

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

August 13, 2013 at 3:00 p.m.

- 
1. [13-26200-E-13](#) NICOLE CHAMBERS COUNTER MOTION FOR RELIEF FROM  
IRS-2 Stephen N. Murphy JUDGMENT OR ORDER PURSUANT TO  
RULE 60(A) AND (B)  
7-30-13 [[67](#)]

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's Attorney, Chapter 13 Trustee and Office of the United States Trustee on July 30, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

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

**REVIEW OF COUNTER MOTION**

The Internal Revenue Service filed this Counter-Motion to confirmation of the proposed Chapter 13 Plan in this case. In this case the Internal Revenue Service asserts three claims - a secured claim, an unsecured priority claim, and a general unsecured claim. The prior order valuing the Internal Revenue Service's secured claim contained the standard form language stating that the amount of the secured claim in excess of the value of the collateral was to be a general unsecured claim to be paid through the Chapter 13 Plan. The Service asserts that merely because the claim is not secured does not mean that it is a general unsecured claim. The Internal Revenue Service asserts that some portion of the amount in excess of the value of the collateral is part of its unsecured priority claim.

August 13, 2013 at 3:00 p.m.

Though the bankruptcy case has been dismissed, the court vacates that portion of the prior order to the extent that it could be interpreted to make a determination of what constitutes the priority unsecured claim and the general unsecured claim of the Internal Revenue Service in this case.

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

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

The Motion to for Relief from Judgment having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and the order of this court filed on June 17, 2013 (Dckt. 31) is vacated to the extent that it provides for any amounts of the Claim of the Internal Revenue Service in this case in excess of \$118,253.00 is to be paid as a general unsecured claim through any plan in this case. The court makes no determination as to what portion, if any, of the amount in excess of \$118,253.00 constitutes a priority unsecured claim or a general unsecured claim for the Internal Revenue Service in this bankruptcy case.

2. [13-26200-E-13](#) **NICOLE CHAMBERS** **MOTION TO CONFIRM PLAN**  
**SNM-2** **Stephen N. Murphy** **6-28-13 [45]**

**Final Ruling:** The case having previously been dismissed, the Motion is denied as moot.

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

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

The Motion to Confirm Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied as moot, the case having already been dismissed.

3. [13-27501-E-13](#) WILLIAM/MYKELL MORGAN  
TSB-1 Eric John Schwab

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
7-18-13 [[24](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 18, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. §341. Attendance is mandatory. 11 U.S.C. §343.

Also, the Trustee argues that the Debtor has failed to provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. §521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3).

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

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

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

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

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

4. [13-27501-E-13](#) **WILLIAM/MYKELL MORGAN** **OBJECTION TO CONFIRMATION OF**  
**WFH-1** **Eric John Schwab** **PLAN BY SIERRA CENTRAL CREDIT**  
**UNION**  
**7-16-13 [21]**

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 July 16, 2013. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

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

Creditor Sierra Central Credit Union opposes confirmation of the Plan on the basis that Debtors have not classified Sierra Central in the proposed plan, but discuss treatment in the additional provisions depending on whether their claim is allowed. Creditor argues that although Debtors are challenging its lien, it should be classified in the plan pursuant to 11 U.S.C. § 1322. Debtors contend that if Creditor's lien is valid, they will later amend the plan to provide for it as a Class 2 creditor and will sell or refinance the real property by May 25, 2013. Creditor objects as the real property is not identified and the date has already passed. Creditor's counsel states that she conferred with Debtor's counsel and the date should be May 25, 2014.

Creditor also argues that Debtors do not provide for a scenario where they are unable to sell or refinance the real property to satisfy Creditor's claim. Creditor requests that the plan contain a reporting requirement on the

progress of a sale or refinancing efforts and a written update at the end of each quarter until its claim is paid in full with interest at a rate of 5.25%.

Based on a review of Creditor's Proof of Claim No. 2-1 (which amends Proof of Claim No. 1), Creditor Sierra Central Credit Union has asserted a valid claim in the amount of \$173,461.71. 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). Here, Debtor has not objected to the proof of claim, therefore, Debtor must provide for the claim in the proposed plan.

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

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.

5. [09-42703-E-13](#) JOHN/CHRISTINA VIZENOR  
JT-12 John A. Tosney

MOTION TO VALUE COLLATERAL OF  
GE CAPITAL RETAIL BANK  
7-16-13 [[143](#)]

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, respondent creditor, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

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

Debtor is the owner of real property commonly known as 2389 Kelsey Court, Yuba City, California. Debtor offers the Declaration of John Huynh, a licensed real estate appraiser with over 10 years' experience, who opines that the value of the property is \$225,000.00.

The first deed of trust secures a loan with a balance of approximately \$262,345.91. The second deed of trust secures a loan with a balance of approximately \$43,110.39. GE Capital Retail Bank's second deed of trust secures a loan with a balance of approximately \$60,471.98. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of GE Capital Retail Bank's secured by a third deed of trust recorded against the real property commonly known as 2389 Kelsey Court, Yuba City, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$225,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

6. [09-46803-E-13](#) **MINH DANG AND LOAN LAM** **MOTION FOR COMPENSATION FOR**  
**PGM-4** **Peter G. Macaluso** **PETER G. MACALUSO, DEBTORS'**  
**ATTORNEY(S), FEES: \$1,240.00,**  
**EXPENSES: \$0.00**  
**7-10-13 [[71](#)]**

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, respondent creditor, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

**The Motion for Compensation is granted.** No appearance required.

Law Offices of Peter G. Macaluso, Counsel for Debtor, seeks additional attorney fees in the amount of \$1,240.00. Counsel argues that these additional fees are actual, reasonable, necessary and unanticipated as post-confirmation work required.

## **Description of Services for Which Fees Are Requested**

1. Additional of 2009 taxes under 11 U.S.C. § 1305 claim. Counsel suggests this was unanticipated, as Debtor requested that the 2009 post-petition taxes be added to the plan; and

2. To address a Motion to Dismiss, counsel assisted with a Motion to Modify Plan. Counsel suggests this was unanticipated as an application to dismiss case was received from the Trustee.

The hourly rates for the fees billed in this case are \$200.00/hour for counsel for 6.2 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 \$1,240.00 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 \$ 1,250.00.

7. [11-21604-E-13](#) WAYNE/REBECCA PINCKARD MOTION TO APPROVE LOAN  
DMA-1 David M. Alden MODIFICATION  
7-11-13 [[38](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

**The Motion to Approve the Loan Modification is granted.** No appearance required.

Debtors are the owners of the real property commonly known as 5338 Bramble Way, Sacramento, California. CitiMortgage, Inc., whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment from the current \$1,200 to \$1,039.23. The modification will capitalize the pre-petition arrears and provides an interest rate of 2.375%.

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

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

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

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

**IT IS ORDERED** that Debtors Wayne and Rebecca Pinckard are authorized to amend the terms of their loan with CitiMortgage, Inc., which is secured by the real property commonly known as 5338 Bramble Way, Sacramento, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A" Docket Entry No. 41, in support of the Motion.

8. [13-27413-E-13](#) **CHRISTINA BASHAW** **MOTION FOR COMPENSATION BY THE**  
**CA-1** **Michael David Croddy** **LAW OFFICE OF CRODDY AND**  
**ASSOCIATES, P.C. FOR MICHAEL**  
**DAVID CRODDY, DEBTOR'S**  
**ATTORNEY(S), FEE: \$2,050.86,**  
**EXPENSES: \$0.00.**  
**7-23-13 [[14](#)]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

**The court's tentative decision is to continue the hearing on the Motion for Compensation** to 3:00 p.m. on -----, 2013. Counsel shall file and serve on or before -----, 2013, supplemental pleadings (1) providing the task billing analysis; (2) billing statements for all fees and expenses relating to services provided to this Debtor in connection with consultation, investigation, preparation, filing, and prosecution of this bankruptcy case; and (3) testimony or other evidence properly authenticating documents and attesting to the truthfulness of the information therein. The supplemental pleadings shall be filed and served on the Chapter 13 Trustee, U.S. Trustee, and any other party requesting special notice in this bankruptcy case. . Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

## **FEES REQUESTED**

Croddy & Associates, P.C., Counsel for Debtor, files an Application for the Allowance of Additional Fees and Expenses in this case. Counsel requests the court approve \$2,050.86 in "additional fees and costs" in this Chapter 13 case for services provided from February 21, 2013 through July 3, 2013. The total fees relating to this Chapter 13 case for which Counsel is to be paid is \$3,326.86. Prior to the commencement of the case Counsel was paid \$1,276.00. Billing statements for the pre-petition fees and post-petition fees are presented to the court as Exhibits "B" and "C." However the "Billing Statement" for the pre-petition fees is merely a form in which the Debtor acknowledges that he has paid \$995.00 in fees to Counsel and an additional \$281.00 in expenses. There is no detailed billing statement for the \$1,281.00 in fees which counsel wants to have approved and paid for representing the Debtor in this Chapter 13 case. The fees relating to this case paid pre-petition have not yet been approved by this court.

The Local Bankruptcy Rules expressly address the process by which an attorney may seek approval of fees for representing a Chapter 13 debtor. Local Bankruptcy Rule 9012-1(a) and (b) provide,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.

(b) Court Approval Required. After the filing of the petition, a debtor's attorney shall not accept or demand from the debtor or any other person any payment for services or cost reimbursement without first obtaining a court order authorizing the fees and/or costs and specifically permitting direct payment of those fees and/or costs by the debtor.

Congress addressed the pre and post-petition fees of counsel for a debtor for services relating to a bankruptcy case.

§ 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in

connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to-

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. § 329.

No disclosure as to what services were provided for the \$1,281.00 received by Counsel, the court cannot determine if it exceeds the reasonable value of the services and whether "additional" fees are warranted.

#### **FAILURE TO PROVIDE TASK BILLING ANALYSIS**

Debtor provides a break down of pre-confirmation expenses, with no post-confirmation fees or expenses. However, counsel does not explain what services were substantial and unanticipated in the work laid out.

In seeking the approval of fees, the court requires that counsel provide a task billing analysis in which the various activities, time charged, and fees by task area is provided. These can include Administrative Work (such as applications to employ, communicating with the Clerk's office for procedure, and the organizational activities of counsel); motions for relief from the stay; motions for sale, use or lease of property, for obtaining credit, or abandoning property; preference and avoiding adversary proceedings, other adversary proceedings; plans, disclosure statements, and confirmation; and the like. Within each of the task areas a brief description is provided and the time and fees relating to those items.

The Motion includes counsel's raw time records, in which all of the activities are mixed together, leaving it for the court to mine the document to construct a task billing analysis for counsel. The court declines the opportunity, leaving it to counsel who intimately knows the work done and his billing system to correctly assemble the information. FN.1.

-----  
FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young association (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced

so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different task areas.

-----

**REVIEW OF MOTION**

Counsel has filed his motion seeking the allowance of fees and expenses, which states with particularity (Fed. R. Bank. P. 9013), the following grounds:

- a. The Motion purports to also be a declaration by counsel. Declarations are filed as separate pleadings from the motion, other declarations, points and authorities, and the exhibits. [Commonly, the exhibits are filed a one separate pleading as the "exhibits to motion," rather than separate documents consisting of "exhibits to motion," "exhibit to declaration 1," exhibits to "declaration 2," "exhibits to declaration 3," and "exhibits to points and authorities." The court working in a near paperless environment, combining the motion with points and authorities, with multiple declarations, with multiple exhibits (which in the past has resulted in a more than hundred page electronic document) creates an unworkable electronic document which leads to unnecessary confusion and the court performing legal assistant work in properly reassembling document for the attorney.]
- b. Though not clearly stated in the Motion, the title includes the reference that Counsel has opted-out of the no-look fee allowance procedure allowed by the Local Bankruptcy Rules in Chapter 13 cases.
- c. Counsel state that he has spent time performing the following services,
  - i. Met with Debtor,
  - ii. Document Preparation & Filing,
  - iii. Attendance of First Meeting of Creditors.
- d. Counsel filed the bankruptcy case on May 31, 2013.
- e. Time and Expenses for which compensation and reimbursement sought.

Person Performing Work	Hourly Rate	Time	Total
Senior Attorney	\$375.00	6.00	\$2,250.00

Associate Attorney	\$275.00	0.00	\$0.00
Legal Assistant	\$125.00	5.50	\$687.50
Clerical		0.00	\$0.00
<b>Expenses</b> Items			
	Method of Computing		Total Expense
Expenses			\$389.36

- f. The Debtor wished to file a Chapter 13 case due to high income and debt.
- g. Work performed confirming that Chapter 13 plan and post-confirmation, "(1) None, Explanation: None."
- h. Counsel has been retained and served as attorney since November 8, 2010.
- i. Prior to filing of the case Counsel received \$1,276.00 [presumably from or for the benefit of Debtor for legal services provided to the Debtor].
- j. No prior fees and expenses have been allowed by the court in this case.
- k. To date Counsel has been paid \$0.00 by the Chapter 13 Trustee or through the Debtor's Chapter 13 Plan.
- l. Counsel provides a two paragraph citation and authorities in the "MOCLARATION" (a combined "Motion-Declaration" pleadings."

Counsel has provided his separate declaration in support of the Motion. The Declaration appears to be substantially the same text as used in the Motion. While making reference to the Fee Agreement (Exhibit "A"), Billing Statement (Exhibit "B"), and Report of Time and Expenses (Exhibit "C"), the witness does not (1) authenticate the documents, (2) state under penalty of perjury that they are true and accurate copies of the original documents, nor (3) state under penalty or perjury that the information in the documents is true and correct. FN.2.

-----  
 FN.2. One could argue, "Look judge, you know I wouldn't lie, you know that when I said here are the documents, I am giving you true and accurate copies of the documents. You are just wasting an attorneys' time in making them comply with the Local Rules and provide clear evidence for such "simple" motions." First, it is never the case of whether the court "trusts" the attorney or witness before the court when requiring the proper presentation of evidence. Rather, the court evenly and equally applies the law and rules to all parties and their counsel, notwithstanding how experienced and well

respected (as is Counsel seeking fees for the present Motion) is the attorney or witness. As to applying the rules, this court does not have secret, unwritten exceptions to the rules, forcing attorneys to guess when they have to comply with the law or rules, or when they can cut the corner and ignore the law or rules.

Counsel should consider the fair and equal application of the rules to other motions presented to the court. Just with respect to fees, if the court is going to provide consumer attorneys with legal services in preparing task billing analyzes, then why shouldn't the court do it for a more complicated \$10,000, \$30,000, or \$100,000 interim fee application involving several hotly contested matters, adversary proceedings, contested disclosure statement hearings, and motions to convert or dismiss. Then the attorney with the \$10,000 fee application is convinced that the court unfairly applies the rules, and the consumer attorney "gets his/her motions granted for whatever they ask because the court grants special favors to him/her."

-----

In addition to the task billing analysis, the Motion and supporting pleadings provide the court with no idea as to what has been done in this case and why \$3,326.86 in fees is reasonable. The court is not told who the attorneys are who have worked on and billed to this file, their experience, or information necessary to determine if the requested hourly billing rate is reasonable for the actual services provided. Exhibit "C" consists of the gross billing records. At the end is a list of attorneys and legal assistant stating their hourly rates and time for which fees are sought. While the court recognizes the name of the senior attorney, Counsel should not assume that merely because the court knows experienced counsel that he does not have to provide the basic information necessary to determine fees.

The raw time records do include a description of the task relating to each time entry, which are not organized by task areas. Additionally, the descriptions are squished into separate boxes on the right hand side of the page. Examples include,

IRD: (Input Raw Data) [1.50hours/ No Charge] INPUT RAW DATA Analyzed the data provide by D1 for completeness and internal consistency. Moved data where necessary from the answers in the homework packet to the appropriate locations in BestCase. Entered the information provided by D1 into BestCase and developed a follow up list of questions
---

WC: (Work on Case) Worked on case. INITIAL calculations and analysis on creating the Chapter 13 Plan, Income and Expenses (Schedules I & J), and the Means Test (Form 22). Through and detailed work up based on pay stubs, and Tax Returns. Developed a follow up list of information and documents to request from D1.

WC: (Work on Case) Work on case. ADDITIONAL calculations and analysis on creating the Chapter 13 Plan, Income and Expenses (Schedules I & J) and the Means Test (Form 22). Through and detailed work up based on pay stubs, and Tax returns. Developed a follow up list of information and documents to request from D1.

WC: (Work on Case) Work on case. FINAL calculations and analysis on creating the Chapter 13 Plan, Income and Expenses (Schedules I & J) and the Means Test (Form 22). Through and detailed work up based on pay stubs, and Tax returns. Developed a follow up list of information and documents to request from D1.

Not only does this require the court to tease out the work done and determine (and then state) for counsel the tasks to which they relate, but the text is in a difficult form to read and contains what appears to be stock, repetitive language.

#### **EXPENSES**

Counsel requests that the court approve \$389.36 in expenses, without any explanation as to what constitutes such expenses. Most likely, they are reasonable and necessary expenses. However, counsel may be charging \$1.00 a page for photocopies, \$1.00 (plus fees) for each email, and \$5.25 a page for facsimiles. The court does not blindly approve either fees or expenses, even for experienced and well respected consumer attorneys such as Counsel.

#### **RULING**

Because this appears to be one of the first time Counsel has presented fee applications to this court, the hearing is continued to 3:00 p.m. on -----, 2013. Counsel shall file and serve on or before -----, 2013, supplemental pleadings (1) providing the task billing analysis; (2) billing

statements for all fees and expenses relating to services provided to this Debtor in connection with consultation, investigation, preparation, filing, and prosecution of this bankruptcy case; and (3) testimony or other evidence properly authenticating documents and attesting to the truthfulness of the information therein. The supplemental pleadings shall be filed and served on the Chapter 13 Trustee, U.S. Trustee, and any other party requesting special notice in this bankruptcy case.

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

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

The Motion for Allowance of Additional Fees and Expenses filed by Law Office of Croddy & Associates, P.C., Counsel for 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 is continued to 3:00 p.m. on -----, 2013. Counsel shall file and serve on or before -----, 2013, supplemental pleadings (1) providing the task billing analysis; (2) billing statements for all fees and expenses relating to services provided to this Debtor in connection with consultation, investigation, preparation, filing, and prosecution of this bankruptcy case; and (3) testimony or other evidence properly authenticating documents and attesting to the truthfulness of the information therein. The supplemental pleadings shall be filed and served on the Chapter 13 Trustee, U.S. Trustee, and any other party requesting special notice in this bankruptcy case.

9. [13-24815-E-13](#) HUBERTO/NORMA AGUILAR MOTION TO CONFIRM PLAN  
TOG-2 Thomas O. Gillis 6-28-13 [41]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 28, 2013. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Trustee opposes confirmation offering evidence that the Debtor is \$503.00 delinquent in plan payments, which represents multiple months of the \$301.00 plan payment. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

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

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

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

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

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

10. [13-27917-E-13](#) MARKO/RADMILA LUKIC OBJECTION TO CONFIRMATION OF

**Final Ruling:** The Chapter 13 Trustee having filed a "Withdrawal of Objection" for the pending Objection to Confirmation of Plan, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Objection" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Objection to Confirmation, and good cause appearing, **the court dismisses without prejudice the Chapter 13 Trustee's Objection to Confirmation.**

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.

An Objection to Confirmation having been filed by the Chapter 13 Trustee, the Chapter 13 Trustee having filed an ex parte motion to dismiss the Objection without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Objection being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation is dismissed without prejudice.

11. [09-41828-E-13](#) SANTIAGO SANCHEZ  
DBJ-5 Douglas B. Jacobs

MOTION TO MODIFY PLAN  
7-3-13 [[79](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

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

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

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 3, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

12. [13-29328-E-13](#) RANA DOMONDON MOTION TO EXTEND AUTOMATIC STAY  
RHM-1 Robert Hale McConnell 7-16-13 [8]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

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

Debtor seeks an extension of the automatic stay in this case. The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. Debtor filed a first petition for relief under Chapter 13 of the bankruptcy code on [no date stated]
- B. The first case was dismissed on July 3, 2013.
- C. This second case was filed on July 16, 2013.
- D. As set forth in the Declaration of Debtor, debtor's circumstances have changed since the first case in a positive manner as required by Section 361 of the Bankruptcy Code.

The Motion 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 request that the court search through other documents in order to find the required elements for relief. 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."

#### **CONSIDERATION OF DECLARATION**

Debtor states that in her previous Chapter 13 case she relied upon a paralegal in Hayward, California and she did not understand the process or what the court was requested. Debtor filed the case in pro per. Debtor states that she has now located counsel in the city in which she lives and believes she now understands the process much better. Debtor is attempting to apply for a loan modification with her lender and believes she has the ability to properly fund this case. Debtor states that her children who live with her understand they will have to pay some of the expenses, rather than she and her husband.

#### **DISCUSSION**

This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior Chapter 13 bankruptcy case (No. 13-20206) was dismissed on July 3, 2013 for failure file a Chapter 13 plan and well as a Form 22C. See Order, Bankr. E.D. Cal. No. 13-20206 Dckt. 56, June 26, 2013. 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 Debtor 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).

Here, Debtors allege that she has now obtained an attorney, when she filed her previous case in pro per, she is attempting a loan modification and that her live-in children plan on contributing to the household expenses. This is sufficient to explain the adjustments made since the prior case was dismissed and how this will lead to a successful completion.

The Debtor has offered clear and convincing evidence to rebut the presumption of bad faith. Debtor has demonstrated a change in circumstances from the last filing that indicates to the court the Debtors will be successful in completing a plan.

The motion 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 Extend the Automatic Stay filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes, unless terminated by further order of this court.

13. 11-42631-E-13 MINH TRAN  
PGM-3 Peter G. Macaluso

MOTION TO MODIFY PLAN  
7-8-13 [[101](#)]

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 July 8, 2013. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

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

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 8, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

14. 11-45031-E-13 KENNETH/POLLY DAVIS  
DBJ-3 Douglas B. Jacobs

MOTION TO MODIFY PLAN  
7-3-13 [54]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 41 days' notice was provided. 35 days' notice is required.

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

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

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 3, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

15. [13-25332-E-13](#) **TIMOTHY/TRACI SHIELDS** **MOTION TO VALUE COLLATERAL OF**  
**DBJ-2** **Douglas B. Jacobs** **WELLS FARGO BANK, N.A.**  
**6-20-13 [32]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on June 20, 2013. By the court's calculation, 54 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 1467 Colonial Drive, Chico, California. The Debtor seeks to value the property at a fair market value of \$255,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$314,000.00. Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately \$28,000.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 1467 Colonial Drive, Chico, 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 \$255,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

16. [13-25635-E-13](#) **JEFFREY BRADFORD** **MOTION TO CONFIRM PLAN**  
**ACW-1** **Andy C. Warshaw** **6-20-13 [25]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 20, 2013. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

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

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

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

#### **SERVICE**

Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified:

**LOCAL RULE 2002-1  
Notice Requirements**

**(a) Listing the United States as a Creditor; Notice to the United States.** When listing an indebtedness to the United States for other than taxes and when giving notice, as required by FRBP 2002(j)(4), the debtor shall list both the U.S. Attorney and the federal agency through which the debtor became indebted. The address of the notice to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:

**For Cases filed in the Sacramento Division:**

United States Attorney  
(For [insert name of agency])  
501 I Street, Suite 10-100  
Sacramento, CA 95814

**For Cases filed in the Modesto and Fresno Divisions:**

United States Attorney  
(For [insert name of agency])  
2500 Tulare Street, Suite 4401  
Fresno, CA 93721-1318

. . .

**(c) Notice to the Internal Revenue Service.** In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:

- (1) United States Department of Justice  
Civil Trial Section, Western Region  
Box 683, Ben Franklin Station  
Washington, D.C. 20044
- (2) United States Attorney as specified in LBR 2002-1(a) above; and,
- (3) Internal Revenue Service at the addresses specified on the roster of governmental agencies maintained by the Clerk.

The proof of service lists only the following addresses as those used for service on the Internal Revenue Service:

Internal Revenue Service  
Centralized Insolvency Operations  
PO Box 7346  
Philadelphia PA 19101-7346

The proof of service states that the addresses used for service are the preferred addresses for the Internal Revenue Service specified in a Notice of Address filed by that governmental entity.

A motion is a contested matter. See Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all three addresses, and service was therefore inadequate.

#### **CREDITOR'S OBJECTION**

Wells Fargo Bank, N.A. opposes the motion on the basis that the proposed plan does not provide for curing the default on its secured claim. Debtor states he is seeking a loan modification to cure the pre-petition arrears but Creditor has no confirmation that Debtor is under review for a loan modification.

However, Creditor has not offered any evidence in support of their opposition nor is there a Proof of Claim filed from which the court can determine the amount of arrears.

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

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

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

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

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



17. [13-27835-E-13](#) JEFFREY/MONICA JACKSON MOTION TO VALUE COLLATERAL OF  
RWH-2 Ronald W. Holland SPECIALIZED LOAN SERVICING, LLC  
7-11-13 [[20](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

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

Debtor seeks to value the collateral of Specialized Loan Servicing, LLC.

However, there has been no showing that Specialized Loan Servicing, LLC ("Specialized") is the creditor or agent for service of process for the actual creditor. On the first page of the proof of claim form (the electronic input form used by the creditor) the creditor is named as Specialized Loan Servicing, LLC. The first attachment to the proof of claim electronic form is a Official Form 10 proof of claim in which the creditor is named as "U.S. Bank National Association, as Trustee, relating to Home Equity Mortgage Trust Series 2007-2, Home Equity Mortgage Pass-Through Certificates, Series 2007-2." Proof of Claim 4-1, attachment 1. This first attachment is 20 pages in length and includes the Mortgage Proof of Claim Attachment (Form B 10, Attachment A). On this form the creditor is again listed as "U.S. Bank National Association, as Trustee, relating to Home Equity Mortgage Trust Series 2007-2, Home Equity Mortgage Pass-Through Certificates, Series 2007-2." This clearly states that Specialized Loan Servicing, LLC is not the creditor.

While it is obvious that the Debtor has relied on the statement under penalty of perjury by Specialized that it is the "creditor," such statement appears to be false in that on the attachment Specialized states under penalty of perjury that U.S. Bank, N.A., as Trustee, is the actual creditor. The false statement on the Proof of Claim could well mislead a debtor and debtor's attorney to obtain an ineffective order valuing a claim. When loan servicing companies create the false impression that they are a creditor, it causes the court concern that the servicing company and creditor could well be engaging

in a conspiracy to try and deprive debtors and the court obtaining effective *in personam* jurisdiction over the creditor.

The court will not knowingly enter an order valuing the "claim" of a loan servicing company which is not a creditor in the case. Specialized is merely a debt collection service provider for the actual creditor. The court entering an order purporting to value a secured claim of Specialized Loan Servicing, LLC will be of no material effect to the claim of the actual creditor, and would do harm to the Debtor and Debtor's counsel (who is seeking such an order).

The court will issue a separate Order to Show Cause for Specialized Loan Servicing, LLC, to show cause as to why the court should not conduct an evidentiary hearing concerning the Proof of Claim filed by Specialized Loan Servicing, LLC, representing themselves as a creditor in this case and the accuracy of the information provided in the Proof of Claim. The court shall also consider what corrective sanctions may be appropriate to correct this conduct of Specialized Loan Servicing, LLC in misrepresenting that it is a "creditor" in the bankruptcy case.

The court not having before it a creditor who has a secured claim to be valued, the Motion is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.



18. [13-27835-E-13](#) JEFFREY/MONICA JACKSON  
TSB-1 Ronald W. Holland

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID CUSICK  
7-18-13 [[27](#)]

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 18, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan relies on a pending Motion to Value Collateral. The court having denied the motion to value collateral without prejudice, the court sustains the Trustee's objection on this basis.

The Trustee also objects on the basis that the plan is not the Debtor's best effort, as the monthly unemployment income of \$1,950.00 is listed for Monica Jackson, when Debtor testified at the First Meeting of Creditors that she is now working and earning a gross income of approximately \$3,000.00 per month. Trustee argues that Debtors have additional income which should be paid into the plan.

Lastly, the Trustee states that Debtors' Schedule J fails to list expenses for property taxes and insurance. Trustee states Debtors testified that the property taxes are included in the mortgage payment, but the insurance is paid separately and amounts to \$700.00 per year, which is not included in their budget.

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.

19. [13-25737-E-13](#) **EDDIE/JACKYE RAIGER** **MOTION TO VALUE COLLATERAL OF**  
**CAH-2** **C. Anthony Hughes** **WELLS FARGO BANK, N.A.**  
**7-11-13 [26]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 403 Unity Court, Roseville, California. The Debtor seeks to value the property at a fair market value of \$330,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$458,262.45. Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately \$152,909.91. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. See 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 403 Unity Court, Roseville, 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 \$330,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

20. [13-27337-E-13](#) ELIAS/ETIENNETTE  
DJC-2 VILLASENOR  
Diana J. Cavanaugh

MOTION TO VALUE COLLATERAL OF  
SANTANDER CONSUMER USA, INC.  
7-13-13 [[23](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 13, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of a 2007 Chrysler Pacifica Limited Minivan 4DR. The Debtor seeks to value the property at a replacement value of \$11,950.00 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).

However, Debtor has not established that underlying debt is not a purchase-money loan acquired within the 910-day period prior to the filing of the petition. If so, Debtor is statutorily unable to prevail on this motion to value collateral pursuant to 11 U.S.C. §1325(a)(\*). The Debtor has not stated the prima facie case for the requested relief. See Fed. R. Bankr. P. 9013. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

21. [13-27337-E-13](#) ELIAS/ETIENNETTE MOTION TO VALUE COLLATERAL OF  
DJC-3 VILLASENOR SCHOOLS FINANCIAL CREDIT UNION  
Diana J. Cavanaugh 7-13-13 [27]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 13, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of a 2003 Cadillac Escalade sporty utility 4DR. The Debtor seeks to value the property at a replacement value of \$11,090.00 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).

However, Debtor has not established that underlying debt is not a purchase-money loan acquired within the 90-day period prior to the filing of the petition. If so, Debtor is statutorily unable to prevail on this motion to value collateral pursuant to 11 U.S.C. §1325(a) (\*). The Debtor has not stated the prima facie case for the requested relief. See Fed. R. Bankr. P. 9013. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

22. [13-27337-E-13](#) **ELIAS/ETIENNETTE** **MOTION TO VALUE COLLATERAL OF**  
**DJC-4** **VILLASENOR** **QUANTUM3 GROUP, LLC**  
**Diana J. Cavanaugh** **7-13-13 [31]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 13, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of a woman's wedding ring. The Debtor seeks to value the property at a replacement value of \$2,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

However, Debtor has not established that underlying debt is not a purchase-money loan acquired within the one year period prior to the filing of the petition. If so, Debtor is statutorily unable to prevail on this motion to value collateral pursuant to 11 U.S.C. §1325(a)(\*). The Debtor has not stated the prima facie case for the requested relief. See Fed. R. Bankr. P. 9013. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is denied without prejudice.

Creditor Sterling Jewelers, Inc. and its agent, Quantum3 Group LLC ("Creditor") filed an opposition, disputing the Debtor's valuation of \$2,000.00. Creditor states that on December 29, 2012, Debtor purchased a

14karat white gold engagement ring for \$4,229.98, not including interest, and within one year of the bankruptcy filing. Creditor states it has filed a timely proof of claim in the amount of \$3,786.84. Creditor argues that Debtors cannot cram down PMSI liens on household goods purchased within one year prior to the bankruptcy, pursuant to the hanging paragraph of 11 U.S.C. § 1325.

The purchase date of December 29, 2012 and the date of the petition May 29, 2013 is approximately 151 days. This falls outside of the time required by 11 U.S.C. §1325(a) (\*) and 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 for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied.

23. [13-27337-E-13](#) **ELIAS/ETIENNETTE** **MOTION TO VALUE COLLATERAL OF**  
**DJC-5** **VILLASENOR** **BANK OF AMERICA, N.A.**  
**Diana J. Cavanaugh** **7-13-13 [35]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 13, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of a 2008 Chrysler Sebring LX sedan 4DR. The Debtor seeks to value the property at a replacement value of \$6,335.00 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).

However, Debtor has not established that underlying debt is not a purchase-money loan acquired within the 910-day period prior to the filing of the petition. If so, Debtor is statutorily unable to prevail on this motion to value collateral pursuant to 11 U.S.C. §1325(a)(\*). The Debtor has not stated the prima facie case for the requested relief. See Fed. R. Bankr. P. 9013. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

24. [09-44339-E-13](#) **GLEN PADAYACHEE**  
**PLC-13** **Peter L. Cianchetta**

**OBJECTION TO NOTICE OF MORTGAGE  
PAYMENT CHANGE**  
7-1-13 [[135](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 1, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

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

Debtor objects to the Notice of Mortgage Payment Change filed by U.S. Bank, N.A. Debtor states the Notice of Mortgage Payment Change filed is not supported by the backup included with the Notice. Debtor states that the payment the Trustee has been paying prior to receipt of this Notice of Mortgage Payment Change has been \$1,643.16. Debtor states that he cannot determine why the mortgage payment was increased because there is no purported change in the escrow and (2) the Debtor asserts that the interest rate on the Note which underlies the claim is fixed.

Debtor also alleges that he has been charged with Attorney Fees and for "property preservation" without notice.

Debtor provides his Declaration as evidence, stating he does not understand the increase in payment and that the Notice of Mortgage Change does not provide sufficient explanation as to the increase in payment. However, this is the only admissible evidence provided in support of the Motion. While the court can consider the Notice of Mortgage Payment Change, Proof of Claim No. 5, and the prior Civil Minute Order - as they are part of the present record - the other Exhibits included in support of the motion are unauthenticated.

The Notice of Mortgage Payment Change states that the principal and interest payment has been decreased from \$2,076.78 to \$2,017.30, based on an adjustment to the interest rate in the Debtor's variable-rate note. Notice of Mortgage Payment Change filed March 1, 2013, no Docket Number. This is

supported by an Adjustable Loan Notification letter sent to the Debtor December 12, 2012.

**Review of Payment Change and Debtor's Arguments**

The Debtor states that his current mortgage payment is \$1,643.16, and that he makes an insurance payment directly to Farmers Insurance for this property. He does not testify as to the amount of this payment. The Debtor further testifies that (1) his property taxes have not increased for this next year and (2) the interest rate for his loan has decreased slightly.

The Notice of Mortgage Payment Change (Exhibit 1, Dckt. 137) provides the following information.

Current Interest Rate:	2.8658%	New interest Rate:	2.8717%
Current Principal and Interest Payment:	\$2,076.79	New Principal and Interest Payment:	\$2,017.30
		New Total Payment, Principal, Interest, and Escrow, If Any	\$2,017.30

Attached to the Notice of Mortgage Payment Change is a December 26, 2012 letter from U.S. Bank, N.A. stating that the \$2,017.30 in principal, interest, and an impound payment of \$496.95. The "impound portion" is not identified and no method of what "expense" or other payment item to which it relates is disclosed.

The Notice of Mortgage Payment Change which states that the New Principal and Interest payment is \$2,017,30 is incorrect. Clearly, to get to this number, based upon the attachment to the Notice, this amount also includes an "impound" (for an unstated purpose) of \$496.95. When this "impound" (for an unstated purpose) is subtracted from the \$2,017.30 misstated principal and interest payment amount, the actual principal and interest payment being stated by U.S. Bank, N.A. is \$1,520.35. This is in line of what the Debtor states was the prior payment of \$1,643.16 being made by the Chapter 13 Trustee through the plan.

Though U.S. Bank, N.A. has been served with this Objection and provided 44 days notice, it has not filed any reply or provided an explanation as to why and how it computes a \$2,017.30 monthly payment from this Debtor.

Based upon the evidence provided and the Notice of Mortgage Payment Changed filed by U.S. Bank, N.A. on March 1, 2013, the correct amount of the monthly principal and interest payment on its secured claim in this case is \$1,520.35. No basis has been provided for this court to determine that a monthly "impound" payment of \$496.95 is proper. The Chapter 13 Trustee shall make the monthly principal and interest payment of \$1,520.35 to U.S. Bank, N.A. on its secured claim in this case.

In addition, based on Exhibit 4 provided by the Debtor, the property taxes for this property, which are paid through the Creditor, are \$4,449.84 a month. This averages \$370.82 a month. While not stated by U.S. Bank, N.A. in the Notice of Mortgage Payment Change, it is paying the property taxes through escrow. The Debtor does not state in his declaration that he is paying the property taxes directly (as he does for the property insurance).

On Schedule J the Debtor computes his Monthly Net Income to be \$2,556.51. Dckt. 1 at 23. The Expenses on Schedule J do not include any amount for payment of the U.S. Bank, N.A. secured claim or property taxes. It states that property taxes are included as part of the monthly mortgage payment. It further states that the property insurance is not included as part of the monthly mortgage payment.

The confirmed Second Amended Chapter 13 Plan in this case requires a monthly plan payment of \$2,396.50. Plan, Dckt. 71. In confirming the Second Amended Plan, the Debtor relied on the expense information provided in Schedule J. Declaration ¶ 3(g), Dckt. 70.

In addition to the payment of \$1,520.35 for the principal and interest payment, the Trustee shall also disburse \$370.82 a month to U.S. Bank, N.A. as the monthly impound for property taxes for the property which secures the U.S. Bank, N.A. claim, which monies U.S. Bank, N.A. shall then use to timely pay such property taxes from the impound.

The monthly payment of \$1,891.17 is consistent with the amount as stated in the Adjustable Loan Notification dated December 26, 2012 (Notice of Mortgage Payment Change, Exhibit 1), from U.S. Bank, N.A. to the Debtor, stating that the principal and interest payment changes on February 1, 2013.

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 Notice of Mortgage Payment Change 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 Objection to the Notice of Mortgage Payment Change (filed March 1, 2013) is sustained and the amount of the monthly mortgage payment due U.S. Bank, N.A. on its claim secured by the real property commonly known as 9779 Ametrine Court, Elk Grove, California is \$1,891.17, effective February 1, 2013 (the date stated in the Notice of Mortgage Payment Change and the December 26, 2012 Adjustable Loan Notification, Exhibit 1). This amount is comprised of a \$1,520.35 monthly principal and interest payment, and a \$370.82 monthly impound payment for the payment of the real property taxes for the Ametrine Court Property.



26. 09-34545-E-13 ERIC REESE  
EJS-1 Eric John Schwab

MOTION TO SELL  
7-19-13 [37]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2013. By the court's calculation, 25 days' notice was provided. 21 days' notice is required.

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

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

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

Here, the Debtor proposes to sell his business, Freeport Cleaners, located at 2001 4<sup>th</sup> Avenue, Sacramento, California. The sales price is \$300,000.00 and the named buyer is Young Jin Choi. Debtor asserts that there will be funds leftover from the sale to pay 100% dividend to all creditors and if the sale is approved, he will amend the plan to pay allowed claims in full. The terms are set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 40.

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

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

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

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

**IT IS ORDERED** that the Debtor's proposed sale of the business and the equipment, described as business, Freeport Cleaners, located at 2001 4<sup>th</sup> Avenue, Sacramento, California, to Young Jin Choi for \$300,000.00 on the terms described in Exhibit A filed in support of the Motion, Dckt. 40, is granted.

27. [12-40945-E-13](#) **MANSOUR/MARTHA GANJI** **MOTION TO CONFIRM PLAN**  
**PGM-3** **Peter G. Macaluso** **7-1-13 [56]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 1, 2013. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

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

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 1, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

28. [12-41047-E-13](#) **ELI BAYER** **MOTION TO MODIFY PLAN**  
ULC-1 **Julie B. Gustavson** 7-8-13 [[22](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 8, 2013. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

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

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 8, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

29. [13-26347-E-13](#) ROY/DAWN MARTIN AMENDED MOTION TO CONFIRM PLAN  
SAC-1 Scott A. CoBen 7-18-13 [[31](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 27, 2013. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

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

The Trustee objects on the basis that the Debtors may not be able to make plan payments. Trustee argues that the prior plan called for payments of \$385.00 for 36 months, with the surrender of the collateral of Bank of America (2002 Trek RV) and Bank of the West (2006 Meridian RV). The Debtors have now proposed a plan to surrender only the collateral of Bank of America (2002 Trek RV) and propose to pay \$703.00 per month to retain the collateral of Bank of the West (2006 Meridian RV). In addition, Debtors filed current statements of income and expense, showing in IRA draw of \$750.00, without explanation. The

Trustee argues where the Debtors have changed their minds once over whether to keep collateral and filing a Schedule J showing no payments were being made or were to be made on the collateral, the Trustee is not certain if the Debtor really has the ability to make the payments.

The Trustee also argues that the plan may unfairly discriminate against general unsecured creditors in favor of the unsecured claim of the collateral of Bank of the West. Schedule A states the secured value is \$85,000.00 and the total claim is approximately \$90,000.00. The claim filed asserts a secured claim of \$89,581.44, but reveals a total purchase price of \$109,500.00 and a purchase date of 9/18/09. Trustee argues that the unsecured claim of Bank of the West will be paid in full either under the plan or after the plan, while unsecured creditors only receive 14%.

**DEBTOR'S REPLY**

Debtors respond, stating that the original Schedules I & J were inaccurate. Debtors always intended to keep their 2006 Meridian RV and their budget has been corrected to provide for this expense. Debtors plan on utilizing an exempt retirement asset, Mr. Martin's IRA, to make payments on the 2006 Meridian RV. Debtor asserts this may not be the most prudent financial decision, but Debtor is in his 70s and traveling is very important to them.

Debtor state this is the reason they moved the Bank of the West from surrender to Class 4 pay direct. In order to do this, Debtor will withdraw from his IRA to cover the monthly payment for the RV and related insurance payment, for a total of \$772.00 per month. The insurance is \$69.00 per month and the payment is \$703.00 per month.

Debtors state they will be able to make the RV and mortgage payments for the 36 month plan period.

Debtors also argue that 11 U.S.C. § 1322(b)(1) does not apply to secured claims, which the claim of Bank of the West is secured. Debtors state that 11 U.S.C. § 1322(b)(5) authorizes payment of long term debts which are not discharged.

**DISCUSSION**

The Debtors have now amended Schedule I to state that their income as of the commencement of the case was \$5,334.00 gross (no deductions for taxes). Of this, the Debtors are receiving \$2,657.00 in Social Security Benefits ("net"), \$1,927.00 in pension or retirement, and \$750.00 in a draw from an 401K account. Both Debtors state that they are retired.

As of the May 7, 2013, commencement of this case, the Debtors reported having, as relevant to this motion, the following assets:

- A. PERS Retirement - Wife
- B. IRA - Husband.....\$70,000.00
- C. 2012 Jeep Liberty

- D. 2002 Trek RV, 24'
- E. 2006 Meridian RV, 36'
- F. 2006 Chevy Impala

The full \$70,000 IRA has been claimed as exempt no Schedule C. No objection to the claim of exemption has been made by any party in interest.

Under the First Amended Chapter 13 Plan the Debtor is to make \$385.00 a month plan payments for 36 months. The Debtors intend to retain the 2006 Meridian RV, and will make direct payments of \$703.00 a month to Bank of the West for its claim secured by this property. On Schedule D the Debtors list Bank of the West as having a claim in the amount of \$90,000.00 and the Meridian RV as having a value of \$85,000.00.

In their Reply, the Debtors acknowledge that from a straight financial basis, retaining the 2006 Meridian RV may not be the best fiscal decision. However, Mr. Martin is in his 70's and believes that this current use of the IRA funds will allow him to travel and achieve personal enjoyment of a value greater than leaving the money sitting in the IRA. With a \$703.00 a month payment for the RV, in addition to the \$750.00 that the Debtors are already taking from the IRA, the \$70,000.00 IRA will be exhausted in approximately 48 months. Then the Debtors' monthly income will be \$4,584.00 a month, which is less than the average monthly expenses shown on Schedule J (which does not include a payment for the 2006 Meridian RV).

The Trustee objects, basically stating that the Debtors are wasting the payments made to the Bank of the West, asserting that the 2006 Meridian RV may be worth less than \$85,000, resulting in Bank of the West receiving an effective payment on its unsecured portion of the claim than other creditors holding general unsecured claims. However, the other creditors would receive nothing from the IRA exempt monies, and the fact that the Debtors choose to retain the RV under these circumstances does not work an unfair discrimination on creditors holding general unsecured claims. The Debtors are not diverting monies to Bank of the West which otherwise should be part of the projected disposable income to fund the plan. FN.1.

-----  
FN.1. Neither party provides the court with a calculation of projected disposable income in this case other than the Debtor's calculation of Monthly Net Income on Schedule J. Given that some of the income is from Social Security, the calculation must be done in light of the Ninth Circuit Court of Appeals decision in Drummond v. Welsh, 711 F.3d 1120 (9th Cir. 2012). The court chooses not to *sua sponte* address this issue in light of the total amount of income, the Debtors' expenses, and the Plan in this case.  
-----

The Trustee does raise a substantial objection as to the feasibility of the Plan. The Debtors did not provide the court, Trustee, and creditors with complete information as to their expenses, such as income taxes, and the tax impact of drawing an additional \$703.00 a month from the IRA. In their reply, the Debtors have provided a detailed explanation of their tax and insurance expenses which yield the "net" amounts reflected on Amended Schedule

I. For the IRA distribution, the Debtors state that taxes are withheld (25%) for federal income taxes.

While the court believes that the Debtors' conclusion that this may not be the best fiscal decision, the Debtors have met the Trustee's concerns for whether the plan is feasible for the short 36 months of this plan. The Debtors acknowledge that after the plan is completed (shortly after) the IRA will be exhausted and they will not have sufficient income to pay their expenses. At that time they will be left to liquidate their one remaining asset, their home, to pay their day to day expenses. While that would not be the court's personal or professional financial decision, the court will not paternalistically deny confirmation because it is a "financially dumb" plan. The Debtors have retained the services of a knowledgeable consumer counsel, who the court is confident has explained the financial trap the Debtor are setting for themselves.

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, Debtors' First Amended Chapter 13 Plan filed on June 27, 2013, is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

30. [13-24353](#)-E-13 WALTER LARSON  
CA-1 Michael David Croddy

MOTION FOR COMPENSATION BY THE  
LAW OFFICE OF CRODDY &  
ASSOCIATES, P.C. FOR MICHAEL  
DAVID CRODDY, DEBTOR'S  
ATTORNEY(S), FEE: \$3,801.98,  
EXPENSES: \$0.00.  
7-23-13 [[15](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

**The court's tentative decision is to continue the hearing on the Motion for Compensation** to 3:00 p.m. on -----, 2013. Counsel shall file and serve on or before -----, 2013, supplemental pleadings (1) providing the task billing analysis; (2) billing statements for all fees and expenses relating to services provided to this Debtor in connection with consultation, investigation, preparation, filing, and prosecution of this bankruptcy case; and (3) testimony or other evidence properly authenticating documents and attesting to the truthfulness of the information therein. The supplemental pleadings shall be filed and served on the Chapter 13 Trustee, U.S. Trustee, and any other party requesting special notice in this bankruptcy case. . Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**FEES REQUESTED**

Croddy & Associates, P.C., Counsel for Debtor, files an Application for the Allowance of Additional Fees and Expenses in this case. Counsel requests the court approve \$2,520.98 in "additional fees and costs" in this Chapter 13 case for services provided from February 12, 2013 through May 2, 2013. The total fees relating to this Chapter 13 case for which Counsel is to be paid is \$3,801.98. Prior to the commencement of the case Counsel was paid \$1,281.00 Counsel was paid \$1,281.00. Billing statements for the pre-petition

fees and post-petition fees are presented to the court as Exhibits "B" and "C." However the "Billing Statement" for the pre-petition fees is merely a form in which the Debtor acknowledges that he has paid \$1,000.00 in fees to Counsel and an additional \$281.00 in expenses. There is no detailed billing statement for the \$1,281.00 in fees which counsel wants to have approved and paid for representing the Debtor in this Chapter 13 case. The fees relating to this case paid pre-petition have not yet been approved by this court.

The Local Bankruptcy Rules expressly address the process by which an attorney may seek approval of fees for representing a Chapter 13 debtor. Local Bankruptcy Rule 9012-1(a) and (b) provide,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.

(b) Court Approval Required. After the filing of the petition, a debtor's attorney shall not accept or demand from the debtor or any other person any payment for services or cost reimbursement without first obtaining a court order authorizing the fees and/or costs and specifically permitting direct payment of those fees and/or costs by the debtor.

Congress addressed the pre and post-petition fees of counsel for a debtor for services relating to a bankruptcy case.

§ 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to-

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. § 329.

No disclosure as to what services were provided for the \$1,281.00 received by Counsel, the court cannot determine if it exceeds the reasonable value of the services and whether "additional" fees are warranted.

**FAILURE TO PROVIDE TASK BILLING ANALYSIS**

Debtor provides a break down of pre-confirmation expenses, with no post-confirmation fees or expenses. However, counsel does not explain what services were substantial and unanticipated in the work laid out.

In seeking the approval of fees, the court requires that counsel provide a task billing analysis in which the various activities, time charged, and fees by task area is provided. These can include Administrative Work (such as applications to employ, communicating with the Clerk's office for procedure, and the organizational activities of counsel); motions for relief from the stay; motions for sale, use or lease of property, for obtaining credit, or abandoning property; preference and avoiding adversary proceedings, other adversary proceedings; plans, disclosure statements, and confirmation; and the like. Within each of the task areas a brief description is provided and the time and fees relating to those items. For the present Motion, counsel appears to have merely lumped substantially all of the post-confirmation work into an "after confirmation" category, requesting that Counsel receive an additional \$500 for filing a modified plan.

The Motion includes counsel's raw time records, in which all of the activities are mixed together, leaving it for the court to mine the document to construct a task billing analysis for counsel. The court declines the opportunity, leaving it to counsel who intimately knows the work done and his billing system to correctly assemble the information. FN.1.

-----  
FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young association (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different task areas.  
-----

**REVIEW OF MOTION**

Counsel has filed his motion seeking the allowance of fees and expenses, which states with particularity (Fed. R. Bank. P. 9013), the following grounds:

- a. The Motion purports to also be a declaration by counsel. Declarations are filed as separate pleadings from the motion, other declarations, points and authorities, and the exhibits. [Commonly, the exhibits are filed a one separate pleading as the "exhibits to motion," rather than separate documents consisting of "exhibits to motion," "exhibit to declaration 1," exhibits to "declaration 2," "exhibits to declaration 3," and "exhibits to points and authorities." The court working in a near paperless environment, combining the motion with points and authorities, with multiple declarations, with multiple exhibits (which in the past has resulted in a more than hundred page electronic document) creates an unworkable electronic document which leads to unnecessary confusion and the court performing legal assistant work in properly reassembling document for the attorney.]
- b. Though not clearly stated in the Motion, the title includes the reference that Counsel has opted-out of the no-look fee allowance procedure allowed by the Local Bankruptcy Rules in Chapter 13 cases.
- c. Counsel state that he has spent time performing the following services,
  - i. Met with Debtor,
  - ii. Document Preparation & Filing,
  - iii. Attendance of First Meeting of Creditors.
- d. Counsel first meet with the Debtor on November 8, 2010.
- e. Counsel filed the bankruptcy case on March 20, 2013.
- f. Time and Expenses for which compensation and reimbursement sought.

Person Performing Work	Hourly Rate	Time	Total
Senior Attorney	\$375.00	7.20	\$2,700.00
Associate Attorney	\$275.00	0.50	\$137.50
Legal Assistant	\$125.00	5.00	\$625.00
Clerical		0.00	\$0.00

Expenses Items	Method of Computing		Total Expense
Expenses			\$339.48

- g. The Debtor wished to file a Chapter 13 case due to high income and debt.
- h. Work performed confirming that Chapter 13 plan and post-confirmation, "(1) None, Explanation: None."
- i. Counsel has been retained and served as attorney since November 8, 2010.
- j. Prior to filing of the case Counsel received \$1,281.00 [presumably from or for the benefit of Debtor for legal services provided to the Debtor].
- k. No prior fees and expenses have been allowed by the court in this case.
- l. To date Counsel has been paid \$0.00 by the Chapter 13 Trustee or through the Debtor's Chapter 13 Plan.
- m. Counsel provides a two paragraph citation and authorities in the "MOCLARATION" (a combined "Motion-Declaration" pleadings."

Counsel has provided his separate declaration in support of the Motion. The Declaration appears to be substantially the same text as used in the Motion. While making reference to the Fee Agreement (Exhibit "A"), Billing Statement (Exhibit "B"), and Report of Time and Expenses (Exhibit "C"), the witness does not (1) authenticate the documents, (2) state under penalty of perjury that they are true and accurate copies of the original documents, nor (3) state under penalty or perjury that the information in the documents is true and correct. FN.2.

-----  
 FN.2. One could argue, "Look judge, you know I wouldn't lie, you know that when I said here are the documents, I am giving you true and accurate copies of the documents. You are just wasting an attorneys' time in making them comply with the Local Rules and provide clear evidence for such "simple" motions." First, it is never the case of whether the court "trusts" the attorney or witness before the court when requiring the proper presentation of evidence. Rather, the court evenly and equally applies the law and rules to all parties and their counsel, notwithstanding how experienced and well respected (as is Counsel seeking fees for the present Motion) is the attorney or witness. As to applying the rules, this court does not have secret, unwritten exceptions to the rules, forcing attorneys to guess when they have to comply with the law or rules, or when they can cut the corner and ignore the law or rules.

Counsel should consider the fair and equal application of the rules to other motions presented to the court. Just with respect to fees, if the court is going to provide consumer attorneys with legal services in preparing task billing analyzes, then why shouldn't the court do it for a more complicated \$10,000, \$30,000, or \$100,000 interim fee application involving several hotly contested matters, adversary proceedings, contested disclosure statement hearings, and motions to convert or dismiss. Then the attorney with the \$10,000 fee application is convinced that the court unfairly applies the rules, and the consumer attorney "gets his/her motions granted for whatever they ask because the court grants special favors to him/her."

-----

In addition to the task billing analysis, the Motion and supporting pleadings provide the court with no idea as to what has been done in this case and why \$3,801.98 in fees is reasonable. The court is not told who the attorneys are who have worked on and billed to this file, their experience, or information necessary to determine if the requested hourly billing rate is reasonable for the actual services provided. Exhibit "C" consists of the gross billing records. At the end is a list of attorneys and legal assistant stating their hourly rates and time for which fees are sought. While the court recognizes the name of the senior attorney, Counsel should not assume that merely because the court knows experienced counsel that he does not have to provide the basic information necessary to determine fees.

The raw time records do include a description of the task relating to each time entry, which are not organized by task areas. Additionally, the descriptions are squished into separate boxes on the right hand side of the page. Examples include,

IRD: (Input Raw Data) [1.50hours/ No Charge] INPUT RAW DATA Analyzed the data provide by D1 for completeness and internal consistency. Moved data where necessary from the answers in the homework packet to the appropriate locations in BestCase. Entered the information provided by D1 into BestCase and developed a follow up list of questions
WC: (Work on Case) Worked on case. INITIAL calculations and analysis on creating the Chapter 13 Plan, Income and Expenses (Schedules I & J), and the Means Test (From 22). Through and detailed work up based on pay stubs, and Tax Returns. Developed a follow up list of information and documents to request from D1.

WC: (Work on Case) Work on case. ADDITIONAL calculations and analysis on creating the Chapter 13 Plan, Income and Expenses (Schedules I & J) and the Means Test (Form 22). Through and detailed work up based on pay stubs, and Tax returns. Developed a follow up list of information and documents to request from D1.

WC: (Work on Case) Work on case. FINAL calculations and analysis on creating the Chapter 13 Plan, Income and Expenses (Schedules I & J) and the Means Test (Form 22). Through and detailed work up based on pay stubs, and Tax returns. Developed a follow up list of information and documents to request from D1.

Not only does this require the court to tease out the work done and determine (and then state) for counsel the tasks to which they relate, but the text is in a difficult form to read and contains what appears to be stock, repetitive language.

#### **EXPENSES**

Counsel requests that the court approve \$339.48 in expenses, without any explanation as to what constitutes such expenses. Most likely, they are reasonable and necessary expenses. However, counsel may be charging \$1.00 a page for photocopies, \$1.00 (plus fees) for each email, and \$5.25 a page for facsimiles. The court does not blindly approve either fees or expenses, even for experienced and well respected consumer attorneys such as Counsel.

#### **RULING**

Because this appears to be one of the first time Counsel has presented fee applications to this court, the hearing is continued to 3:00 p.m. on -----, 2013. Counsel shall file and serve on or before -----, 2013, supplemental pleadings (1) providing the task billing analysis; (2) billing statements for all fees and expenses relating to services provided to this Debtor in connection with consultation, investigation, preparation, filing, and prosecution of this bankruptcy case; and (3) testimony or other evidence properly authenticating documents and attesting to the truthfulness of the information therein. The supplemental pleadings shall be filed and served on the Chapter 13 Trustee, U.S. Trustee, and any other party requesting special notice in this bankruptcy case.

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

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

The Motion for Allowance of Additional Fees and Expenses filed by Law Office of Croddy & Associates, P.C., Counsel for 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 is continued to 3:00 p.m. on -----, 2013. Counsel shall file and serve on or before -----, 2013, supplemental pleadings (1) providing the task billing analysis; (2) billing statements for all fees and expenses relating to services provided to this Debtor in connection with consultation, investigation, preparation, filing, and prosecution of this bankruptcy case; and (3) testimony or other evidence properly authenticating documents and attesting to the truthfulness of the information therein. The supplemental pleadings shall be filed and served on the Chapter 13 Trustee, U.S. Trustee, and any other party requesting special notice in this bankruptcy case.

31. [13-27956-E-13](#) PATRICIA HEUSTESS  
TSB-1 Pro Se

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
7-18-13 [[36](#)]

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 18, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. §341. Attendance is mandatory. 11 U.S.C. §343.

Also, the Trustee argues that the Debtor has failed to provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. §521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3).

The Trustee further alleges that the Debtors have failed to provide copies of the employer payment advices as required under 11 U.S.C. §521(a)(1)(B)(iv).

Lastly, the Trustee states that the plan will not complete in 60 months as required because Debtor's plan calls for payments of \$200.00 for 60 months, and Debtors ongoing mortgage payment is listed at \$1,524.00 with total arrears of \$15,000.00 to be paid \$180.00 per month. The plan payment of \$200.00 is insufficient to cover these amounts, plus the Trustees compensation.

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.

32. [10-32958-E-13](#) CLIFF/DALE GORDON MOTION TO DISMISS DALE LINDA  
CAH-30 C. Anthony Hughes GORDON  
7-9-13 [[321](#)]

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 26, 2013. By the court's calculation, 18 days' notice was provided.

**Tentative Ruling:** The Motion to Dismiss Debtor was properly set for hearing by the Bankruptcy Court on July 26, 2013. Opposition, if any, was to be filed and served before August 7, 2013. The Trustee having filed a response, the court will address the merits of the motion.

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

Debtors Cliff and Dale Gordon, seek an order dismissing Joint Debtor, Dale Linda Gordon from the case. This case was commenced by the filing of a voluntary petition on May 17, 2010. Debtor Cliff Gordon wishes to continue the Chapter 13 case in his name while the Joint Debtor is dismissed.

Debtors offer their Declaration in support of the Motion, stating the following:

1. We filed a Chapter 13 petition bankruptcy on May 17, 2010.
2. We have carefully reviewed the factual allegations contained in the Motion and confirm that those representations are true and accurate.

3. We wish to dismiss Dale Gordon from this case.

Dckt. 322.

### **Trustee's Response**

The Trustee filed a response, requesting the original signed declarations or a scanned copy be produced of Docket Number 322, the Debtors' Joint Declaration. Trustee requests this because no reason why the motion to dismiss debtor is made in the Motion or in the Declaration. This request is being made three years after the case has been filed and both Debtors are apparently successfully prosecuting a confirmed Chapter 13 Plan. The Debtors are now less than two years from completing the Plan in this case. The Trustee notes that the majority of the property and debts appear to be community based on the schedules and still subject to the administration of the bankruptcy court. Trustee states that neither Debtor has not reported to the Trustee a domestic support obligation and the income of both debtors appears depended on the same business.

On July 9, 2013, the Debtors filed a joint declaration which bears signatures for each of the two Debtors. Dckt. 328.

### **DISCUSSION**

The Debtors cite 11 U.S.C. § 1307(b) as authority of the court to dismiss Joint Debtor. Pursuant to 11 U.S.C. § 1307(b), a debtor may request the court to dismiss a case, if the case has not been previously converted. Here, the Debtors do not seek dismissal of the case, rather, they seek to dismiss one of the joint debtors and for the case to continue in the name of the other joint debtor, without an explanation.

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 Debtor 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 granted and Dale Linda Gordon is dismissed from this Chapter 13 case. Cliff Gordon shall continue as the sole Chapter 13 Debtor in this case.

33. [13-27960-E-13](#) DARRELL/JOYCE WOLTKAMP  
TSB-1 Len ReidReynoso

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
7-18-13 [[14](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 18, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

**The court's tentative decision is to continue the hearing on the Objection to Confirmation the to 3:00 p.m. on September 10, 2013.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. §341. Attendance is mandatory. 11 U.S.C. §343. The continued meeting is set for August 22, 2013.

Also, the Trustee argues that the Debtor has failed to provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. §521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3).

Debtors responds, providing a copy of their 2012 Federal Income Tax Return. Debtors do not address the failure to appear at the prior 341 or any indication that they will appear at the continued meeting. However, in light of the Debtors filing an opposition which states that they believe a Plan is viable in their case and they desire to prosecute the case, the court infers that they intend to attend the continued First Meeting of Creditors.

The court continues the hearing to 3:00 p.m. on September 10, 2013.

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 hearing on the Objection to Confirmation the Plan is continued to 3:00 p.m. on September 10, 2013.

34. [10-49461-E-13](#) YVONNE JOYCE MOTION TO MODIFY PLAN  
DPC-1 Julius M. Engel 7-12-13 [[128](#)]

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

Correct Notice Not Provided. No proof of service has been filed for the court to determine if notice and service are proper.

**Tentative Ruling:** The Motion to Confirm the Plan has not been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

Debtor Yvonne Annette Joyce filed a response to the Trustee's Notice of Default and Application to Dismiss on July 12, 2013. In this response, Debtor disputes the amount owed and seeks a modified payment due to \$400.00 in lost wages. Dckt. 128. No amended plan has been filed or served to date. FN.1.

-----  
FN.1. Though the Debtor is represented by counsel, his response to the Notice of Default has been filed in *pro se*.  
-----

The Trustee opposes confirmation offering evidence that the Debtor is \$1,340.00 delinquent in plan payments under the confirmed plan, which represents multiple months of the \$450.00 plan payment. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Trustee also notes that Debtor has not filed the proper documents in support of plan modification after confirmation pursuant to Local Bankruptcy Rule 3015-1(d) (2). Debtor has not filed a modified plan or proof of service. The Trustee has no way of knowing the actual plan payment proposed, the treatment of creditors, or the percentage to unsecured creditors. The Trustee states that the document filed by Debtor does not comply with Federal Rule of Bankruptcy Procedure 9013 as it fails to state with particularity the grounds upon which relief is based.

Debtor has also failed to file updated income and expense statements in support of a reduction in wages and a reduction in the plan payment. Debtor's Schedule I shows income of a pension or retirement income of \$314.00 and a monthly contribution from Andrew Ivey of \$1,462.00. It is unclear where the reduction of income applies.

Further, Debtor has failed to meet their burden of proving the requirements of confirmation. See *Amfac Distribution Corp. v. Wolff (In re Wolff)*, 22 B.R. 510, 512 (9th Cir. B.A.P. 1982) (holding that the proponent of a Chapter 13 plan has the burden of proof as to confirmation). Such evidence, typically in the form of a Debtors' Declaration proving the elements of 11 U.S.C. §1325(a), is required. See Local Bankr. R. 9014-1(d) (6).

The Trustee also states that the Debtor's plan may no longer be feasible, as the Trustee calculates the plan will complete in more than the 60 months proposed, possibly taking up to 81 months. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

The reduction in plan payment would also be insufficient to pay the \$773.24 monthly dividend of Debtor's Class 2 creditor, Guild Mortgage company.

Lastly, the Debtor has filed the motion without the aid of an attorney. However, a review of the docket shows that Debtor is represented in the bankruptcy case by Julius M. Engel. No Substitution of Attorney of Withdrawal has been filed to date. The court is not clear why Debtor is attempting this modification without counsel.

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

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

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

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

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

35. [09-25463](#)-E-13 CRAIG/CAROLYN MCCONNELL  
JT-4 John A. Tosney

MOTION TO VALUE COLLATERAL OF  
THE BANK OF NEW YORK MELLON  
TRUST COMPANY, N.A.  
7-12-13 [[65](#)]

**APPEARANCE OF JOHN TOSNEY, ATTORNEY FOR  
DEBTORS REQUIRED FOR AUGUST 13, 2013 HEARING.  
TELEPHONIC APPEARANCE PERMITTED.**

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, respondent creditor, and Office of the United States Trustee on July 12, 2013. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

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

Debtor seeks to value the collateral of "The Bank of New York Mellon Trust Company, N.A., fka The Bank of New York Company, N.A., as successor in interest to JPMorgan Chase Bank, N.A., as Trustee for GMACM Home Equity Loan Trust, Series 2007-HE2, (serviced by Green Tree Servicing, LLC)."

However, creditor Bank of New York Mellon, a federally insured financial institution, was not served properly. Congress created a specific rule to provide for service of pleadings, including this contested matter, on federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(h), which provides

(h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested

matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless-

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Here, Debtors failed to serve any service upon Creditor at by certified mail. Furthermore, Creditor was not served at an address stated on the FDIC and California Secretary of State for the Bank. Creditor was served at "c/o Green Tree Servicing, LLC" and "c/o Malcolm & Cisneros, A Law Corporation," neither being authorized addresses for the Bank of New York Mellon. None of the exceptions in Federal Rule of Bankruptcy Procedure 7004(h) apply.

Therefore, the motion is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

36. [13-27864-E-13](#) KIM/KERI WONG  
TSB-1 Scott J. Sagaria

OBJECTION TO CONFIRMATION OF  
PLAN BY TRUSTEE DAVID P. CUSICK  
7-18-13 [[16](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 18, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. §341. Attendance is mandatory. 11 U.S.C. §343.

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.

37. [13-23469-E-13](#) RONALD/JILL SHAFER  
DO-1 Mary Ellen Terranella

CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY  
WESTAMERICA BANK  
4-25-13 [[24](#)]

**CONT. FROM 7-2-13**

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

Service and notice appear correct. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 25, 2013. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

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

#### **PRIOR HEARING**

Creditor WestAmerica Bank opposes confirmation of the Plan on the basis that Debtors attempt to reorganize the debt of their corporation in an individual Chapter 13 proceedings. Second, Creditor argues that Debtors are not eligible for Chapter 13 protection since they do not have regular income. Third, Creditor objects on the grounds that the plan does not satisfy the best interests of creditors test or disposable income test. Fourth, Creditor argues that the plan was not filed in good faith.

#### **Background**

Creditor states that it made a \$150,000 commercial loan to Burger City, Inc. pursuant to a Commercial Security Agreement in favor of Creditor. Creditor states that the corporation pledged as collateral all equipment, accounts, and general intangibles.

Creditor states that this corporation is privately held and Debtors own 60% of the outstanding shares while Debtors' family owns the remaining shares. Creditor states that Burger City, Inc. is an insider of Debtors and that this restaurant generates substantial gross revenues. Creditor states that Debtors executed a Commercial Guaranty in favor of Creditor and that Debtors' obligations are unsecured. Creditor states that pursuant to the guaranty any amounts owed to Debtors would be subordinated to amounts owed to Creditor.

Creditor states that as of the petition date the corporation owed \$137,566.39 on the loan. FN.1.

-----  
FN.1. The motion lists the amount as \$137,566.339. The court's review of the claims register indicates Creditor filed proof of claim number 4 listing the amount as \$137,566.39.  
-----

Creditor states that the proposed plan indicates Debtors will receive \$6,400 per month from the restaurant. Creditor states that Debtors value their interest in the restaurant at \$0 on their schedules.

First, Creditor argues that Debtors do not have regular income since the corporation distributes \$6,400 per month to Debtors. Creditor argues that these distributions are not regular income since there is no showing that Debtors will regularly receive this amount. Creditor states the corporation has defaulted on payments and if Creditor is not paying its creditors there is no reason to believe it can pay Debtors to support the proposed plan. Creditor states that at minimum more information is needed regarding how Debtors propose to fund the plan.

Second, Creditor argues that Debtors have not demonstrated that they have disposable income to fund the plan since Debtors have not shown that they have signature authority over corporate funds.

Third, Creditor states that Debtors must submit their future income to the control of the Chapter 13 Trustee and that it will be difficult for Trustee to confirm that Debtors are submitting their disposable income to the Trustee over the life of the plan.

Fourth, Creditor states that its claim is unsecured and the plan improperly classifies the claim in Class 2. Creditor argues that simply because Debtor pledged equipment owned by Debtor to secured the debt of the corporation, does not mean that Debtors' guaranty was secured. Creditor argues that the plan cannot be confirmed over its objection unless Debtors cure the corporation's default.

Fifth, Creditor argues that the plan relies on a motion to value claim of Wilmington Trust Company set for hearing May 14, 2013. The court's decision is to grant the motion.

Sixth, Creditor argues that the plan may not be Debtors' best effort since Debtors have not provided sufficient information regarding amounts generated by the corporation.

**DISCUSSION**

The Debtors have personally guaranteed the obligation of Burger City. In addition to the debt of Burger City being secured by the corporate assets, Creditors asserts that some of the equipment is personally owned by the Debtors. On Amended Schedule B the Debtors list miscellaneous items of restaurant equipment with a value of \$4,100.00. Dckt. 23. To the extent that this equipment is owned by the Debtors, and thereby property of the estate (11

U.S.C. § 541), then Creditor has a secured claim for the value of the equipment, 11 U.S.C. § 506(a), and an unsecured claim.

The Debtors' Chapter 13 Plan provides for a monthly payment of \$248.00 for 36 months. The Chapter 13 Plan provides for the \$248.00 to be paid as follows:

- A. Administrative expenses.....\$225.00 a month
  - 1. Debtors' Counsel to be paid \$3,000, Which is \$83.55 a month
  - 2. Chapter 13 Trustee expenses projected at 8% to be \$20.00 a month
  - 3.
- B. Class 1 Secured Claims.....No Claims Paid
- C. Class 2 Secured Claims
  - 1. Creditor, \$4,100 secured claim.....\$211.35 a month 506(a) Value of \$4,100.00
  - 2. Wilimington Trust Secured Claim.....\$0.00 a month 506(a) Value of \$0.00
- D. Class 3 Secured
  - 1. Surrender of Browns Valley Property to Tax Collector and lien holder.
- E. Class 4 Secured - Direct Debtor Payment
  - 1. \$3,121.00 a month to Select Portfolio Servicing, Inc. for claim secured by 1018 Vintage Court. Claim of \$555,331 secured by property with a value of \$378,000. Schedules A and D, Dckt. 1.
- F. Class 5 Unsecured Priority.....None
- G. Class 6 Special Unsecured.....None
- H. Class 7 General Unsecured Claim.....0.00% Dividend

Plan, Dckt. 5.

On its face, it appears that the \$248.00 a month in plan payments is insufficient to fund the \$225.00 in administrative expenses and the \$211.35 to Creditor.

While Creditor expends time addressing why Burger City cannot be a Chapter 13 Debtor, such is not now before the court. What is before the court

are two Debtors who have an interest in a corporation. The Plan attempts to provide for the secured claim of Creditor. Presumably, Creditor is enforcing whatever rights it has against the non-debtor entities.

Further, Creditor complains that since the Debtors have an interest in a corporation from which they derive their income, that is somehow a per se basis for denying confirmation. Such an assumption is incorrect. Creditor is free to conduct any and all such discovery as appropriate into the finances of Burger City. Quite possibly, Creditor already has all of the financial information and could enlighten the court as to whether the \$6,400.00 a month in income is reasonable and truthful for the Estate's interest in Burger City.

In addition to inadequately funding the Plan, the court notes that the Debtors assert that a plan which provides for \$3,121.00 a month in mortgage payments on \$6,400.00 in income is reasonable. The Debtors are only able to propose paying \$248.00 a month in plan payments. From the \$6,400 in income from Burger City, the Debtors pay \$928.00 in income taxes and social security.

### **Good Faith and Proposed Plan Payments**

In substance, the Debtors seek to confirm a plan which diverts \$3,121.00 a month to pay a mortgage on property which is well underwater and is of no economic benefit to the estate. The \$3,121.00 a month appears to be well in excess of what would be a reasonable housing expense for a Chapter 13 Debtor. Creditor, holding a substantial unsecured claim in this case has objected.

The Debtors assert that two cases state the "controlling law" in the Ninth Circuit - *In re Farley*, 114 B.R. 711 (Bankr., S.D. Cal. 1990), and *In re Warren*, 89 B.R. 87 (B.A.P. 9th Cir. 1988), two decisions by other bankruptcy judges. The established law in the Ninth Circuit is that ruling of other bankruptcy judges, including the Bankruptcy Appellate Panel, while persuasive, are not controlling. See discussion in *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220, 1225 FN.3, (9th Cir. 2002) binding nature of Bankruptcy Appellate Panel decision an open question in the Ninth Circuit.

Pursuant to 11 U.S.C. § 1325(a)(3) a plan must be proposed in good faith. Courts apply the totality of the circumstances test in making a good faith determination and consider several factors in determining whether a plan was proposed in good faith, including:

1. Whether the proposed plan accurately states debtor's secured and unsecured debts;
2. Whether the proposed plan accurately states debtor's expenses;
3. Whether the proposed plan accurately states the percentage repayment of unsecured claims;
4. Whether the proposed plan has deficiencies and whether the inaccuracies amount to an attempt to mislead the bankruptcy court;
5. Whether the proposed payments indicate a fundamental fairness in dealing with one's creditors.

*In re Powers*, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991) (citing *In re Smith*, 848 F.2d 813, 818 (7th Cir. 1984)). Although good faith in a Chapter 13 proceeding is determined on a case by case basis, a debtor must at minimum show that he or she has an honest intention. *In re Powers* at 992. One factor courts consider is whether the debtor acted equitably in proposing the Chapter 13 plan and whether a debtor has misrepresented facts in the plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed a plan in an inequitable manner. *Id.* at 992.

As stated in *Warren*, good faith is not statutorily defined, and quoting the Ninth Circuit ruling in *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir. 1982) (controlling law),

"Given the nature of bankruptcy courts and the absence of congressional intent to specially define "good faith," we believe that the proper inquiry is whether the Goebes acted equitably in proposing their Chapter 13 plan. A bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. Though it may consider the substantiality of the proposed repayment, the court must make its good-faith determination in the light of all militating factors."

The Ninth Circuit Court of Appeals has also recently concluded that with the 2005 BAPCPA amendments Congress provided some definition to this wide ranging equitable review with respect to above median income debtors. In *Drummond v. Welsh*, 711 F.3d 1120, 1128-1130, 1133-1135, (9th Cir. 2012) [footnotes omitted],

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

The changes in the Bankruptcy Code did not require our reconsideration of the 'totality of the circumstances' test as a measure of good faith, and we continued to employ that formulation. Nevertheless, they did raise questions about the breadth of the "good faith" inquiry. The 1984 amendments included statutory language that directly addressed matters, such as how much a debtor had to pay under a plan, that

previously had been subsumed in the 'good faith' inquiry. Once Congress explicitly addressed those issues, a number of courts and commentators concluded that there was no need to consider them as part of the inquiry into good faith.

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

...

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

'[d]etermining what was 'reasonably necessary' for the maintenance or support of the debtor was dependent on each debtor's individual facts and circumstances. This amorphous standard produced determinations of a debtor's 'disposable income' that varied widely among debtors in similar circumstances. BAPCPA replaced the old

definition of what was 'reasonably necessary' with a formulaic approach for above-median debtors. 11 U.S.C. § 1325(b)(3).'

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

...

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

The court has reviewed form F22C, the "Means Test Form" filed by the Debtors. Dckt. 1 at 43-49. Under penalty of perjury the Debtors state that they are above median income debtors. As instructed by the Ninth Circuit Court of Appeals, the court considers the calculation of the Debtors expenses, as "cabined" by Congress with the BAPCPA amendments, making the 707(b) calculation. Neither the Debtors nor the objecting creditor have provided the court with their computation of this necessary calculation.

11 U.S.C. § 1325(b)

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably

necessary to be expended for such child) less amounts reasonably necessary to be expended-

(A) (I) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548 (d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548 (d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

**(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707 (b) (2), if the debtor has current monthly income, when multiplied by 12, greater than-**

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4.

11 U.S.C. § 1325(b).

The court turns to consider the application of 11 U.S.C. § 707(b)(2) to the determination of the reasonable, necessary, and proper expenses for these Debtors in this Chapter 13 case.

11 U.S.C. § 707(b)(2)

(A) (I) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of-

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or

(II) \$10,000.

(ii)

(I) **The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts.** In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 302 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of-

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B) (I) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in

the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide-

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (I) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of-

(I) 25 percent of the debtor's nonpriority unsecured claims, or \$6,000, whichever is greater; or

(II) \$10,000.

11 U.S.C. § 707(b).

As attested to by the Debtors, and not challenged by any party in interest, the Debtors are above median income debtors. The Debtors advance as their reasonable, necessary, and § 1325(b) permitted expenses the following,

Expense	Schedule J Used To Compute Projected Disposable Income	IRS Expenses Allowed for 3 Persons, 707(b) (November 2012 - March 31, 2013 filed cases - Solano County, California)	Expense Under/(over) 707(b) allowed amount	
Mortgage, Including Property Taxes and Insurance	\$3,121	\$2,155	(\$966)	

		IRS Housing and Utilities standards include mortgage or rent, property taxes, interest, insurance, maintenance, repairs, gas, electric, water, heating oil, garbage collection, telephone, cell phone, internet, and cable.		
Electricity	\$250	Included	(\$250)	
Water, Sewer	\$105	Included	(\$105)	
Telephone	\$180	Included	(\$180)	
Cable, Land Line, Internet	\$120	Included	(\$120)	
Home Maintenance	\$100	Included	(\$100)	
Additional Household Supplies		\$65	\$65	
Food	\$700	\$639	(\$61)	
Clothing	\$125	\$209	\$84	
Additional 5% Permitted for Food and Clothing		\$42	\$42	
Laundry, Dry Cleaning	\$0			
Medical, Dental	\$100	\$180	\$80	
Personal Care Products & Services		\$63	\$63	
Transportation	\$500	\$472	(\$28)	
Recreation	\$150		(\$150)	
Charitable	\$50	\$50		
Life Insurance	\$163	\$163		
Auto Insurance	\$300			
Vehicle Registration	\$30		(\$30)	Included in Transportation Expense
Miscellaneous		\$251	\$251	
School Activities	\$130		(\$130)	

Total	\$6,124	\$4,289	(\$1,535)	
	Schedule J	707(b) Expenses	Additional/ (Excessive) Expenses	

Neither the Debtors nor the Objecting Creditor address the ruling in *Drummond* or how to properly compute the permitted expenses (computed according to the strict formula under 11 U.S.C. § 707(b)). The Debtors do respond that their mortgage payment consists of a principal and interest payment of approximately \$2,696.00. Their annual tax bill has been reduced to \$3,900.00 (\$225.00 a month) a year and their homeowner's insurance is approximately \$1,200.00 a year (\$100.00 a month). When the actual amount of property taxes, insurance, principal, and interest are totaled, the monthly payment would be \$3,021.00, \$100.00 less a month than used on Schedule J by the Debtors to compute their projected disposable income.

As required by the controlling law stated in *Drummond*, the court computes the maximum housing expense (principal, interest, taxes, and insurance) allowed the Debtors to be \$2,155, which is \$966.00 less than the \$3,121.00 expense the Debtors want to incur.

The court continued the hearing to allow the Debtor and WestAmerica Bank (the Chapter 13 Trustee, U.S. Trustee and any other party in interest if they choose) to file a serve supplemental briefs addressing the calculation of proper expenses for computing projected disposable income pursuant to 11 U.S.C. § 1325(b)(2).

**CHAPTER 13 TRUSTEE'S SUPPLEMENTAL BRIEF**

The Chapter 13 Trustee filed a supplemental brief in support of objection to confirmation pursuant to 11 U.S.C. § 1325(b). The Trustee states that he believes Schedule I is supposed to represent the income of the Debtor at the time of filing and projected for the first year (based on line 17) and any projection or average is limited to the month of filing. The Trustee further states that Schedule J is similarly supposed to represent the Debtors expenses at the time of filing and projected for the first year.

The Trustee asserts that the Debtor must pay in their projected disposable income if the Trustee or an unsecured creditor objects for the applicable commitment period of the plan. Projected disposable income appears to the amount of Form 22C, Line 59, as modified by the projected changes on Schedule I & J.

The Trustee also states that Court still has discretion to determine the reasonableness of expenses pursuant to 11 U.S.C. § 1325(b)(2).

In his analysis of Form 22C, the Trustee states the Internal Revenue Service standards for California are to be used in examining the housing and utility expenses. The Trustee notes that the US Trustee website maintains an area where they present these expenses on a current and historic basis, while the IRS does not provide a breakdown of the categories. Form 22C provides to

use the US Trustee website and the IRS website provides to use the US Trustee website.

**HOUSING EXPENSE:** The Trustee states that the mortgage/rent expense standard is \$2,155.00 and the non-mortgage expense is \$506.00. Trustee states that at the court's prior hearing the court cited \$2,023.00 for 3 persons, but this appears to be the expense for Yolo County when the Debtors are located in Solano County.

The Trustee states this would adjust the monthly disposable income on Debtor's Line 59 from negative \$658.41 to negative \$152.41.

**SECURED DEBT PAYMENT:** The Trustee also states where the housing and utility standard includes property taxes and insurance, Debtor's allowance would be reduced by \$425.00, which would result in the monthly disposable income changing from a negative \$152.41 to a positive \$272.59.

**DISCLOSED INCOME:** The Trustee also argues that Debtors' income appears under-reported on Form 22C based on historic averages and Schedule I which maintains the Debtor will receive \$484.00 more each month. Trustee states this would raise the monthly disposable income to \$756.59.

**ADDITIONAL INCOME:** The Trustee states that he does not believe additional income is necessarily available from the business, but objects based on the evidentiary record. The petition discloses the Debtor has a DBA of "Burger City, Inc." and FDBA of "Pasta City Express." Schedule B discloses a 60% ownership interest in Burger City and a 30% partnership interest in "5.5 acres Browns Valley," valuing both at \$0.00. Schedule I discloses income from Burger City but no business expenses are listed and the monthly income of Burger City is not disclosed.

The Trustee argues that he is not aware as to how much income the Debtor should be receiving from Burger City. The Debtor has provided the trustee with significant financial information showing taxable sales income for the corporation in the last quarter of 2012. Trustee states that the Debtor has not provided any indication to the court as to the monthly revenue and expenses.

**OTHER EXPENSES:** Based on discrepancies between Schedule J and Form 22C, the Trustee objects to the allowance of certain expenses. The Taxes are listed on Schedule J at \$928.00 per month, but are listed on Form 22C at \$958.00 per month. Cable, land line and internet are listed at \$120.00 on Schedule J when Form 22C lists Telecommunications expense as \$180.00. Education expenses are listed on Schedule J at \$130.00 per month when Form 22C shows them at \$145.00 per month.

The Trustee states adjusting these amounts would raise the monthly disposable income to \$861.59.

Finally, the Trustee states the table from the court's prior hearing should be adjusted on three expenses:

- (1) The mortgage expense should be adjusted to \$2,661.00

(2) Cable, Landline, Internet may be allowed with proof according to *In re Scurlock*, 385 B.R. 814 (Bankr. M.D. N.C. 2008).

(3) School expense may be allowed with proof according to *In re Grabarczyk*, 2012 Bankr. LEXIS 5226, (Bankr. N.D. Ohio 2012).

The Trustee states that unless the Debtor is allowed to project the additional expenses, which exceed the specific allowance, confirmation of the plan should be denied unless the plan payment is increased by \$873 to \$1121.00.

#### **WEST AMERICA BANK'S SUPPLEMENTAL BRIEF**

Westamerica Bank ("Creditor") agrees with the court's analysis and calculation as stated at the prior hearing, with the reasonable housing expense for Debtors being capped at \$2,023.00 per month. Creditor states that after adjusting the Debtors' disposable income, the Debtors have an additional \$1,853 per month in disposable income that must be applied to pay their unsecured debts. Creditor argues that the plan does not provide sufficient payments to the unsecured creditors and the plan should not be confirmed.

Creditor also argues that the plan is not feasible. The plan is funded by income the Debtors expect to receive from Burger City. The Creditor argues this assumption is unrealistic given that Burger City is not paying its debts as they come due, including the obligation to Westamerica Bank. Therefore, Creditor asserts that a plan dependent on continued income from an insolvent corporation is not feasible.

#### **DEBTORS' SUPPLEMENTAL BRIEF**

Debtors provide a supplemental brief, arguing that 11 U.S.C. § 707(b)(2)(a)(iii)(II) provides for the allowance of "any additional payments to secured creditors necessary for the debtor, in filing a plan under Chapter 13 of this title to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts."

Debtors argue that although the IRS standards provide a basis for expenses in § 707(b)(2)(A)(ii)(II), the court is given a level of discretion when it comes to the amounts paid on secured debt necessary to maintain possession of the debtor's residence pursuant to 11 U.S.C. § 707(b)(2)(A)(iii)(II), which states (emphasis added),

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of--

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and

(II) **any additional payments to secured creditors necessary for the debtor**, in filing a plan under chapter 13 of this title, to **maintain possession of the debtor's primary residence**, motor vehicle, or other property **necessary for the**

**support of the debtor and the debtor's dependents**, that serves as collateral for secured debts;

divided by 60.

Debtors also argue that the IRS is open to allowing actual expenses of delinquent taxpayers who show documentation that using the standards leaves them an inadequate means of providing for basic living expenses.

The Debtors seek to distinguish the *Drummond v. Welsh* case from the present case, on the basis that the Debtors have no social security income, have no secured debt other than their residence and have a total unsecured debt of \$26,100.00.

Additionally, Debtors also point out that the *Drummond* court did not address the fact that the debtors' mortgage payment exceeded the amount specified under the IRS Standards for housing expense applicable in Montana. Debtor states the highest mortgage amount for a household of two per IRS standards was \$982.00 (the county which they resided is unknown) and the Debtor calculates their payment to be \$1,573.00.

Debtors also argue that they believe they prepared their Means Test accurately, save for a minor difference of \$30.00 on their income tax amount - line 30 - which should be \$928.00 no \$958.00. The Debtors also state that as they reside in Solano County, the mortgage allowance should be \$2,155.00. Debtors also argue the "excessive" expenses of \$873.00 are related to their secured housing payment, which "additional" amount is specifically provided for in 707(b)(2)(a)(iii)(II). Debtors state they have accurately and truthfully detailed their income and expenses and are current on their first mortgage. Debtors argue that the mere fact that the residence is worth less than the balance due on the first mortgage does not make the property unnecessary for the debtors' effective reorganization.

Debtors argue that if they are unable to retain their family home, the idea of a fresh start is unattainable, as is the purpose of the Chapter 13 bankruptcy. Debtors also argue they currently have an annual mortgage interest deduction of \$13,434.54 and if they did not have this, their tax withholding per month would be considerably more than the \$928.00 currently listed on their Schedule I. Debtor states the withholding for their tax bracket would be at least \$1,000.00 more per month.

Debtors argue that trying to meet the fictional payment of \$1,121.00 suggested by the Chapter 13 Trustee in order to retain their home, they are left with few choices. Mr. Shafer works two jobs and it would be difficult for him to find a third. Mrs. Shafer could get a second job, but they would then need to expend funds for the care of their 11 year old daughter and transportation expenses would increase.

Lastly, Debtors argue that although *Drummond* provided insight into the court's view of the result of Congress' adoption of the means test in terms of reducing the bankruptcy court's discretion to review income and debt payment, it did not address the predicament of debtors whose housing expense exceeds the standards, but who have no secured vehicles to offset that excess. Debtors request the court give consideration to the totality of their circumstances.

## **SUPPLEMENTAL DISCUSSION**

The court has discretion to determine the reasonableness of expenses pursuant to 11 U.S.C. § 1325(b)(2). The Trustee and Debtor are correct that the mortgage/rent expense IRS standard is \$2,155.00 for residents in Solano County (and the court has made the correction in the chart in the first part of this Ruling).

Even if the court were to allow additional expenses, in excess of the Standards, related to their residence, the record is not clear regarding the income received from Burger City and whether it is accurate. The court does not have the information that Creditor and the Chapter 13 Trustee have, but both raise concerns that have not been addressed by the Debtors.

The court does not accept the Debtors' contention that since they want to maintain their residence, and make a \$3,121.00 a month payment. While the good news is that the Debtors have above-median income, the bad news is that Congress thought it wise to create an expense presumption for their residence at the Internal Revenue Service Guidelines. It is true that the court has been given some discretion when it comes to the secured payments on a residence, that discretion is limited to a debtor showing that the above Guideline housing expense is necessary for the support of the debtor or dependent of the debtor.

The Debtors offer no substantial evidence as to why this residence and the more than \$3,100.00 a month payment is "necessary" for the support of the Debtors or dependants of the Debtors. The Debtors do provide their testimony that if they did not make this mortgage payment, for which they receive an interest deduction, they "estimate we would have to withhold at least \$1,000.00 more per month for income taxes." Declaration, Dckt. 49. Other than this one-sentence "estimate," no testimony is provided as to why this house is "necessary." Additionally, notwithstanding these being over-median income debtors and their attempting to support their desire to make this mortgage payment, no specific testimony is provided as to their actual taxes, an analysis of the actual financial impact of renting a house for \$2,100.00 a month (if such an expense house is actually "necessary") and what other expenses will not be incurred if the Debtors are not maintaining their current home.

Debtors have not addressed the Trustee's concern with two other expenses. Cable, land line and internet are listed at \$120.00 on Schedule J when Form 22C lists Telecommunications expense as \$180.00. Education expenses are listed on Schedule J at \$130.00 per month when Form 22C shows them at \$145.00 per month.

The proposed Chapter 13 Plan does not comply with the requirements of 11 U.S.C. §§ 1322 and 1329, and 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 Objection to the Chapter 13 Plan filed by Creditor WestAmerica Bank 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 is sustained and confirmation of the Chapter 13 Plan is denied.

38.        [09-48372-E-13](#)    **TANYA/BENJAMIN MONARQUE**        **MOTION TO MODIFY PLAN**  
             **PGM-3**                                **Peter G. Macaluso**                                **7-8-13 [70]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 8, 2013. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

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

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

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

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

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



for costs from Debtors in June 2013. Both Debtors' plan and the Rights and Responsibilities indicate only \$1,500.00 was paid by Debtors and total fees of \$4,000.00 have been charged. The Trustee requests an itemization of the \$500.00 case costs and proof of the expenses.

Debtors respond, stating that the retirement loan payment of \$804.76 ends in December 2014, the Debtors will continue to allocate \$804.76 on a voluntary basis to their retirement for the remainder of the plan. Debtors state Debtors had been contributing \$1,517.83 per month to their retirement plans prior to filing their bankruptcy. This consisted of \$713.07 voluntary contribution and a loan payment of \$804.76. The voluntary contribution was discontinued upon filing the bankruptcy and the retirement account loan payment has remained intact pursuant to sections 1322(f) and 362 (b) (19). Debtors cite *In re Prigge*, 441 B.R. 667, 676-77 (Bankr. D. Mont. 2010) for the proposal that Congress expressly excluded from disposable income all amounts necessary to repay a loan from the debtor's retirement plan.

## **DISCUSSION**

If the trustee or an unsecured creditor objects to confirmation of a Chapter 13 plan, "the court may not approve the plan unless . . . the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B); see also *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469, 177 L. Ed. 2d 23 (2010).

The Bankruptcy Appellate Panel for the Ninth Circuit recently held that 11 U.S.C. § 541(b)(7) does not authorize chapter 13 debtors to exclude voluntary post-petition retirement contributions in any amount for purposes of calculating their disposable income. *Parks v. Drummond (In re Parks)*, 475 B.R. 703, 709 (B.A.P. 9th Cir. 2012). When Congress amended BAPCPA, it chose to exclude the repayment of 401(k) loans from disposable income in § 1322(f). *Id.* at 708.

However, Debtor may not use income remaining after full payment of loans to renew funding of 401(k) plan because income becoming available post-petition is projected disposable income that must be distributed to unsecured creditors. While section 1322(f) provides that amounts required to repay 401(k) loans are not disposable income, section 1306 captures property acquired after commencement of the case. Because repayment of a 401(k) loan during the life of the plan can be reasonably anticipated at the time of confirmation, the post-petition income that becomes available after 401(k) loans are repaid must be considered as projected disposable income available to unsecured creditors. *Seafort v. Burden (In re Seafort)*, 669 F.3d 662 (6th Cir. 2012).

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.

40.        [12-28685-E-13](#)    **RALPH/JANNETTE CAINES**                    **MOTION TO MODIFY PLAN**  
              **MET-1**                    **Mary Ellen Terranella**                    **7-4-13 [25]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 4, 2013. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

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

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

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

The Trustee opposes the motion on the basis that all priority claims may not have been disclosed. The Debtor listed on Schedule E the Franchise Tax Board ("FTB") for 2011 taxes and this creditor has filed a claim for 2011 taxes. Debtor has also filed a claim for 2009 taxes and the Trustee is not certain that all priority claims have been disclosed and thus the plan may not comply with 11 U.S.C. § 1322(a)(1), (2) and (6).

The Trustee also argues that the Debtors are proposing to reduce the interest rate to secured non-PSMI claim by the Internal Revenue Service ("IRS"). The confirmed plan lists this creditor with an interest rate of 4%. The proposed modified plan lists the creditor with an interest rate of 3%. The Trustee has paid \$675.95 in interest and \$3,278.44 in principal to this creditor, and the Trustee argues the plan will require a new computation of the

11 payments made to the creditor where no reason for a change in the interest rate has been given.

The Debtors respond, stating that they listed the FTB in their petition and plan for pre-petition taxes, indicating tax liability for 2011. They did not realize at the time they filed their petition that they owed the FTB for the 2009 tax year. They argue they did list pre-petition tax debt owed to the FTB, they just underestimated the amount of the pre-petition tax liability.

The Debtor states that the Debtors have provided for the same interest rate the IRS provided in its proof of claim, which was 3.00%. Debtors state that if the court finds the interest rate indicated in the proof of claim filed by the IRS is not correct, they will provide the interest rate from the originally confirmed plan.

A review of IRS Proof of Claim No. 7 indicates the annual interest rate to be 3.00%. Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. It is settled law in the Ninth Circuit that a proof of claim is prima facie valid. *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). Here, the Proof of Claim provides for 3.00% interest, as does the proposed modified plan.

The Debtor having clarified the issues raised by the Trustee, the Motion to Confirm is granted.

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 4, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

41. 13-27986-E-13 DEBORAH CANDATE  
MDE-1 Mary Ellen Terranella

OBJECTION TO CONFIRMATION OF  
PLAN BY WELLS FARGO BANK,  
N.A.  
7-22-13 [18]

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

Proper 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 July 22, 2013. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

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

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

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on July 26, 2013. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot 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 Confirmation of the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Objection is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

42. 13-27986-E-13 DEBORAH CANDATE  
TSB-1 Mary Ellen Terranella

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
7-18-13 [[14](#)]

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

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 18, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on July 26, 2013. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot 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 Confirmation of the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Objection is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

43. [13-24488-E-13](#) GREGG/STACEY HOLTWARREN

STATUS CONFERENCE RE: MOTION  
TO VALUE COLLATERAL OF WELLS  
FARGO BANK, N.A.  
4-8-13 [[14](#)]

Debtors' Atty: Eric John Schwab

Notes:

Set for a status conference pursuant to civil minute order filed 5/23/13 [Dckt 31]. All discovery to be completed by 7/22/13.

Order Confirming Plan filed 6/3/13 [Dckt 32]

[EJS-1] Stipulation Resolving Debtors' Motion to Value Collateral of Wells Fargo Bank, N.A. filed 6/25/13 [Dckt 33]; Order granting filed 7/3/13 [Dckt 35]

**Final Ruling:** The court having entered an Order valuing the secured claim of Wells Fargo Bank, N.A. (Dckt. 35), **the Status Conference is removed from the calendar.**

44. 13-27790-E-13 WILLIAM/LYNN SHOUSE  
TSB-1 Scott D. Hughes

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
7-18-13 [29]

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 18, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. §341. Attendance is mandatory. 11 U.S.C. §343.

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

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

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

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

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

45.            12-32499-E-13            ELONDRO PRATT            MOTION TO MODIFY PLAN  
                 EJS-3                            Eric John Schwab            7-9-13 [47]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 9, 2013. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

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

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

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 9, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

46. [13-25399-E-13](#) ROLANDO SANTIAGO  
ASW-1 Mark A. Wolff

CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY THE  
BANK OF NEW YORK MELLON  
5-29-13 [20]

**CONT. FROM 7-2-13**

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

Incorrect 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 May 29, 2013. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

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

The creditor The Bank of New York Mellon opposes confirmation of the Plan. The objecting creditor holds a deed of trust secured by the Debtor's residence. The creditor asserts the Debtor owes \$115,982.16 in pre-petition arrearage. The Plan does not propose to cure the arrearage. 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 the arrearage, the plan cannot be confirmed.

The court continued the hearing to allow the parties to review and file a stipulation. No such stipulation appears on the docket to date.

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

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

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

The Objection to the Chapter 13 Plan filed by the 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.

47.        09-42890-E-13        ROBERT SMITH        CONTINUED MOTION TO INCUR DEBT  
          CAH-2                    C. Anthony Hughes        7-8-13 [[32](#)]

**CONT. FROM 8-6-13**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on July 8, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion Incur Debt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Chapter 13 Trustee filed opposition and the court will take up the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

The motion seeks permission to obtain credit to purchase real property commonly known as 2821 Paymaster Trail, Cool, California as his primary residence. Debtor states he and his non-filing spouse have entered into a contract to purchase the property for \$295,000.00 with \$5,000.00 deposit and \$10,000.00 down payment. The funds for the deposit and downpayment came from Debtor's holiday pay and paid vacation time at his employment with the State of California, Department of Corrections.

Flagstar Wholesale Lending approved the financing of the property, subject to approval of the court for a FHA 30 year fixed loan in the amount of \$279,812.00 at a 3.75% interest rate, including principal, interest and impound. The monthly payment will be \$1,987.52. Debtor testifies that he will be able to afford this monthly mortgage and has filed updated income and expense statements.

#### **TRUSTEE'S OPPOSITION**

Trustee opposes the motion on the basis that the proposed purchase may not be in the best interest of the estate, increasing Debtor's expenses by \$357.57 with the new mortgage expense over the prior rent. The Trustee is also not sure of the tax advantage to which the Debtor refers from purchasing the home. The Trustee also notes several differences that Debtor has not explained from the current statement of income and expenses, including increased income, the appearance of two sons (no ages) and decrease in income due to budget cuts in addition to several increases in expenses.

#### **DEBTOR'S RESPONSE**

Debtor responds, stating that the two children are the children of Debtor's spouse that have been and are living with the Debtor, ages 23 and 24 years of age. These children are working part-time and do not have enough income to support themselves on their own and do not contribute to the household. Debtor did not anticipate these children being dependents when he filed the petition.

Debtor also states that the increases in expenses are due to the support of a family of four, four cell phones, food for four, and transporting all four driving to work and home. Debtor states that his insurance has decreased because he has retired and no longer drives as many miles, which decreased the policy.

Debtor also states that the spouse's car payment increased because her previous car had mechanical problems and she had to purchase a new vehicle in December 2011.

#### **CONTINUANCE**

The court continued the hearing on the Motion to Incur Debt to allow the Debtors to provide documentation regarding the issues raised by the court, including the Debtors ability to afford the payments on the proposed loan, the two adult children now listed having income, and the purchase of a new car in December 2011 during which this bankruptcy was pending. Debtor stated at the hearing that the transaction closed August 15, 2013, for which Debtor has a deposit.

#### **SUPPLEMENTAL DECLARATIONS**

Debtor Robert Smith filed a declaration stating that his two adult children work part-time, one for House to Moving company at 15-30 hours a week at minimum wage and the other for Ruth Chris Steak House between 15-25 hours a week at minimum wage.

Debtor states he has decreased his food expenses by \$200.00 to be able to increase his monthly payment to \$500.00 to provide more to the general unsecured creditors.

Debtor states that his non-filing spouse purchased her own vehicle in her own name and that he is not on the loan. He states that he and his wife keep all of their finances separate, with their own bank accounts and separate bills.

Debtor's non-filing spouse also filed a Declaration stating the same facts.

## **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).

Here, the proposed loan is sufficiently described in the motion and supporting pleadings. Furthermore, Debtor and his non-filing spouse have provided sufficient information regarding the issues raised by the court at the prior hearing. The terms of the proposed home loan being reasonable, the motion 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 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 Debtor Robert Smith is authorized to purchase the real property commonly known as 2821 Paymaster Trail, Cool, California according to the terms stated in the Purchase Agreement filed as Exhibit "A," Docket Entry No. 34, in support of the Motion.

48. 13-29395-E-13 FRANK/GRACE MURPHY MOTION TO EXTEND THE AUTOMATIC  
PSB-1 Pauldeep Bains STAY O.S.T.  
8-6-13 [14]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on August 6, 2013. By the court's calculation, 7 days' notice was provided.

**Tentative Ruling:** The Motion to Extend Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

Debtors seek to extend the automatic stay in this case. This is Debtor's second bankruptcy petition pending in the past year. Debtor's prior Chapter 13 bankruptcy case (No. 11-48512) was dismissed on June 5, 2013 for failure to make plan payments. See Order, Bankr. E.D. Cal. No. 11-48512 Dckt. 69, June 5, 2013. 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.

#### **DISCUSSION**

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 Debtor 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.

Here, Debtors allege they were operating a business and the income was not consistent which was why they were unable to keep up with the plan payments. Debtors assert they closed the business at the end of 2012 and Debtor now works as a sub-contractor with steady income. Debtors state they will now be able to maintain their new plan payments. This is sufficient to explain the changed circumstances since the prior case was dismissed and how this will lead to a successful completion of a Chapter 13 plan.

The Debtor has offered clear and convincing evidence to rebut the presumption of bad faith. Debtor has demonstrated a change in circumstances from the last filing that indicates to the court the Debtors will be successful in completing a plan.

The motion 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 Extend the Automatic Stay filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes, unless terminated by further order of this court.