtor's exemptions since the original hearing on this Objection was held on June 24, 2014. In the absence of an explanation addressing the Trustee's concerns with the subject exemption, the Objection is sustained and the claim of exemption shall be denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Debtor's Claim of Exemptions filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is sustained and Debtor is denied the $12,869,00 exemption and $18,280.00 claimed in Met Life Insurance - Term Policy pursuant to California Civil Code of Procedure §§ 703.140(b)(8) and (5), respectively.

58. 14-26695-E-13 ARNOLD CHRISTAIN
CAH-1 Aaron C. Koenig

MOTION FOR DETERMINATION OF VIOLATION OF THE AUTOMATIC STAY AND/OR MOTION FOR SANCTIONS FOR

VIOLATION OF THE AUTOMATIC STAY
7-2-14 [8]

No Tentative Ruling: The Motion for Damages for Violation of 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 the Chapter 13 Trustee, the respondent Creditor, and the Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 notice was provided. 28 days' notice is required.

The Motion for Damages for Violation of 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). The defaults of the non-rsrespondent 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 Damages for Violation of the Automatic Stay is --------.

The present Motion for Damages for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by the Debtor in this case, Arnold Brent Christian (the "Debtor"), against Cal-Western Reconveyance, LLC.

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

1. The debtor initiated the above-entitled Chapter 13 bankruptcy on June 27, 2014 at 10:02 a.m. to 10:03 a.m.

2. The purpose of the filing was to stop a trustee sale of the debtor's residence located at 104 Westport Lane, Vallejo, CA 94591. The sale date was set for June 27th, 2014 at 10:30 a.m.

3. After the bankruptcy was filed Cal-Western Reconveyance was called and notified of the bankruptcy. Further, a fax was sent to them along with a cover letter letting them know that a bankruptcy was filed.

4. However, despite receiving notice of the filed bankruptcy, Cal-Western Reconveyance went ahead and sold the debtor's home.

5. Further calls and notices to Cal-Western Reconveyance have been futile. Currently, they are insisting that the sale is valid and that the debtor's bankruptcy did not occur prior to the sale date.

6. The debtor is therefore seeking a determination that Cal- Western Reconveyance, LLC has willfully violated the automatic stay.

7. The factual and legal arguments for this motion are stated in the attached Memorandum of Points and Authorities.

The Motion for Damages for Violation of the Automatic Stay does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion fails to state any legal authority and grounds on which Debtor's Motion rests.

Rather, Debtor instructs the court to ascertain the legal and factual arguments that serve as a basis for this motion by reviewing the "attached Memorandum of Points and Authorities." The basis for the requested relief is not contained in the body of Debtor's Motion. The details of the Creditor's alleged violation of the automatic stay, as well as the legal authority for the relief sought is drafted and included in Debtor's Memorandum of Points and Authorities. This is not sufficient.

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."

This pleading requirement for the motion is important for most contested matters and critical for the present motion. A person alleged to have violated the stay must be clearly presented with the grounds in the motion, in the same manner as would be set out in a complaint (which a higher pleading standard required in the motion). A person should not be required to dig through a series of pleadings, arguments, evidence, quotations, and contentions to divine the actual grounds.

Memorandum of Points and Authorities in Support of Motion

Debtor's Memorandum of Points and Authorities provide further detail into the Creditor's alleged knowledge of Debtor's bankruptcy filing, and its subsequent violation of the automatic stay. Debtor states that he initiated his Chapter 13 bankruptcy to halt the Trustee sale of his residence, located at 104 Westport Lane, Vallejo, California. The sale date was set for June 27th, 2014 at 10:30 a.m. Exhibit C, Foreclosure Profile Report, Dckt. No. 14.

Debtor states that he filed his bankruptcy at 10:03 am, on June 27, 2014. The Memorandum states that, after the bankruptcy was filed, Cal-Western Reconveyance was called and notified of the bankruptcy. A fax was sent to Cal-Western, along with a cover letter informing the company that a bankruptcy was filed. ¶ 5, Declaration of Robert Gee, Dckt. No. 11.

At 10:30 a.m. on June 27, 2014, however, Cal-Western Reconveyance authorized the sale of debtors home despite being notified of the bankruptcy. Debtor's counsel states that further calls were made to Cal-Western Reconveyance to resolve the issue. On July 1, 2014, an employee of Debtor's counsel spoke to an "April" from Cal-Western Reconveyance, LLC. "April" told Debtor's counsel's employee that the sale was final and valid, and that the bankruptcy was not filed before the sale date. ¶ 4, Declaration of Courtney Pearson, Dckt. No. 10.

Debtor is therefore seeking a determination that Cal- Western Reconveyance, LLC willfully violated the automatic stay. Debtor additionally requests actual damages accrued as a result of trying to enforce the automatic stay.

Notice

Debtor states that Cal-Western Reconveyance had actual notice of the automatic stay. The first notice came via a phone call by employee Robert Gee at 10:12 a.m. on June 27, 2014. Declaration of Robert Gee, Dckt. No. 11. During this phone call the bankruptcy case number was provided to Cal-Western Reconveyance.

The second notice came approximately 7 minutes later via a fax transmittal that also provided the case number and debtor identification. Exhibit A, Dckt. No. 13.

The third notice came that same day at 10:30 am when employees were again told of the bankruptcy filing. Debtor's counsel states that further efforts to inform Cal-Western Reconveyance, LLC, of the bankruptcy were made on June 27, June 30, and July 1, 2014. Declaration of Courtney Pearson, Dckt. No. 10. Debtor argues that Cal-Western Reconveyance had notice of the debtor's bankruptcy and the imposition of the automatic stay and yet still authorized the sale of the debtor's home.

Intentionality

Debtor argues that Cal-Western Reconveyance's actions were intentional and done in bad faith. Debtor asserts that this is not an instance where the foreclosing party had a good faith belief that the debtor did not file for bankruptcy or that the automatic stay did not apply to them.

Debtor claims that Cal-Western Reconveyance is a well-known foreclosure company that regularly processes trustee sales and notices to stop a sale due to the filing of a bankruptcy. Debtor argues that Cal-Western had actual physical proof (in the form the first 3 pages of the debtors bankruptcy petition) that the debtor was in a bankruptcy prior to the 10:30 a.m. sale. Debtor's counsel and his employees made multiple attempts afterward to rescind the sale, but to no avail, since Cal-Western Reconveyance would not accept that the bankruptcy occurred prior to the sale of the property.

Debtor's Exhibit D, Dckt. No. 14, consists of an eCalWebFiling Submission Summary, Notice of Filing of Voluntary Petition transmitted by this court's automation system, and an EFiling History showing that the first docket entries for Debtor's case appeared on June 27, 2014, at 10:03:14 am.

OPPOSITION BY CREDITOR

Cal-Western Reconveyance, LLC (or "Cal-Western," "Creditor"), acknowledges that Debtor's attorney called Cal-Western at 10:12 am on June 27, 2014, to inform the company of Debtor's bankruptcy case, and that Debtor's attorney sent a fax a minute later. Cal-Western states, however,

that according to PACER, Debtor's case was not filed until 11:15 am. Cal-Western states that according to its records, the Rental Property was sold at 10:40, before the Debtor's case was filed.

After it received the phone call and the fax, Cal-Western tried to verify Debtor's filing and could not find Debtor's case listed. The Creditor states that a search done as late as 10:46 a.m. showed "No match found." ¶ 5, Declaration of Barbara R. Gross in Support of Opposition to Motion, Dckt. No. 27. Debtor's attorneys state that they received confirmation that Debtor's Petition was submitted for filing at 10:02, but Creditor states that this information was not provided to them.

The "Notice of Filing," that Debtor provides as Exhibit D in support of the Motion, states the Petition was received at 10:03. Cal-Western states that when they tried to verify Debtor's filing at 10:46, however, it was unable to do so because the Petition had not been processed and "filed.

The Creditor's employees apparently took this to mean that Debtor's bankruptcy case has not yet been filed. The Creditor states that included in the District's FAQs for e-Filing, in response to "How Does e-Filing Work?," the Court directs an ECF user to "click the Submit button to submit [a document] to the court for filing. Creditor interprets the procedures outlined on the court's website indicates that "submitting" a document to a court for filing is not the same as "filing" a document. Creditor states that elsewhere, the protocol is different. Creditor's attorney states that e-Filers in the Southern District of California upload documents directly to the docket, with no lag time. This makes verification of a filed document easy and "fool-proof."

Creditor states that Debtor's attorneys, whose office is in Sacramento should be aware of the delay between uploading a document and having that document filed. Cal-Western states that it did not know of the stay: it received a telephone call and faxed correspondence comprising of a letter and a Petition.

Cal-Western states that receives "scores of faxes" every day purporting to notify it of the automatic stay. Most of these include a time-stamped Petition or a Notice of Case Commencement or a receipt from a Bankruptcy Court, which allows Creditor to search for the case on PACER and confirm it is actually filed. ¶ 7, Declaration of Barbara R. Gross in Support of Opposition to Motion, Dckt. No. 27.

Cal-Western describes its protocol when being informed of bankruptcy flings thusly: when Cal-Western is notified of an bankruptcy filing, its staff "immediately" researches the case on PACER, and when it verifies the bankruptcy filing, it halts the foreclosure sale. In cases where the Petition is filed before a sale but Cal-Western is not notified until after, Cal-Western client rescinds the sale. Gross Declaration, ¶ 8, Dckt. No. 27. When Cal-Western cannot verify that a bankruptcy case is valid, Cal-Western does not halt the sale.

Cal-Western states that it "did everything correctly in Debtor's case." Cal-Western states that the PACER records show that Debtor's case was not filed until 11:15 a.m, which is after the sale took place, and that

Cal-Western did not violate the stay because no stay was in effect at the time of the sale.

RESPONSE TO OPPOSITION BY DEBTOR

Debtor responds to Creditor's claims that the bankruptcy case was filed after the trustee sale is incorrect. Debtor states that PACER does not provide the time a bankruptcy case is filed, but rather, that PACER provides the month, day and year of the filing–and not the time.

Debtor states that Creditor's cited time of 11:15 a.m. is the time that the document was made available to view by PACER, which is not the same time as "when a case is filed." Debtor states that a case is filed as soon as all of the documents are submitted through the e-filing system, and that is common for the filed documents to not appear on PACER for several hours or several days (if a case is filed on a late Friday afternoon or Saturday, or Sunday). Debtor's attorneys claim that almost any document filed on a late Friday afternoon will not be available for view on PACER until Monday morning. If this occurs, however, this does not mean that the case was filed on Monday. It means it was filed on Friday and appeared on PACER for viewing on Monday.

The Response states that Debtor has provided information that the documents were filed at 10:02 am to 10:03 am. Exhibit D, Dckt. No. 14. Therefore, the documents were filed at this time and it occurred before the 10:40 am sale date. Cal-Western was sent a fax that gave the case number of 2014-26695 and the fax was received at 10:19 a.m. Exhibits A and B, Dckt. No. 14.

Debtor argues that the fact that the Debtor received a case number means that the case is filed, and that Cal-Western's argument that no case was filed, even though Debtor received a case number, is invalid. Debtor states that the reasoning that a case has not been filed until it becomes available to view on PACER is illogical; in adopting this line of reasoning, then if the debtor were to have filed his bankruptcy on Friday afternoon and received a bankruptcy case number, the case would still would not have been filed until Monday morning when the documents were uploaded to PACER for viewing.

Debtor also questions Cal-Western's attempts, as an experienced foreclosure firm, in verifying the Debtor's case filing. Debtor argues that Cal-Western should have known that all documents filed are not immediately ready for viewing on PACER, and that Cal-Western already had in its possession a fax transmittal from Debtor, showing the first three pages of Debtor's petition.

LEGAL STANDARD

A request for an order of contempt by the United States Trustee or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283-85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to wilful violations of the stay, and then typically to actual damages,

including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (an Congressionally created injunction) pursuant to its inherent power as a federal court. *Steinberg v. Johnston*, 595 F.3d 937, 940, (9th Cir. 2011), fn. 3.

Attorneys' fees may only be recovered for work involved in bringing about an end to the stay violation, not for pursuing an award of damages. *Sternberg v. Johnston*, *id.*, 947-48 (9th Cir. 2011) ("[P]roven injury is the injury resulting from the stay violation itself. Once the violation has ended, any fees the debtor incurs after that point in pursuit of a damage award would not be to compensate for 'actual damages' under § 362(k)(1)."), *cert. denied*, 2011 U.S. LEXIS 6502 (2011). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty on compliance on the nondebtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151-52 (9th Cir. 1996). A party which takes an action in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191-92 (9th Cir. 2003).

DISCUSSION

The court's inquiry begins with the court's file itself. The Petition filed in this case bears the following filing information, "Filed: 6/27/2014 10:03:14 AM." Petition, Dckt. 1. While Cal-Western Reconveyance did an immediate Pacer check, it apparently chose only to do so immediately, before the Pacer files had been updated to reflect a Petition having been filed with this court. Just as it taking time for a piece of paper to work its way from the front counter into a physical file, an electronically filed pleading takes time (through more quickly than the old physical file days) to get to the electronic file. It is the filing with the clerk, not the "placing in the file" which is the commencement of the bankruptcy case. See *United States v. Henary Bros. P'Ship (in re Henry Bros. P'ship)*, 214 B.R. 192, (B.A.P. 8th Cir. 1997); Fed. R. Bankr. P. 5005.

Though not cited by the Parties, this court has a Local Bankruptcy Rule expressly authorizing the electronic filing of documents. Local Bankruptcy Rule 5005-1 provides in pertinent part,

> "Documents Submitted in Electronic Form. Documents submitted in electronic form shall be deemed filed as of the date and time stated on the Notice of Electronic Filing issued by the Clerk."

L.B.R. 5005-1(f)(2), "Time of Filing." The filing stamp for the Petition, the Notice of Electronic Filing," is 10:03:14 on June 27, 2014.

The Bankruptcy Code expressly states that "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." 11 U.S.C. § 301(a). The commencement of the voluntary

bankruptcy case constitutes the order for relief under that chapter. 11 U.S.C. § 301(b).

That an act taken in violation of the automatic stay is void, not merely voidable, is well-established law in the Ninth Circuit.

> In fact, the automatic stay provision is so central to the functioning of the bankruptcy system that this circuit regards judgments obtained in violation of the provision as void rather than merely voidable on the motion of the debtor. See [*In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992)]. Courts regularly void state court default judgments against debtors when the judgments are obtained in violation of the automatic stay provision, even where the debtor filed for bankruptcy in the midst of the state court proceedings. See, e.g., *In re Fillion*, 181 F.3d 859, 861 (7th Cir. 1999); *In re Graves*, 33 F.3d 242, 247 (3d Cir. 1994).

FN.1. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001).

As earlier stated, the Ninth Circuit addressed the significance of the automatic stay to bankruptcy proceedings. *Schwartz v. United States of America (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992), (Emphasis in original),

> Our decision today clarifies this area of the law by making clear that violations of the automatic stay are void, not voidable. See *In re Williams,* 124 Bankr. 311, 316-18 (Bankr. C.D. Cal. 1991) (recognizing that the Ninth Circuit adheres to the rule that violations of the automatic stay are void and criticizing the BAP decision in this case). . .
>
> > The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. *It stops all collection efforts, all harassment, and all foreclosure actions.* It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (emphasis added).

Creditors who wish to take action against a debtor or property which is subject to the automatic stay "[h]ave the burden of obtaining relief from the automatic stay." FN.2.

FN.2. *Id.* at 572.

The Ninth Circuit revisited this issue in *40235 Washington Street Corporation v. Lusardi (In re Lusardi)*, 329 F.3d 1076 (9th Cir. 2003), addressing a county tax sale of real property which occurred after a bankruptcy case was filed, with neither the county nor the purchaser having any knowledge of the bankruptcy case. The Ninth Circuit concluded that because the tax sale occurred while the bankruptcy case was pending, the sale was void, and that the debtor, not the purchaser, was the owner of the real property. This ruling finding that the sale was void was issued more than 12 years after the sale had occurred and notwithstanding the county not having refunded the purchase money paid by the buyer at the tax sale.

The automatic stay is just that, automatic, with no obligation on a debtor to affirmatively enforce the stay. When a creditor has notice of a bankruptcy case, it is the creditor's burden to determine the extent of the automatic stay and seek such relief as is appropriate. COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 362.02; *Carter v. Buskirk (In re Carter)*, 691 F.2d 390 (8th Cir. 1982); *Hillis Motors v. Hawaii Automobile Dealers' Association (In re Hillis Motors)*, 997 F.2d 581, 586 (9th Cir. 1993) ("Where through an action an individual or entity would exercise control over property of the estate, that party must obtain advance relief from the automatic stay from the bankruptcy court. *Carroll v. Tri-Growth Centre City Ltd. (In re Carroll)*, 903 F.2d 1266, 1270-71 (9th Cir. 1990).")

Once the creditor learns or has notice of a bankruptcy case having been filed, any actions that it intentionally undertakes are deemed willful. FN.3. As the Ninth Circuit Court of Appeals explained:

> A "willful violation" does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was "willful" or whether compensation must be awarded.

FN.3. *In re Risner*, 317 B.R. 830, 835 (Bank. D. Idaho 2004); *see also Eskanos and Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002); *Thompson v. GMAC, LLC*, 566 F.3d 699, 702-3 (7th Cir. 2009); *Emp't. Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996) (holding that the knowing retention of estate property violates the automatic stay).

FN.4. *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989) (citing *INSLAW, Inc. v. United States (In re INSLAW, Inc.)*, 83 B.R. 89, 165 (Bankr. D.D.C. 1988)).

The fact that a creditor may have originally acted in good faith and reasonably believed that its conduct did not violate the automatic stay does not insulate the creditor from the court finding the continuing conduct in violation of the automatic stay was willful and subject that creditor to damages. FN.5.

FN.5. *In re Cordle*, 187 B.R. 1, 4 (N.D. Cal. 1995).

Bankruptcy Code § 362(a)(3) states that the automatic stay applies to, "any act to obtain *possession of property of the estate* or *of property from the estate* or to exercise control over property of the estate." (Emphasis added). As one of the fundamental principles girding the Bankruptcy Code, "the automatic stay requires a creditor to maintain the status *quo ante* and to remediate acts taken in ignorance of the stay." FN.6 "The operation of the automatic stay applies to property merely in the debtor's possession at the time of filing, and remains in effect until and unless the debtor abandons such property or relief from the stay is sought." FN.7. The automatic stay imposes an affirmative duty to discontinue actions in violation of the stay. FN.8. A creditor cannot use the state court enforcement action as leverage in negotiations once the bankruptcy case has been commenced. FN.9. When property of the estate is held in violation of the automatic stay the onus is on the creditor to turn over the property, not for the debtor, debtor-in-possession, Chapter 7 trustee, or Chapter 11 trustee to chase the creditor and force correction of the continuing violation. FN.10. "The responsibility is placed on the creditor to address the continuing violation of the automatic stay because to place the burden on the debtor to undo the violation 'would subject the debtor to the financial pressures the automatic stay was designed to temporally abate.'" FN.11.

FN.6. *Franchise Tax Bd. v. Roberts* (*In re Roberts*), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994).

FN.7. *Turbowind, Inc. v. Post Street Management, Inc.* 42 B.R. 579, 585 (S.D. Cal. 1984).

FN.8. *Sternberg v. Johnson*, 595 F.3d 937, 944 (9th Cir. 2010); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002) (addressing the obligation to discontinue post-petition collection proceedings).

FN.9. *Eskanos & Alder*, 309 F.3d at 1215.

FN.10. *Taxel*, 98 F.3d at 1151.

FN.11. *Johnson v. Parker* (*In re Johnson*), 321 B.R. 262, 283 (D. Ariz. 2005) (citation omitted).

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59. 10-22197-E-13 LC-4 — SHAWN/YVONNE BEAMAN — Lorraine W. Crozier — MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A. — 6-3-14 [64]

Final Ruling: No appearance at the August 5, 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, the respondent Creditor, parties requesting special notice, and Office of the United States

Trustee on June 3, 2014. By the court's calculation, 63 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 Bank, N.A., "Creditor," is granted.

The Motion to Value filed by Shawn R. Beaman, Jr. and Yvonne M. Beaman, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtors' declaration. Debtors are the owner of the subject real property commonly known as 2124 Coffee Creek Way, Plumas Lake, California, "Property." Debtors seek to value the Property at a fair market value of $220,000.00 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).

Debtors state that a motion to value the secured claim of Wells Fargo Bank, LC-1, was heard on March 23, 2010, but because service may not have been sufficient to assume the due process due, Debtors again move the court for an order valuing their residence at $220,000.00, as of the petition date filed.

The senior in priority first deed of trust secures a claim with a balance of approximately $303,725.00. Creditor's second deed of trust secures a claim with a balance of approximately $37,765.00. 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 Shawn R. Beaman, Jr. and Yvonne M. Beaman, "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 Bank, N.A., secured by a second in priority deed of trust recorded against the real property commonly known as 2124 Coffee Creek Way, Plumas Lake, 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 $220,000.00 and is encumbered by senior liens securing claims in the amount of $303,725.00, which exceed the value of the Property which is subject to Creditor's lien.

60. 12-36299-E-13 SS-2 LORIE DUMONT Scott D. Shumaker MOTION TO APPROVE LOAN MODIFICATION 6-10-14 [36]

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 the Chapter 13 Trustee, the Office of the United States Trustee, and all creditors on June 10, 2014. By the court's calculation, 56 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 Lorie Ann Dumont, ("Debtor") seeks court approval for Debtor to incur post-petition credit. Debtor states that the Federal Mortgage Association by and through its servicer, Seterus, Inc., has agreed to modify a loan on Debtor's property. The identified service holder, Federal National Mortgage Association, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $697.58 in years 1 through 5, not including property taxes and insurance.

The Motion is supported by the Declaration of Lorie Dumont. Dckt. No. 38. 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.

Debtor states, however, that as can be seen from the Loan Modification Agreement filed concurrently with the Motion, the parties signed and finalized the Agreement in February 2014. Unfortunately, neither the Debtor nor Seterus informed Counsel of the finalized loan modification agreement. The Debtor testifies that she did not think to speak to Counsel or to seek Court approval because Seterus did not mention court approval as a requirement. Accordingly, Debtor requests that the Order Approving the Loan Modification be made retroactive to February 1, 2014. ¶ 13, Dckt. No. 38.

The Loan Modification Agreement filed as Exhibit A in support of the Motion, Dckt. No. 39, appears to have been executed between Debtor Lorie Dumont (identified as the "Borrower"), and Seterus, Inc., which is identified as the loan servicer for the Federal National Mortgage Association (the "Lender"). The Agreement is signed by a representative of Seterus, Inc., Scott Burich, and Debtor Lorie Dumont, and was dated by the signatories on February 20, 2014, and February 14, 2014, respectively. The Debtor requests that the Order Approving the Loan Modification be made retroactive to February 1, 2014.

INCORRECT PARTY TO LOAN MODIFICATION

Debtor seeks to modify a loan admittedly being serviced by Seterus, Inc." However, it has been repeatedly represented in this court that loan servicing companies 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.

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 Motion to Approve the Loan Modification indicates Debtor's understanding that the actual creditor on this loan is the Federal

National Mortgage Association, or Fannie Mae, but there are no documents and evidence providing showing that Seterus, Inc., as the servicing agent for the Federal National Mortgage Association, has the right to enter into a loan modification with the Debtor in this case.

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.

Although both the Debtor and servicing company acknowledge that Federal National Mortgage Association is the actual owner of the underlying obligation, there are no references to Federal National Mortgage Association in Debtors' originally filed and amended schedules. The real creditor of interest in possession of the Note, which appears to be Federal National Mortgage Association, 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. The court is not certain how the Debtor can enter into a loan modification agreement with Seterus, Inc., a loan servicing company, modifying the terms of 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.

No Proof of Claim has been filed by Seterus, Inc., asserting that is the actual holder of the claim. Seterus, Inc., has not provided a Power of Attorney granting it powers to enter into modification agreements with Debtors, to reduce the amount owed on a loan. 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 enter and sign a written contract, indicating that they are in approval of the modification negotiated by the loan servicing company and the Debtor, and that the servicing agent actually has the authority to enter into such an agreement with the Debtor borrower.

LOAN MODIFICATION WITH ACTUAL PARTY IN INTEREST

Although Seterus, Inc., has produced any documentation showing that it is entitled to execute a loan modification agreement in its own name, and to bind Seterus, Inc., into a modification agreement, the moving party has stated that it is acting on behalf of the Federal National Mortgage Association as its servicing agent, and not as a creditor in this case. The Loan Modification Agreement filed in support of this Motion, designed as Exhibit "A" on Dckt. No. 39, expressly states that Seterus, Inc., is acting as the loan servicer for Federal National Mortgage Association, the "Lender." The court therefore grants the Motion to Approve Loan Modification as between Federal National Mortgage Association and the Debtor.

Federal National Mortgage Association, as serviced by Seterus, Inc., whose claim the plan provides for in Class 4, has agreed to a loan

modification which will reduce Debtor's mortgage payment to $697.58 in years 1 through 5, not including property taxes and insurance. The principal and interest payments for Year 6 will be $752.59, while the monthly principal and interest payments for year 7 through the date of maturity (January 1, 2036) will be $759.27.

The interest rate will be 3.25% for years 1 through 5 beginning February 1, 2014, 4.250% for year 6 and 4.375% from year 7 until the date of maturity (January 1, 2036). Debtor will pay escrow off property taxes and property insurance, which is currently in the amount of $120.51. This amount will be adjusted periodically by lender as these expenses increase or decrease.

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

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 Lorie Dumont 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 Lorie Dumont ("Debtor") to amend the terms of the loan with Federal National Mortgage Association, as serviced by Seterus, Inc., which is secured by the real property commonly known as 8648 Coolwoods Way, Sacramento, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 39.

61. 10-35278-E-13 BSJ-3 RODNEY/SHEILA BORGESON Brandon Scott Johnston

MOTION TO REOPEN CASE AND SUBMIT DEBTOR'S 11 U.S.C. & 1328 CERTIFICATE AND MOTION TO SUBSTITUTE DECEASED PARTY 7-25-14 [59]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Notice Provided: The Interim Order Reopening the Case for the Limited Purpose of Conducting a Hearing on Motion to Reopen was served by the Clerk of the Court through the Bankruptcy Noticing Center on the parties on July 29, 2014. 7 days notice of the hearing was provided. Dckt. 66.

The Motion to Reopen Case is xxxx.

On October 4, 2013, the Clerk of the Court filed the Order Closing this Chapter 13 case without the entry of a discharge. Dckt. 57. No discharge was entered due to Debtors Rodney James Borgeson and Sheila Anne Borgeson failing to file form EDC 3-190 (§ 1328 certificate). The Chapter 13 Trustee's final report was approved and the Trustee discharged in this case. September 23, 2013 filed Order, Dckt. 56.

On July 25, 2014, Debtor Rodney James Borgeson filed an *ex parte* motion to reopen this case to (1) allow "her" to file a § 1328 certificate and a Motion to Substitute Deceased Party. Dckt. 59. On July 25, 2014, counsel for Rodney James Borgeson and Sheila Anne Borgeson filed a "Suggestion of Death Upon the Record" asserting that Debtor Sheila Anne Borgeson had died on November 19, 2012.

A Motion to Substitute Rodney James Borgeson as the personal representative for Sheila Anne Borgeson was also filed on July 25, 2014. Dckt. 62. The Motion states that Sheila Anne Borgeson died on November 19, 2012 (almost one year before the Chapter 13 case was closed). That upon her death, $50,000.00 in life insurance proceeds were received. The Motion, signed by Debtors' Counsel, states,

a. Funeral Home and Crematory was paid "approximately" $9,000.00 for mortuary services and "merchandise" expenses.

b. "I" paid Calvary Catholic Cemetery $22,000.00 for a crypt.

c. "I" paid Sutter Hospital $1,500.00 for hospital bills.

d. "I" spent approximately $1,500.00 on food and expenses for people who paid their final respects at the mortuary and at "my" home.

Before this court determines by final order that this case should be reopened and whether the Trustee should be reappointed, the court has determined that an initial hearing on the Motion is necessary. On its face, while the Debtors were in this bankruptcy case, Rodney James Borgeson took $50,000.00 of insurance proceeds received by the estate (*see* 11 U.S.C. § 1306) and spent that money on a funeral. This included paying $22,000.00 for a crypt, $12,000.00 for other funeral expenses, and $16,000.00 unaccounted for by this Debtor.

The bankruptcy case having been closed for almost nine months, and all of the debts subject to the discharge predating the June 2010 filing, the court is unsure as to (1) whether the Debtor has determined that the reopening of this case is proper and (2) whether the Trustee must be reappointed to investigate the $50,000.00 in insurance proceeds.

At the August 5, 2014 hearing, ----------.

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

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

The Motion to Reopen the Bankruptcy Case filed by Rodney Borgeson, the surviving 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 Reopen the Bankruptcy Case is ----------.