UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 23, 2016 at 3:00 p.m.

1.	**12-41404-E-13**	**CARRIE WILSON**	**MOTION TO APPROVE LOAN**
	JLB-5	**James Brunello**	**MODIFICATION**
			7-19-16 [67]

Final Ruling: No appearance at the August 23, 2016, hearing is required.

The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Approve Loan Modification, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Approve Loan Modification, and good cause appearing, the court dismisses without prejudice the Debtor's Motion to Approve Loan Modification.

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.
>
> A Motion to Approve Loan Modification having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Loan Modification is dismissed without prejudice.

2. **16-20414-E-13** **RALPH HASKELL** **CONTINUED MOTION TO CONFIRM PLAN**
RWF-1 **Robert Fong** **6-6-16 [48]**

Final Ruling: No appearance at the August 23, 2016, Hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 6, 2016. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Opposition having been filed, the court will address the merits of the motion at the hearing.

Opposition of Trustee withdrawn based on additional information and amended Schedules I and J filed. Dckt. 67.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The Motion to Confirm the Amended Plan is granted.

Ralph Turner Haskell ("The Debtor") filed the instant Motion to Confirm Plan on June 6, 2016. Dckt. 48.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 21, 2016. Dckt. 54. The Trustee objects to the Plan on the ground that the plan may not be in the Debtor's best efforts. The Debtor is over the median income and proposed plan payments of $275.00 for 20 months with a 12% dividend to unsecured creditors. Debtor's Amended Form 122C-2 filed June 6, 2016 reflects a monthly disposable income of $29.01. However, the Trustee's calculations show disposable income of $1,179.99 for 60 months, which totals $70,799.40 that unsecured creditors are entitled to. The following revisions were made by the Trustee:

a. The Trustee removed the net mortgage or rent expense because the debtor has a reverse mortgage and has not listed a mortgage expense on Schedule J.

b. The Debtor adds $155.00 for business cell phone expense, however the Debtor has failed to file any independent documentation for this expense as requested by the

Trustee. Normal cell phone service is included in housing and utilities.

c. The Debtor deducted $1,054.17 for income taxes, however the Debtor has only listed an expense for taxes of $188.20 on Schedule I.

d. The Debtor lists an expense on Schedule J in the amount of $213.00 per month for storage. The Debtor admitted that he is storing his motorcycles and household goods in storage.

TRUSTEE'S STATUS REPORT

The Trustee has provided the court with a status report of the case. The Debtor has provided the Trustee with 2015 State and Federal Tax Returns, 2nd quarter 2016 tax payments, AT&T Wireless statement, Wells Fargo Bank Statements for non-filing spouse, Susan B. Tracy form January 2016 through May 2016, and First US Credit Union statements of Debtor from January 2016 through May 2016. After reviewing the evidence, the trustee argues against the following deductions of Form 122C-2:

1. $155.00 for business cell phone expense on line #23

2. $1,054.00 for taxes on line #16.

The Trustee also asserts that the costs for storing Debtor's motorcycles and household goods is unreasonable.

The Debtor's AT&T Wireless statement shows three separate wireless numbers with different charges totaling $157.13. The Debtor has claimed a deduction for optional telephone services, such as a business cell phone for the non-filing spouse, in the amount of $155.00. The Debtor has failed to prove that he is eligible for this deduction as there appears to be three phone numbers and it is not clear which phone is used for the business.

The 2015 Federal Tax Return reflects that Debtor's total tax was $7,721.00, or $643.41 per month. The Debtor's 2015 State Tax Return reflects that Debtor's total tax was $736.00, or $61.33 per month. Combined, the monthly tax is $704.74. However, has an expense for on-going taxes on Amended Schedule J of $856.00 per month.

The Debtor has provided a copy of a 2016 Form 1040-ES Payment Voucher in the amount of $6,000 as well as a copy of two personal checks made out to United States Treasury each in the amount of $3,000.00. If the Debtor owes only $6,000.00 in taxes per year, or $500.00 per month, the monthly on-going payment is less than the amount of $856.00 listed on Amended Schedule J.

Finally, the Trustee states that the Debtor is paying more for storage than the actual contents being stored. The Debtor is storing his motorcycles and household goods in storage. Schedule B accounts for four motorcycles with a combined value of $9,250.00. The Debtor is proposing to pay $213.00 for 60 months, totaling $12,780.00. The Debtor is paying $3,530.00 more than the value of the property to store it over the course of the Plan.

DEBTOR'S RESPONSE

The Debtor filed a Response to the Trustee's Opposition addressing the Trustee's arguments on July 18, 2016. Dckt. 61.

Business Cell Phone Expense

The Debtor states that Debtor had previously explained that he and his wife both use their cell phones regularly in the course of business. Line 23 of Form 122C-2 provides for "optional telephone and telephone services," which may include "business cell phone service, to the extent necessary for your health and welfare or that of your dependents, or for the production of income." The Debtor's number costs, $48.40 per month, his wife's costs $97.22 per month, both Debtor and his wife use their cell phones regularly in the course of their work. Their home based phone line costs $11.51 per month and is used by Debtor in his work as a sales associate.

Taxes

The Debtor states that Debtor appropriately and accurately listed his tax obligations. The Debtor and his wife have paid an average of $1,000 per month, consistent with the estimated monthly tax payments on Debtor's Schedules I & J and the Means Test.

The Debtor's 2015 taxes show payments of $7,721.00 and $736.00. However, Debtor was out of work from January to March. The taxes reflected on the 2015 returns are because the Debtor was out of work for three months.

The amount of $1,054.00 listed on Form 122C-2 for taxes is consistent with the Schedule J tax deduction of $856.00. Debtor's Amended Schedule I shows Debtor's work income of $1,534.00, with tax deductions of $188.00 in addition to the ongoing tax payment of $856.00 on Schedule J. Additionally, the petition was filed prior ro the filing of 2015 taxes. The available taxes at the time showed Debtor and his wife paying $10,287.00 to the Internal Revenue Service for the 2014 tax year, which is fully consistent with the Schedules I & J and the Means Test estimate of $1,054.00 per month.

Storage

The garage at Debtor's residence is used to keep cars, and most of the remaining garage space is used by Debtor's wife to store her many samples for her business. The rental storage is the only place available to keep motorcycles and other household items that cannot be kept at Debtor's residence because of lace of space.

JULY 26, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on August 23, 2016. Dckt. 64.

AMENDED SCHEDULES I AND J

The Debtor filed amended Schedules I and J on August 12, 2016. Dckt. 65.

TRUSTEE'S SUPPLEMENTAL EX PARTE MOTION TO DISMISS TRUSTEE'S OPPOSITION

On August 16, 2016, the Trustee filed an ex parte motion to dismiss the Trustee's opposition. Dckt. 67. The Trustee states that the Debtor's amended Schedules I and J resolves the Trustee's objections.

DISCUSSION

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 creditors. The Trustee has withdrawn his opposition. Therefore, upon review of the Motion and no pending objections remaining, the amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on June 6, 2016 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

3. **16-23617-E-13** **JOHN MONROE** **AMENDED MOTION TO VALUE**
HLG-1 **Kristy Hernandez** **COLLATERAL OF CITIFINANCIAL SERVICES, INC.**
7-26-16 [30]

Final Ruling: No appearance at the August 23, 2016, hearing is required.

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

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

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

The Motion to Value secured claim of CitiFinancial Services, Inc. ("Creditor") is granted, and the secured claim is determined to have a value of $0.00.

The Motion to Value filed by John Henry Monroe Jr. ("Debtor") to value the secured claim of CitiFinancial Services, Inc. ("Creditor") is accompanied by Debtor's declaration. FN.1. Debtor is the owner of the subject real property commonly known as 2428 Skyview Circle, Fairfield, California ("Property"). Debtor seeks to value the Property at a fair market value of $498,671.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. The Debtor originally filed the Motion to Value on July 7, 2016. Dckt. 18. David Cusick, the Chapter 13 Trustee, filed a response on July 22, 2016, stating that the Debtor's Motion incorrectly identified the Debtor as "John Henry Monroe" rather than "John Henry Monroe, Jr." Dckt. 28. In response to this, the Debtor filed an amended Motion to Value on July 26, 2016, correctly identifying the Debtor. Dckt. 30.

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

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

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

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

The senior in priority first deed of trust secures a claim with a balance of approximately $500,187.47. Creditor's second deed of trust secures a claim with a balance of approximately $25,168.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by John Henry Monroe Jr. ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of CitiFinancial Services, Inc. secured by a second in priority deed of trust recorded against the real property commonly known as 2428 Skyview Circle, Fairfield, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $498,671.00 and is encumbered by a senior lien securing a claim in the amount of $500,187.47, which exceeds the value of the Property that is subject to Creditor's lien.

4. **16-23617-E-13** **JOHN MONROE** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **7-13-16 [24]**

Final Ruling: No appearance at the August 23, 2016, Hearing is required.
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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 13, 2016. By the court's calculation, 41 days' notice was provided. 14 days' notice is required.

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

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The court's decision is to overrule the Objection and confirm the plan.

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

1. The proposed plan relies upon a pending Motion to Value secured claim of CitiFinancial Services, Inc. on a second deed of trust on John Monroe Jr.'s ("Debtor") residence. Debtor's plan would have insufficient funds to pay the claim in full if the Motion to Value secured claim of CitiFinancial Services, Inc. was denied.

AUGUST 16, 2016, HEARING

At the hearing, the court continued the instant Objection to August 23, 2016, at 3:00 p.m. because of its interconnectedness with John Monroe Jr.'s ("Debtor") Motion to Value secured claim of CitiFinancial Services, Inc..

DISCUSSION

Debtor's Motion to Value secured claim of CitiFinancial Services, Inc. was granted on August 23, 2016, and the secured claim was determined to have a value of $0.00. The Trustee opposed confirmation because Debtor's plan would not have sufficient funds to cover the secured claim of

CitiFinancial Services, Inc. if the court denied Debtor's Motion to Value. That Motion to Value having been granted, the Trustee's Objection to confirmation is overruled, and Debtor's plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on June 1, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

5. **15-27219-E-13** **BRIAN CLARK**
DPC-1 **Mark Wolff**

OBJECTION TO CLAIM OF SUNUP FINANCIAL, LLC, DBA BALANCE CREDIT.COM BY PERITUS PORTFOLIO II, LLC, CLAIM NUMBER 7-1
7-6-16 [43]

Final Ruling: No appearance at the August 23, 2016, hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, creditors, and Office of the United States Trustee on July 6, 2016. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. Fed. R. Bankr. P. 3007(a) (30 day notice); L.B.R. 3007-1(b)(1) (14-day opposition filing requirement).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim number 7-1 of SunUp Financial, LLC, dba Balance Credit.com by Peritus Portfolio II, LLC is sustained and the claim is disallowed in its entirety.

David Cusick ("Objector"), the Chapter 13 Trustee, requests that the court disallow the claim of SunUp Financial, LLC, dba Balance Credit.com by Peritus Portfolio II, LLC ("Creditor"), Proof of Claim No. 7-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $2,483.07. Objector asserts that the Claim has not been timely not timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is January 20, 2016. Notice of Bankruptcy Filing and Deadlines, Dckt. 10.

DEBTOR'S RESPONSE

Brian Clark ("Debtor") filed a response on July 25, 2016. Debtor states that he does not oppose the Objector's motion.

DISCUSSION

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

The deadline for filing a Proof of Claim in this matter was January 20, 2016. The Creditor's Proof of Claim was filed June 29, 2016. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of SunUp Financial, LLC, dba Balance Credit.com by Peritus Portfolio II, LLC ("Creditor") filed in this case by David Cusick, Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 7-1 of SunUp Financial, LLC, dba Balance Credit.com by Peritus Portfolio II, LLC is sustained, and the claim is disallowed in its entirety.

6. **14-26838-E-13** **TERRY HAMILTON AND NICHOL ARANDA** **MOTION TO BORROW**
PSB-1 **Paul Bains** **7-14-16 [53]**

Final Ruling: No appearance at the August 23, 2016 Hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on July 14, 2016. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

The Motion to Incur Debt is granted.

Terry Hamilton and Nichol Aranda ("Debtor") filed the instant Motion to Incur Debt on July 14, 2016. Dckt. 53. The motion seeks permission to purchase a 2010 Honda Civic EX-L, VIN ending in 7051 (the "Vehicle"), at a total purchase price of $8,700.00, with thirty-six (36) monthly payments of $250.00, including a 2.1% interest rate.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on July 28, 2016. Dckt. 65. The Trustee asserts that the Debtor's motion fails to explain if the seller of the Vehicle is a relative of the Debtor. The Debtor has failed to indicate if this sale is an arms-length transaction.

The Trustee states that the sale appear reasonable as the Debtor is purchasing a 2010 Honda Civic at $8,700.00; $250.00 per month for 36 months with an interest rate of 2.1%.

DEBTOR'S RESPONSE

The Debtor filed a response on July 29, 2016. Dckt. 67. The Debtor states that Roberto V. Aranda is the father of Debtor Nichol Aranda. No declaration or other evidence is provided for this fact argued by counsel in the Reply.

DISCUSSION

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

The Debtor filed a declaration on July 11, 2016, in which they state that credit is needed to purchase a vehicle because the lease on their previous vehicle matured, and they surrendered that vehicle. Dckt. 55.

The court did not make this a final ruling because Debtor's counsel threw in a Reply stating a fact for which no evidence was presented. It is a short walk from a "simple" fact which the client tells the attorney to the attorney arguing complex facts, drawing legal conclusions, and dictating to the court what the evidence to the court would have been if any evidence had been presented. While the shortcoming in this contested matter does not cause the court to deny the Motion (given counsel's usual compliance with the rules and presenting clear and credible evidence), it is a good reminder that the rules are simple and evenly applied, with attorneys not having to guess when they can get away with ignoring the rules and when they will really be applied.

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. While the Trustee has questioned whether this is a "arm-length" transaction, he has not indicated the sales price of the vehicle is inconsistent with the value as reflected in any of the common trade guides (such as Kelly Blue Book and NADA) or that there is anything other suspect about the sale. The Debtor has indicated that their prior vehicle has been surrendered and they are in need of some form of transportation. The instant Vehicle and its terms all appear to be in the best interest of the estate. There being no opposition from any party in interest and the terms 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 Motion is granted and Terry Hamilton and Nichol Aranda ("Debtors") are authorized to incur debt pursuant to the terms of the agreement, Exhibit B, Dckt. 56, with said amount of credit not to exceed the $8,700.00 purchase price for the 2010 Honda Civic.

7. 14-26838-E-13 PSB-2 | **TERRY HAMILTON AND NICHOL ARANDA** | **MOTION TO CONFIRM PLAN 7-14-16 [57]**
Paul Bains

Final Ruling: No appearance at the August 23, 2016 Hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on July 14, 2016. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

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

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

Terry Hamilton and Nichol Aranda (the "Debtors") filed the instant Motion to Confirm the Modified Plan on July 14, 2016. Dckt. 57.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on August 8, 2016. Dckt. 69. The Trustee opposes confirmation on the following grounds:

1. The amount owed to the Internal Revenue Service ("IRS") stated in § 2.13 of the proposed modified plan is more than stated originally. Specifically, the amount owed increased from $6,800.34 to $14,090.71, which is an increase of $7,290.37. The IRS filed a proof of claim for $7,015.13 relating to the 2013 tax year with $6,800.34 entitled to priority. Currently, the Trustee has disbursed $5,009.57 to the 2013 IRS claim. The Trustee opposes confirmation now because the IRS has not amended its claim to include subsequent taxes, which prevents the Trustee from paying the increased amount proposed in the modified plan.

2. The proposed modified plan removes $252.75 owed as vehicle lease payments and adds $250.00 as a proposed car payment. The Trustee would not oppose that change if the Debtors' Motion to Borrow is granted and if the order confirming the modified plan includes language providing that the new creditor be paid as Class 4 debt.

DEBTORS' RESPONSE

The Debtors filed a response on August 8, 2016. Dckt. 72.

First, as to the Trustee's first objection, the Debtor's state that Debtor's counsel has contacted the IRS and hope to have the claim amended prior to the hearing.

Second, as to the Trustee's second objection, the Debtor concurs that the order confirming can add the language authorizing the Debtor to make the $250.00 car payment in Class 4.

DISCUSSION

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

The IRS filed an amended proof of claim on August 9, 2016, to incorporate 2014 taxes owed. Proof of Claim No. 2. The total amount of unsecured priority claims is now $13,096.34. The Debtors' proposed modified plan overestimates the amount owed at $14,090.71–a difference of $994.37. Therefore, in light of the IRS filing an amended Proof of Claim incorporating the 2014 taxes, the Trustee's opposition is overruled

Having granted the Debtors' Motion to Incur Debt and both the Debtor and Trustee concurring that the order confirming can add the additional language authorizing the Debtor to pay Roberto V. Aranda as a Class 4 claim for the newly purchased vehicle, the Trustee's second objection is overruled.

The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and thus, 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 14, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, adding additional language authorizing the Debtor to pay Roberto V. Aranda for the Vehicle as a Class 4 claim outside the plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

8. **16-23346-E-13** **JOSHUA BORS** **MOTION TO VALUE COLLATERAL OF**
JMC-2 **Joseph Canning** **WELLS FARGO BANK, N.A.**
7-15-16 [24]

Final Ruling: No appearance at the August 23, 2016, hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor, creditors, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 15, 2016. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Wells Fargo Bank, N.A. ("Creditor") is granted, and the secured claim is determined to have a value of $5,407.00.

The Motion filed by Joshua Bors ("Debtor") to value the secured claim of Wells Fargo Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2010 Chevrolet Impala ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $5,407.00 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 lien on the Vehicle's title secures a purchase-money loan incurred on March 8, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $6,247.22. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $5,407.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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 Joshua Bors ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. ("Creditor") secured by an asset described as a 2010 Chevrolet Impala ("Vehicle") is determined to be a secured claim in the amount of $5,407.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $5,407.00 and is encumbered by liens securing claims that exceed the value of the asset.

9. **14-26567-E-13** **SAMUEL TAPIA**
JGD-4 **John G. Downing**

ORDER TO APPEAR FOR OCWEN LOAN SERVICING, LLC RE: MOTION FOR ORDER APPROVING A LOAN MODIFICATION
7-22-16 [110]

APPEARANCE OF SENIOR MANAGER OR MANAGERS RESPONSIBLE FOR THE EMPLOYEES OF OCWEN LOAN SERVICING, LLC, REQUIRED FOR HEARING

NO TELEPHONIC APPEARANCE PERMITTED

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, Ocwen Loan Servicing, LLC, Consumer Financial Protection Bureau, and Office of the United States Trustee on July 24, 2016. By the court's calculation, 30 days' notice was provided.

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

The Order to Appear is ----------.

On July 22, 2016, the court issued the following Order to Appear, ordering, in relevant part, the

following:

Therefore, upon review of the Motion to Approve Loan Modification between Debtor and Ocwen Loan Servicing, LLC; the lack of testimony or evidence provided my a managing member or employee of Ocwen Loan Servicing, LLC; and the relative simplicity for a person to provide bona fide, good faith testimony to authenticate records and document an interest in the promissory note, the hearing on the Motion for Order Approving a Loan Modification filed by the Debtor having come on for hearing on July 19, 2016; counsel or representative for Ocwen Loan Servicing, LLC not being present and good cause appearing;

IT IS ORDERED that Ocwen Loan Servicing, LLC, through a senior manager or managers responsible for the employees of Ocwen Loan Servicing, LLC correctly and completely accurately creating loan modification agreement or pleadings to be filed in federal court, and their respective attorneys of choice, shall appear at 3:00 p.m. on August 23, 2016, in person, in Department E of the United States Bankruptcy Court, 501 I Street, Sixth Floor, Sacramento, California, with no telephonic appearances allowed on this matter.

IT IS FURTHER ORDERED that Ocwen Loan Servicing, LLC, address in writing for the court, including properly authenticated and admissible evidence in support thereof, the following:

A. The identify the actual creditor, as that term is defined in 11 U.S.C. § 101(10) of the Debtor in this case for the obligation to be modified by the by the Loan Modification Agreement filed in this case (Dckt. 77);

B. Why, if the creditor is someone other than Ocwen Loan Servicing, LLC, that identify of such creditor has been withheld from the court, Debtor, and other parties in interest in this bankruptcy case;

C. Why the documents presented for approval by this court for the Loan Modification (Dckt. 77) do not have the completed signature blocks for the creditor who (either personally or through an authorized agent) who enters into this Loan Modification Agreement with the Debtor; and

D. If Ocwen Loan Servicing, LLC is the agent for the actual creditor, the good faith basis it has for having the Debtor seek approval of, and authorization for, the Loan Modification Agreement by this court exercising federal judicial power without Ocwen Loan Servicing, LLC disclosing the identify of the creditor and not providing the court with the identity of the real parties in interest whose rights are to be modified through these federal judicial proceedings.

IT IS FURTHER ORDERED that all written responsive pleadings and supporting evidence ordered to be produced shall be filed and served on the Debtor, Debtor's Counsel, the Chapter 13 Trustee, and the U.S. Trustee, attn: Antonia Darling, Esq., on or before August 12, 2016.

BACKGROUND

On June 28, 2016, the court held a hearing on Samuel Tapia's ("Debtor") Motion for Order Approving a Loan Modification. Dckt. 74. The Debtor named "Ocwen Loan Servicing, LLC" as the "creditor" who would be entering into a loan modification with Debtor. This was Debtor's first attempt at getting court approval for a loan modification, and the court continued the Motion on the grounds that the court could not determine by the evidence presented if "Ocwen Loan Servicing, LLC" is actually the creditor, acting in its own right with respect to interest it personally has, who is modifying the contractual obligations of Ocwen Loan Servicing, LLC with the Debtor or if Ocwen Loan Servicing is actually the agent for an undisclosed principal.

The Loan Modification Agreement identifies Ocwen Loan Servicing, LLC as the entity offering the loan modification, disclosing no other person who could be a principal or that Ocwen Loan Servicing, LLC is executing these documents on behalf of any other person. The Loan Modification contract uses ambiguous language "Lender/Loan Servicer/Agent for Loan Servicer" when creating a contractual defined term to identify Ocwen Loan Servicing, LLC. The court is, and has been, concerned over the representations made by Ocwen Loan Servicing, LLC (and other third-party loan services) to consumers in proofs of claim, loan modification agreements, and stipulations when the documents or pleadings fail to clearly identify the creditor, and whether the "loan servicer" is acting as an agent of a principal or is the actual creditor.

The court has expressed in prior cases its concern of the ambiguous and incomplete statements and representations by Ocwen Loan Servicing, LLC in cases before the court. Ocwen Loan Servicing, LLC has been required to appear in this court and address the failure to identify the actual creditor in contracts and loan modifications it is presenting to consumers. As addressed earlier in this case, referencing this being an ongoing issue with Ocwen Loan Servicing, LLC, the court stated:

> Ocwen Loan Servicing, LLC has appeared many times in the court and has been ordered to appear and address the failure to identify the actual creditor in contracts and loan modifications it is presenting to consumer debtors. As in the present case, Ocwen Loan Servicing, LLC would prepare contracts in which it is ambiguously identified as "Lender/Loan Servicer/Agent for Loan Servicer." Ocwen Loan Servicing, LLC was preparing and presenting to consumer and consumer attorneys loan modification agreements which were not with the creditor and for which Ocwen Loan Servicing, LLC was not identified as executing the agreement for a disclosed principal.
>
> Two of the cases in which the court has order[ed] Ocwen Loan Servicing, LLC to appear and address it preparing and presenting contracts to be approved in this federal court which did not include the real parties with a case or controversy are *In re Nissen*, Bankr. E.D. Cal. 11-30546, and *In re Raposo*, Bankr. E.D. Cal. 09-

27153.

No Proof of Claim has been filed. There is no indication on the actual Modification Agreement as to who is the real creditor in interest. The balloon payment agreement only identifies Ocwen as "Lender/Servicer or Agent for Lender/Servicer," appearing to be nothing by a "catch-all" in order to cover all possible roles Ocwen may be playing in a certain transaction without stating explicitly and affirmatively who they are in terms of the transaction.

Notably absent from the motion itself is the identity of the creditor. Rather, the Motion remains silent as to what entity the Debtor is attempting to enter a modification. The Debtor, appearing to "hide the ball" instructs the court to search the "Motion, on the Declaration of Samuel Tapia and Exhibit" to discern the parties of the modification; the respective roles of the party (i.e. Ocwen as servicer or creditor); the actual change in mortgage payments and principal balance; etc. The court declines such invitation.

As discussed supra, Ocwen Loan Servicing, LLC has been ordered to appear before and, as the court has emphasized on these occasions, understands the creditor must be identified. However, notwithstanding Ocwen Loan Servicing, LLC's prior appearances, it appears that the modification documents in the instant case have been prepared to intentionally hide the identity from the court and circumvent the obligations of the parties in federal court.

Civil Minutes, Dckt. 98.

Survey of Other Cases and Conduct of Ocwen Loan Servicing, LLC

I. Paul Costa and Karolyn Cole, Chapter 13 Case No. 10-40834.

A. The court's findings and conclusions in the Civil Minutes on the final hearing on the motion to approve a loan modification include the following:

1. "At the June 10, 2014 hearing nothing further was offered by the Debtors or Ocwen Loan Servicing, LLC. The Servicing company offered no evidence other than the previously submitted declaration that which the could [sic] found to be less than credible or persuasive. Ocwen Loan Servicing, LLC's counsel offered explanations qualified with 'Its my understanding,' rather than being able to provide clear unequivocal statements backed up by evidence that her client is actually a creditor as defined by 11 U.S.C. § 101(10) and not a loan servicing agent (which is a valid status to be and one from which it might well be authorized to execute loan modification documents for the actual creditor)." 10-40834; Civil Minutes, Dckt. 77 at 1.

2. "The Assignment of the Proof of Claim was filed by Ocwen Loan Servicing, LLC's attorneys seven months prior to the June 10, 2014 hearing. Ocwen Loan Servicing, LLC and its attorneys have known of the court's concerns

about whether it is the creditor or the bona fide loan servicer since the first hearing on this Motion on January 28, 2014. Though five months have passed, no copy of an assignment, transfer or negotiation of the note, no copy of a note endorsed in blank, and no declaration of a person with actual knowledge to testify as to the possession and existence of the note has been provided. Rather, the best is that a new employee at Ocwen Loan Servicing, LLC testifies that he has personal knowledge that records of the Servicer state that the Note is some in its possession." *Id.* at 2.

3. "The Debtors have been put at great financial peril by Ocwen Loan Servicing, LLC's, and their attorneys, failure to provide very simple, clear evidence that the Servicer is actually the Creditor (11 U.S.C. § 101(10)). Possibly this Servicer and Onewest Bank, FSB desire the court to deny the modification or hope that the Debtors will tire of the fight, handing the property over to the Creditor pursuant to a preconceived plan." *Id.*

4. "On March 19, 2014, Ocwen Loan Servicing, LLC, filed the Declaration of Joshua Wimbley, a contract management coordinator. Mr. Wimbley states that according to Ocwen Loan Servicing, LLC's business records, it is the holder of the promissory note and is currently in possession of the original Note, which is endorsed and payable to blank (bearer). Declaration, 6, Dckt. 73. Further, the business records reflect that an Assignment was executed on February 13, 2014 showing that the Deed of Trust was assigned to Ocwen Loan Servicing, LLC. *Id.* 8.

   a. The court does not find this evidence credible. First, Mr. Wimbley states that he has been employed by Ocwen for a period of eight months. He has provided no explanation as to how in those eight months of experience he has become well versed in the books and records of Ocwen and can determine that notes endorsed in blank are in the possession of some (unnamed) person at some (unidentified) location for Ocwen. " *Id.* at 4.

II. Wayne Wilkinson and Denise Armendariz, Chapter 13 Case No. 11-20868.

A. Ocwen Loan Servicing, LLC filed a brief in support of the requested loan modification in the Wilkinson/Armendariz case, which includes the following statements and representations by counsel for Ocwen Loan Servicing, LLC:

1. "Ocwen is currently the servicer of a loan secured by a deed of trust against the property located at 9925 Valgrande Way, Elk Grove, CA (the "Property"). Declaration of Kevin Flannigan ("Flannigan Decl."), ¶ 3. It is this trust deed obligation that the proposed loan modification seeks to modify. Flannigan Decl., ¶ 3." 11-20868; Brief, Dckt. 191 at 2.

2. "The investor of this loan is U.S. Bank National Association, As Trustee For MASTR Adjustable Rate Mortgages Trust 2007-3 Mortgage Pass-Through

Certificates, Series 2007-3 ("US Bank"). Flannigan Decl., ¶ 4." *Id.*

3. "Here, the Power of Attorney provides Ocwen with the authority to modify the loan for Debtors and this Court to rely on the Power of Attorney to provide that authority. Accordingly, the loan modification agreement is binding on US Bank [the undisclosed, unidentified principal in the document]." *Id.* at 4.

4. "Due to the straightforward rules provided by HAMP, the servicer must sign the model agreement as written. Therefore, Ocwen cannot vary from the terms of the agreement already provided to Debtor. Flannigan Decl., ¶ 7. Accordingly, there is no requirement under HAMP, nor can the agreement be modified under HAMP, to disclose the name of the investor." *Id.* at 4. FN.3.

FN.2. The court has viewed and rejected this argument as one in which the asserted Regulation trumps the United States Constitution and dictates that trogon horse placeholders will appear in federal court in place of the unidentified real party in interest.

B. The court addressed these contentions by Ocwen Loan Servicing, LLC in connection with the motion to approve loan modification, which findings and conclusions stated in the Civil Minutes for the August 5, 2014 hearing include the following:

1. "Additionally, Ocwen Loan Servicing, LLC argues that it may not modify a HAMP agreement to disclose the name of the investor. The subject modification agreement was made pursuant to the Home Affordable Modification Program (HAMP). Ocwen Loan Servicing states that, while it is aware of the preference of this Court to disclose the name of the investor in the loan modification agreement, under the terms of HAMP, it may not do so." 11-20868; Civil Minutes, Dckt. 202 at 4.

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

3. The court quotes in Footnote 3 to the Civil Minutes the actual langauge of the Handbook, which actually states:

a. " 'Servicers are **strongly encouraged to use the HAMP documents** available on www.HMPadmin.com. A single set of

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

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

c.

III. Exhibit B, Handbook for Servicers of Non-GSE Mortgages, Dckt. No. 193 at 9." *Id.* (emphasis added).

1. "While Ocwen argues long and hard that it can hide the identify of the party entering into the Loan Modification from the court, its arguments both miss the mark and do not have support in the authorities it has cited. *Id.* at 5.

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

3. " Contrary to Ocwens contention that a modification of the HAMP loan modification document is required, rather, Ocwen merely need to type the name of successor to the original lender into the Loan Modification Agreement. Then, Ocwen merely needs to execute the Loan Modification Agreement for that Lender." *Id.* at 6.

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

customarily and reasonably necessary and appropriate for the tasks described in the items (1) through (11) below. Dckt. No. 193 at 2, Exhibit A." *Id.* (emphasis added).

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

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

IV. Amos G. Snell, Chapter 13 Cse No. 13-24512.

A. In connection with a Motion for Relief From the Automatic Stay, the court addressed the conduct of Ocwen Loan Servicing, LLC in the Civil Minutes from the May 14, 2013 hearing, which findings and conclusions include the following:

1. "Ms. DeLage testifies under penalty of perjury that she is a contract management coordinator for Ocwen Loan Servicing, LLC. She testifies that Ocwen Loan Servicing, LLC is the loan servicing agent for Deutsche Bank National Trust Company, Trustee." 13-24512; Civil Minutes, Dckt. 209 at 1.

2. "Ms. DeLage further testifies under penalty of perjury that she has personal knowledge of and states that the books and records of Deutsche Bank National Trust Company, Trustee,...." *Id.* at 2.

3. "Based on the testimony of Ms. DeLage, a Contract Management Coordinator for Ocwen Loan Servicing, LLC, the court cannot determine how she has personal knowledge of the business practices, books and records, how the books and records are maintained, and the duties of the employees of Deutsche Bank National Trust Company, Trustee for the books and records for which she provides personal knowledge testimony under penalty of perjury." *Id.*

4. "At the hearing counsel for Movant appeared and stated that **Deutsche Bank National Trust Company did not want to proceed with the Motion because it did not own the property** [notwithstanding the testimony under penalty of perjury by the Ocwen Loan Servicing, LLC representative] which

is the subject of the Motion. It was stated on April 11, 2013, the Property was sold to an unrelated third party. No evidence was presented as to the sale actually occurring, though the court accepted counsel at his word that as of April 11, 2013, Deutsche Bank National Trust Company did not own the property, and therefore did not have standing to bring the present Motion." *Id.* at 3 (emphasis added).

5. "When advised by counsel that as of April 11, 2013, Deutsche Bank National Trust Company did not own the property, the court reviewed the pleadings with counsel. **The Declaration of Ms. DeLage was executed on April 16, 2013. Dckt. 17. This was five days after Deutsche Bank National Trust Company sold the Property**. Ms. **DeLage testifies under penalty of perjury** (though the court cannot see any basis for her having personal knowledge thereof) that on October 24, 2012, **Deutsche Bank National Trust Company obtained title to the Property.** She provides this declaration in support of the Motion." *Id.* (emphasis added).

V. Michael Neumann, Chapter 13 Case No. 11-48095.

A. The court issued an Order to Appear and Show Cause on September 14, 2015, for Ocwen Loan Servicing, LLC to address the issues of identifying itself as the Creditor. The Order includes the following:

1. "On February 28, 2013, a Notice of Mortgage Payment Change was filed by Ocwen Loan Servicing, LLC for the GMAC Mortgage, LLC claim. February 28, 2013 Docket Entry (after Dckt. Entry 61 and also on the Clerk's Registry of Claims in this case for Proof of Claim No. 1) . On the Notice in the 'Name of Creditor' field, the following information is provided: 'Ocwen Loan Servicing, LLC*.'" (The asterisk is to a footnote stating that Ocwen Loan Servicing, LLC obtained the loan servicing rights." 11-48095; Order, Dckt. 92 at 2.

2. "On April 16, 2013, Pite Duncan, LLP, [attorneys for Ocwen Loan Servicing, LLC] filed a Notice of Transfer of Claim No. 1, executing the document as the attorney for Ocwen Loan Servicing, LLC. Dckt. 62. That Notice states that Proof of Claim No. 1 was transferred from GMAC Mortgage, LLC to Ocwen Loan Servicing, LLC." *Id.* at 3.

3. "On February 18, 2014, Ocwen Loan Servicing, LLC, identified as the creditor, filed a Notice of Mortgage Payment Change, which states that the payment on the debt upon which Proof of Claim No. 1 is based has decreased to $910.78 a month. February 18, 2014 Docket Entry (after Dckt. Entry 70 and also on the Clerk's Registry of Claims in this case for Proof of Claim No. 1) ." *Id.* at 4.

4. "While Ocwen Loan Servicing, LLC's attorneys have filed a document titled

"Notice of Assignment," no document purporting to be an assignment of the promissory note upon which the claim is based has been provided to the court." *Id.* at 8-9.

5. "The court has addressed on multiple occasions Ocwen Loan Servicing, LLC misrepresenting that it is the creditor in bankruptcy cases. One recent case was In re Guitierrez, Bankr. E.D. Cal. 12-28547. In that case, Ocwen Loan Servicing, LLC presented itself as a creditor which, in its personal capacity, had the rights which it was modifying with the consumer debtors. Ocwen Loan Servicing, LLC was not purporting to modify the rights of any principal or other person with respect to the debt owned by those consumer debtors." *Id.* at 10.

6. "The Gutierrez debtors reported to the court that, notwithstanding the discovery requests to identify the actual creditor, Ocwen Loan Servicing, LLC failed to respond as required by the Bankruptcy Rule 2004 subpoena. Case No. 12-28547; Status Report filed June 1, 2015, Dckt. 128. This lack of voluntary disclosure of the true identity of the creditor forced the Gutierrez debtors to file (and incur the costs and expenses for) a motion to compel discover y and seek compensatory sanctions. *Id.*, Motion, Dckt. 130." *Id.* at 11.

7. "Though Ocwen Loan Servicing, LLC failed to respond to the subpoena and identify the creditor, Deutsche Bank Trust Companies Americas, Trustee, appeared in the Gutierrez case and confirmed that it was the creditor and that Ocwen Loan Servicing, LLC was engaged only as the loan servicer for that creditor. *Id.*; Response, Dckt. 124, and Declaration, Dckt. 125." *Id.*

8. "The motion to compel the production of discovery from Ocwen Loan Servicing, LLC was dismissed pursuant to a settlement between Deutsche Bank Trust Companies Americas, Trustee, and the Gutierrez debtors. *Id.*; Stipulation, Dckt. 141. The monetary terms of the settlement were not disclosed, other than that Deutsche Bank Trust Companies Americas, Trustee, agreed to pay the debtors' legal fees relating to the failure of Ocwen Loan Servicing, LLC to comply with the Bankruptcy Rule 2004 subpoena." *Id.*

9. " A similar situation existed in the *Montelongo* bankruptcy case. Bankr. E.D. Cal. 13-23599. The *Montelongo* debtor filed a motion to approve a loan modification between the debtor and Ocwen Loan Servicing, LLC individually, as the creditor, on February 6, 2015. *Id.*; Motion, Dckt. 131. Again, the loan modification documents identified only Ocwen Loan Servicing, LLC personally (with no designation of acting as the agent or exercising a power of attorney) as the only party with whom the debtor was contracting to modify the loan. *Id.*; Exhibit A, Dckt. 134." *Id.* at 11-12.

10. "On June 1, 2015, the *Montelongo* debtor reported that Ocwen Loan

Servicing, LLC had not informally provided the information and had failed to respond to the Bankruptcy Rule 2004 subpoena. *Id.*; Report, Dckt. 170. A motion to compel production of the discovery and for compensatory sanctions was filed by the *Montelongo* debtor. *Id.*; Motion, Dckt. 165." *Id.* at 12.

11. "Though the information was not provided by Ocwen Loan Servicing, LLC in response to the subpoena, U.S. Bank, N.A., Trustee, filed a response identifying itself as the creditor. *Id.*; Response, Dckt. 161, and Declaration, Dckt. 162. Again, it was the creditor who remedied the failure of Ocwen Loan Servicing, LLC to respond to the subpoena and identify the creditor. The creditor in Montelongo paid the attorneys' fees and costs relating thereto the failure of Ocwen Loan Servicing, LLC to comply with the subpoena." *Id.*

12. "In a recent adversary proceeding, the consumer debtor was required to sue both OneWest Bank, FSB and Ocwen Loan Servicing, LLC over the failure to reconvey a deed of trust following the completion of the Chapter 13 plan and payment in full of the allowed secured claim for which the deed of trust was collateral. Gil Raposo and Joanne Raposo v. Ocwen Loan Servicing, LLC and OneWest Bank, FSB. Bankr. S.D. Cal. Adv. Pro. 15-2095. Neither Ocwen Loan Servicing, LLC nor OneWest Bank, FSB responded to the complaint or filed any opposition to entry of the default judgments against each of them." *Id.* at 13.

13. "In Raposo v. Ocwen et al., the need to sue both Ocwen Loan Servicing, LLC and OneWest Bank, FSB was caused by the documents filed in the Raposo bankruptcy case. Bankr. E.D. Cal. 09-27153...On September 4, 2015, a Notice of Transfer of Claim was filed stating that the claim of OneWest Bank, FSB had been transferred to Ocwen Loan Servicing, LLC. *Id.*; Dckt. 96. No copies of any transfer documents were attached to the Notice and no amended Proof of Claim No. 7 setting forth Ocwen Loan Servicing, LLC's standing as a creditor had been filed." *Id.* at 13-14.

B. In ruling on the Order to Appear, the court addressed the contention of Ocwen Loan Servicing, LLC and its attorneys that when Ocwen Loan Servicing, LLC provided documents to its attorneys, and then the attorneys placed the Ocwen Loan Servicing, LLC documents in the attorneys physical or electronic "file," then the records became the business records of the attorney and the attorney was qualified to give proper, credible, admissible personal knowledge testimony about the record. The findings and conclusions of the court in ruling on the Order include the following:

1. "The problem identified by the court is that various attorneys at the Pite Duncan, LLP/Aldridge Pite, LLP [attorneys for Ocwen Loan Servicing, LLC] law firms take it upon themselves to make statements under penalty of perjury to the court. Not only are some of the statements conflicting, but the testimony provided in response to the Order to Show Cause clearly shows that the attorneys had no personal knowledge of the various 'facts' which

they state to be true and correct under penalty of perjury." 11-48095; Civil Minutes, Dckt. 115 at 21.

2. "At best, the testimony presented is that the attorneys were provided with the electronic transmissions filed as Exhibit 4. These all but completely redacted documents do not state that Ocwen Loan Servicing, LLC is in possession of the note. Even if they did, the various attorneys have no personal knowledge of such facts, but are merely parroting what some unidentified person at Ocwen Loan Servicing, LLC may have said. Testimony or statements under penalty of perjury are more than merely parroting what someone else says." *Id.*

3. "From the record, there **appears to be no person at Ocwen Loan Servicing, LLC who can testify to having been in possession of the Note**, to being in possession of the Note, or to having transferred possession of the Note." *Id.* (emphasis added).

4. "Mr. Montoya's testimony is equally carefully circumscribed. As far as possession of the note, it's limited to "information and belief testimony." No grounds are provided for a non-expert witness testifying in federal court under penalty of perjury based solely on "information and belief." (As opposed to pleading in a complaint or motion a necessary element based on information and belief.)" *Id.*

5. "Mr. McAllister's testimony is that in 2012 the Pite Duncan, LLP law firm came into possession of the original note, indorsed in blank, and has continued in possession of it since 2014. He offers no testimony as to why Pite Duncan, LLP, and now possibly Aldridge Pite, LLP, has continued possession of this negotiable paper when no evidence has been provided that possession has ceased outside a statement in Mr. McAllister's declaration." *Id.*

6. "Further, no credible testimony is provided as to why a creditor, such as Fannie Mae, would transfer a negotiable paper out to loan servicers or to the attorneys for loan servicers. As provided in California Commercial Code §§ 3205(b) and 3301, anyone who gets his or her hands on the negotiable paper can treat is as their own - whether legally or illegally in possession of the paper. Such conduct not only appears highly unlikely, but would be inconsistent with federally insured financial institutions or tax payer underwritten entities such as Fannie Mae." *Id.*

7. Such testimony is in **conflict with the Fannie Mae Servicer Guide** presented by Aldridge Pite, LLP and its attorneys as part of the response. Exhibit 3, Dckt. 98. **Except for extraordinary legal proceedings, the original note is either in Fannie Mae's possession or of a third-party custodian**. In another case, the standard Fannie Mae third-party custodial

agreement was presented to the court. On its face, the excerpt of the Fannie Mae Guide does not provide for the Pite Duncan, LLP/Aldridge Pite, LLP law firm to properly be in possession of a note owned by Fannie Mae." *Id.* at 21-22 (emphasis added).

8. "As to the second point, Aldridge Pite, LLP and the attorneys offer no basis for showing that Aldridge Pite, LLP maintains business records relating to the substance of the transactions and facts which these attorney have filed statements under penalty of perjury and argued "facts." Rather, they are merely parroting documents which their client maintains, without any actual, real, credible knowledge of the documents or facts asserted pursuant thereto." *Id.* at 22.

9. "The Aldridge Pite, LLP argument that every attorney is made a competent witness to attest to business records because a client gives the attorney copies of the record fails. First, for the record to qualify for the Federal Rules of Evidence 803(6) exception it must be a record made at or near the time by, or from information transmitted by, someone with knowledge. No one from Aldridge Pite, LLP asserts that the records were made by anyone at Aldridge Pite, LLP or that Aldridge Pite, LLP has any knowledge that the record was made by someone with knowledge. The testimony and arguments presented are that someone at Ocwen Loan Servicing, LLC (or Ocwen Financial, Inc.) told someone at Aldridge Pite, LLP that these are business records." *Id.* at 24-25.

10. "Second, the business records at issue are not ones that Aldridge Pite, LLP keeps in the course of its regularly conducted activity of a business, organization, occupation, or calling, as a law firm. Instead, these "records" exist only when a client provides copies of the clients business records to Aldridge Pite, LLP. Merely because the State of California has issued law licenses to attorneys at Aldridge Pite, LLP does not imbue that law firm with the status of master business record keeper for all of its clients. Aldridge Pite, LLP, as confirmed at the hearing, has no interest in the business of Ocwen Loan Servicing, LLP or Ocwen Financial, Inc. and has no reason to be provided with copies of the business records of Ocwen Loan Servicing, LLC (or Ocwen Financial, Inc.) except with respect to the litigation or non-ligation legal services to be provided by Aldridge Pite, LLP." *Id.* at 25.

11. "Even more insidious is that this "testimony for hire" could work to insulate people from misrepresentations. The court could well imagine that if documents provided by a client for which the attorney provided testimony for hire turned out to be false, the attorney would plead innocence and contend that he or she could not be liable for perjury because the attorney had "relief" on the documents provided by the client. Nobody from the client provided any statements under penalty of perjury, so the attorney would then argue that there was nobody at the client who could be brought to the court to answer for providing false documents, information, or testimony." *Id.*

12. "Though the court does not impose corrective sanctions at this time or recommend that the District Court proceed to address this conduct, it is not a "free pass" for the conduct to continue. Each of the attorneys; Aldridge Pite, LLP; Ocwen Loan Servicing, LLC (to the extent it is a separate legal entity); and counsel for Ocwen Loan Servicing, LLC are each fully aware of the legal deficiencies in the evidence and arguments advanced to the court, and can be guided accordingly in their future conduct, arguments, and evidence presented in federal court. Continued failure to comply with the law and rules in federal court may well be the basis for sanctions, not only in the nature of corrective sanctions in the bankruptcy courts, but rise to the level of sanctions to be addressed by district courts." *Id.* at 26.

Though for more than two years the court has expressed its concern over the representations of Ocwen Loan Servicing, LCC, and Ocwen Loan Servicing, LLC professed to understand and appreciate the need to clearly identify its capacity (whether as an agent and identify the principal, or as the actual creditor) for the court to properly exercise federal judicial power (U.S. Const. Art. III, Sec. 2 - real party in interest, actual case or controversy requirement), this incomplete and inaccurate practice continues. This conduct necessitates the court to order the appearance of Ocwen Loan Servicing, LLC, and its senior management (as the management who have appeared do not appear to be capable of correcting this conduct) again.

SUPPLEMENTAL RESPONSE INFORMATION

The court continued the hearing on Debtor's Motion to Approve the Loan Modification, specifically to allow Debtor's counsel time to contract Ocwen Loan Servicing, LLC and for Ocwen Loan Servicing, LLC to correct this flaw in the Loan Modification Agreement being presented to the court.

On July 13, 2016, John G. Downing filed his declaration in support of the Motion to Approve the Loan Modification. Dckt. 107. Mr. Downing testifies that he made several inquiries of Owen Loan Servicing, LLC, and received an email response on July 12, 2016. The response is attached as Exhibit 1 to the declaration. It states that Ocwen Loan Servicing, LLC obtained the "servicing rights of the loan from Bank of America, N.A. on December 1, 2013." [Emphasis added.] Further, that Ocwen Loan Servicing, LLC, is "[o]bligated to service the loan in accordance with the terms of the Note and Mortgage...." [Emphasis added].

Nowhere in the response does Ocwen Loan Servicing, LLC state that it is the creditor or that it is attempting to collect a debt that is owed to it. Rather, Ocwen Loan Servicing, LLC states that it acquired only the servicing right and that it is obligated to provide the services of a loan servicer.

Mr. Downing filed a second declaration on July 14, 2016, in which he testifies as to a second communication he received from Ocwen Loan Servicing, LLC. Dckt. 108. The document Mr. Downing testifies receiving on July 14, 2016, from Ocwen Loan Servicing is provided as Exhibit 2 (Dckt. 109) and consists of the following:

A. It is titled "Notice of Servicing Transfer (RESPA), Welcome to Ocwen Loan Servicing, LLC."

B. It states that Samuel Tapia, the consumer Debtor in this case, is the "customer" of Ocwen Loan Servicing, LLC.

C. Effective November 30, 2013, Ocwen Loan Servicing, LLC will be servicing Mr. Tapia's mortgage instead of Bank of America.

D. "This communication is from a debt collector attempting to collect a debt; any information obtained will be used be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt."

E. "At Ocwen Loan Servicing, LLC we understand the importance ,of home ownership. We're dedicated to providing you with assistance and information you need about your mortgage loan, as well as additional products you may need as a homeowner, To get started, visit OcwenCustomers.com, select "New Customers" and sign up as a new user with your new Ocwen loan number."

In what appears to be a game of minimal information provided to the less sophisticated consumer, what Ocwen Loan Servicing, LLC tells the consumer is troubling. In addition to not stating anywhere that Ocwen Loan Servicing, LLC is the creditor or owns the obligation which it is trying to collect, **Ocwen Loan Servicing, LLC goes further to advise the Debtor that it is the Debtor who is Ocwen Loan Servicing, LLC's customer.** This communication does not clearly state that Ocwen Loan Servicing, LLC is a third-party loan servicer/debt collector who owes a contractual duty and fiduciary duty, as a loan servicer, to collect this debt for the actual undisclosed creditor. Ocwen Loan Servicing, LLC goes so far as to assure this Debtor that **Ocwen Loan Servicing, LLC is dedicated to provide the Debtor with assistance**, as well as to provide information about additional products which Debtor may need as a home owner.

OCWEN LOAN SERVING, LLC'S RESPONSE

Ocwen Loan Servicing, LLC filed a response to the Order to appear on August 12, 2016. Dckt. 133. Ocwen Loan Servicing, LLC also filed the declarations of Craig Markley, Gina Feezer, and Kim Miller. Dckt. 134, 135, and 136.

Ocwen Loan Servicing, LLC states that it is the servicer of Debtor's loan and Ocwen Loan Servicing, LLC is the attorney in fact and servicer for the owner of the loan, HSBC Bank USA, National Association, as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates ("HSBC").

Ocwen Loan Servicing, LLC asserts that the loan modification agreement used is that which is used in other jurisdictions across the country. Ocwen Loan Servicing, LLC states that HSBC awas note identified in the loan modification agreement because Ocwen Loan Servicing, LLC's computer system was inadvertently not set up to make this change automatically because the contacts tasked with assuring compliance with the court's prior order left Ocwen Loan Servicing, LLC in December 2015, before the necessary updates were implemented.

Ocwen Loan Servicing, LLC argues that following the November 2015 order issued by the court, Ocwen Loan Servicing, LLC held multiple meetings in order to incorporate the requirements of the court into Ocwen Loan Servicing, LLC's preparation of documents. However, the two individuals who were charged with making the necessary computer and loan modification templates adjustments left for unrelated reasons in December 2015.

Ocwen Loan Servicing, LLC does not offer any explanation as what took place during December 2015 and the instant Order to Appear being issued. Ocwen Loan Servicing, LLC does not state why an implementation of the "new system" fell on deaf ears. There does not have been any subsequent follow up for a 7-month period. It appears that it was not until the court once again had to issue an Order to Appear that Ocwen Loan Servicing, LLC once again responded with promises to implement, while also noting that "Ocwen is not aware of any other court that required the loan modification agreement templates to identify the beneficiary." Dckt. 133, pg. 2.

As part of the response, Ocwen Loan Servicing, LLC reviews the history of the Note and Deed of Trust. On July 14, 2006, the Debtor executed the $232,000.00 Note in favor of GreenPoint Mortgage Funding, Inc. as the original lender, which was secured by a Deed of Trust on the Property. Dckt. 137, Exhibit 3.

In August 2012, Debtor defaulted on the Loan and attempted to get a loan modification with the prior servicer, Bank of America, N.A. On December 9, 2010, Bank of America, N.A. notified Debtor that he did not qualify for a loan modification. Foreclosure proceedings were commenced by the prior servicer, Bank of America, N.A., wherein the Creditor was identified in the notice.

On April 28, 2012, MERS, as nominee for Greenpoint Mortgage Funding, Inc. executed an assignment of the Deed of Trust to HSBC Bank USA, National Association as Trustee for J.P. Morgan Alternative Loan Trust 2006- A5 pursuant to the Assignment of Deed of Trust. The assignment was stamped with a recorded date of May 7, 2012 in the Placer County Recorders' Office. Dckt. 137, Exhibit 5.

On October 12, 2012, Ocwen Loan Servicing, LLC's records reflect Bank of America sent the Debtor a letter which notified the Debtor the amount to reinstate the loan and that the failure to do so would result in the beneficiary foreclosing the Property. Dckt. 137, Exhibit 8.

On September 4, 2013, HSBC Bank USA, National Association, as Trustee of J.P. Morgan Alternative Loan Trust 2006-A5 by Bank of America, as its attorney in fact, issued a Corporation Assignment of Deed of Trust to memorialize the assignment of the beneficial interests under the Deed of Trust to HSBC Bank USA, National Association as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates. The Corporation Assignment was stamped with a recorded date of October 4, 2013, in the official records of the Placer County Recorder's Office. Dckt. 137, Exhibit 9.

Ocwen Loan Servicing, LLC began servicing the Loan on November 30, 2013. Declaration of Gina Feezer, Dckt. 134. Ocwen Loan Servicing, LLC states that it was servicing the loan for "HSBC Bank USA, National Association as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates.

Ocwen Loan Servicing, LLC asserts that it worked with the Debtor to review the possibility of

modification and the requirements for trial loan modifications. Ocwen Loan Servicing, LLC states that it was specifically identified as a "loan servicer" in the introductory paragraph of the latter that was sent with the HAMP Trial Period Plan. Dckt. 137, Exhibit 12.

Ocwen Loan Servicing, LLC states that the Debtor made the required three payments and was sent a Home Affordable Modification Agreement, which is the modification filed by the Debtor in the instant case. The loan modification agreement modified the principal balance of the Debtor's Note with a modified principal balance of $311,678.64 of which $75,128.64 was deferred and eligible for forgiveness based on certain conditions. The agreement modified the interest rate to a 2.00% fixed rate loan for the entire duration of the loan, with a maturity date of September 1, 2036.

The Debtor signed the agreement on April 29, 2016 and Ocwen Loan Servicing, LLC states it received the signed copy on May 17, 2016. Dckt. 137, Dckt. 13.

Ocwen Loan Servicing, LLC asserts that on May 24, 2016, Joseph Monaco, a representative of Ocwen Loan Servicing, LLC, with the authority to sign the loan modification agreement, executed the Lender Acknowledgment section of the agreement on Ocwen Loan Servicing, LLC's behalf. Dckt. 137, Exhibit 16.

On June 9, 2016, Ocwen Loan Servicing, LLC states that a notice of Recession of Notice of Default was issued by Ocwen Loan Servicing, LLC, where the signature block identified Ocwen Loan Servicing, LLC as agent for beneficiary. The Notice of Recision was stamped with a recorded date of June 21, 2016. Dckt. 137, Exhibit 15.

Ocwen Loan Servicing, LLC once again reiterates the steps that were taken at Ocwen Loan Servicing, LLC in November and December 2015. Ocwen Loan Servicing, LLC states that from these meetings, Ocwen Loan Servicing, LLC determined that the language to be included either in the loan modification agreement or through an addendum to the loan modification agreement as follows:

> The debtor and {Name of Creditor, Investor or Trust} through the servicer of the underlying mortgage loan agreement, Ocwen Loan Servicing, LLC, have agreed to modify the terms of said underlying mortgage loan agreement. {Name of Creditor, Investor or Trust} is the owner of the loan and retains all rights to collect payments as per the underlying mortgage loan agreement. Ocwen Loan Servicing, LLC, remains servicer for said underlying mortgage loan agreement.

Ocwen Loan Servicing, LLC then restates that these changes were not implemented and was not flagged to such until the instant Order to Appear.

Ocwen Loan Servicing, LLC states that the process has been assigned to Craig Markley, Vice President of the Modification Processing Group, located in Ocwen Loan Servicing, LLC's Texas facility.

> On a daily basis, the bankruptcy loss mitigation team will obtain a list of all final loan modification agreement scheduled to go out for the Eastern District of California. . . The assigned bankruptcy loss mitigation representatives will review each loan and verify through PACER which judge is assigned to the bankruptcy case. If the loan is assigned to this Court, Ocwen will then request that Ocwen's

> correspondence group hold the final modification agreement from being generated. . . All loans that are requested to be held will then get printed by the bankruptcy loss mitigation representative, and have the necessary addendum completed and added to the final modification agreement. The addendum would include the sample language that was previously proposed.
>
> After the final modification agreement has passed qualify control, the bankruptcy loss mitigation representative will mail the updated final modification to the debtor or debtor's attorney if they have counsel. . . Once the agreement has been confirmed for mailing we will then update our servicing system (REALServicing) with the appropriate comment note indicated the agreement has been sent. . . Additionally, Ocwen will have the revised final modification agreement imaged and sent to our imaging team to be added into the Vault (Ocwen's imaging database) so that all Ocwen business units have access to this revised and final agreement. This process will continue to be in place until we have our technology systems updated to automatically handle this process in the near future.

Motion, Dckt. 133; Declaration of Markley, Dckt. 135.

Ocwen Loan Servicing, LLC asserts that it understands the seriousness of the court's order and will work "expeditiously" to ensure that the procedures are put into place. Ocwen Loan Servicing, LLC requests that the Order be discharged.

DISCUSSION

It appears that the court has had to once again bring Ocwen Loan Servicing, LLC into court in order to address the repeated failure of properly identifying the creditor and Ocwen Loan Servicing, LLC's role in the transaction. It appears that as quickly as the court was able to "light a fire" under Ocwen Loan Servicing, LLC to properly address their improper identification in their modifications, that the fire was doused by Ocwen Loan Servicing, LLC's internal bureaucracy and change in staffing - having lost the only two persons at Ocwen Loan Servicing, LLC to make sure that when Ocwen Loan Servicing, LLC appeared or presented matters to the federal courts that its actions were consistent with federal law.

The court remains concerned that Ocwen Loan Servicing, LLC does not fully recognize (or want to recognize) that the issues addressed by the court concerning properly identifying the real creditor or properly identifying itself as the "agent" or "servicer" of the real creditor and providing actual evidence that they are authorized to enter into these agreements are issues that permeate beyond the four walls of the instant courtroom. Rather, the issues raised by the court are fundamental Article III, real parties in interest, concerns.

Instead, it appears that Ocwen Loan Servicing, LLC is merely trying to put a "band-aid" over the overarching problem throughout all of Ocwen Loan Servicing, LLC's modifications by creating a process to only flag "Judge Sargis, CAEB" cases. This appears, at this point, to be a willful and deliberate action by Ocwen Loan Servicing, LLC to inaccurately reflect that itself is the real creditor in interest and has the authority to modify the loan. The only reason the proposed "system" of Ocwen Loan Servicing, LLC seems to have once again "jump started" after receiving the instant Order to Appear is to avoid further scrutiny from this court. Unfortunately, Ocwen Loan Servicing, LLC is plainly missing the point. While

it appears to be of little cost for Ocwen Loan Servicing, LLC to correctly identify the principal for which it is acting, it has steadfastly refused to so do. (Presumably, Ocwen Loan Servicing, LLC would not purport to act unless it knew who the principal was and that it actually had the authority to act in that principals name.)

As this court has stated on many occasions, the fundamental requirement for any federal court to exercise federal court judicial power is that there must be a case or controversy between the parties for whom relief is sought. U.S. Constitution Article III, Sec. 2. Here, there is nothing to indicate that there are two real parties in interest whose rights are being impacted. While the Debtors are before the court, it appears that at best a servicing company, for an unidentified creditor in this case, is being inserted into the Loan Modification Agreement as a "placeholder," who may or may not be authorized to modify the creditor's rights and claim.

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

If Ocwen Loan Servicing, LLC is the loan servicer for the actual creditor and is the authorized agent for the creditor, then it can properly exercise that power. In doing so, it can properly disclose the identity of the true creditor, disclose that it is exercising its agent authority, and execute the documents as the agent for the true creditor.

In an attempt to slightly lessen the burden, Ocwen Loan Servicing, LLC attempts to shift the blame onto the least sophisticated consumer debtor, here being the Debtor, for having “notice” of Ocwen Loan Servicing, LLC’s relationship to the real creditor in interest. However, this is a superficial argument. Ocwen Loan Servicing, LLC points to five different notices sent by various entities, only in which two of the notices appear to be from Ocwen Loan Servicing, LLC. This includes Ocwen Loan Servicing, LLC relying on the response to the loan Modification, in which Ocwen Loan Servicing, LLC asserts that it was specifically identified as a “loan servicer.” A review of the trial loan modification letter shows that it is an 11-page document, in which Ocwen Loan Servicing, LLC does not identify who the actual creditor is nor under what authority Ocwen Loan Servicing, LLC is acting upon. Specifically, the line in which Ocwen Loan Servicing, LLC “hangs its hat” on for the proposition that the Debtor was on notice of Ocwen Loan Servicing, LLC’s identity is:

> As your loan servicer, we are committed to working with you to help make your payment more affordable.

Dckt. 137, Exhibit 12. In Ocwen Loan Servicing, LLC’s eyes, this single introductory phrase was sufficient to put Debtor on continued notice that Ocwen Loan Servicing, LLC is not the creditor in fact, but rather the loan servicer, and that the Debtor should have known the difference. The court does not find this argument persuasive.

This argument raises red flags as to Ocwen Loan Servicing, LLC’s good faith in addressing this

issue and dealing with consumers and consumer counsel. In this very case the Debtor's attorney requested that Ocwen Loan Servicing, LLC identify the actual creditor, to which Ocwen Loan Servicing, LLC responded:

> "We acquired the servicing rights of the loan from Bank, of America on December 1,2013 with the loan due for July 1,2010 payment.
>
> Please note that we are servicing regarding the first (1st) lien on the above referenced property. We are obligated to Service the loan in accordance with the terms of the Note and Mortgage signed by the borrower (Samuel Tapia)."

Declaration, Dckt. 107. This appears to be an attempt to affirmative hide the identify of the creditor. If Ocwen Loan Servicing, LLC was proceeding in good faith, for a note which was traveling from creditor to creditor, servicer to servicer, it would clearly identify the creditor in communicating with the least sophisticated consumer and that consumer's counsel. Trying to blame the Debtor for not knowing based on prior piecemeal correspondence is itself an indictment of Ocwen Loan Servicing, LLC's conduct.

Ocwen Loan Servicing, LLC's further response that they will review for matters pending in the Eastern District and then for this judge, and for those cases correctly identify the creditor and disclose the real party in interest who has a case or controversy to be addressed by the federal court. This appears to be an attempt to pander to one judge, which continuing to maintain a scheme and operation to have loan documents executed by consumer debtors with a person who is not the creditor. Being an agent for a secret, undisclosed principal does not comport with the conduct of a sophisticated business in dealing with least sophisticated consumers. FN.3

FN.3. The court does not find it a compelling argument that even if the agent acts in its own name for an undisclosed principal, after years of litigation over who was the principal and what powers the agent had the consumer might win to enforce the agreement against the undisclosed principal. As this court addressed when presented with that argument by Green Tree Loan Servicing, LLC, the court can envision a situation where the note has been sold and resold, with the tertiary buyer asserting that the loan servicer (who by that time has been put in its own Chapter 7 case) was not authorized to make any modifications and that such action only modified the rights of the servicer (which were none) in the note. Therefore, the consumer who for years made payments on the misrepresented modification for years is still on the hook for the full amount of the loan, years of back interest and principal payments; with the debt buyer and original creditor who sold the note at an enhanced value based on the unmodified terms appreciating the least sophisticated consumer taking good care of the collateral that can now be sold out from under the consumer.

Also, laying the blame on the two apparently uniquely essential people to Ocwen Loan Servicing, LLC complying with the basic Constitutional requirements for the exercise of federal judicial power leaving Ocwen Loan Servicing, LLC rings hollow. If the operation of Ocwen Loan Servicing, LLC for such a basic requirement to do business fails due to that, it is questionable whether Ocwen Loan Servicing, LLC can continue to provide bona fide, good faith, competent services as a loan servicer. More significantly, it appears that concerns of the court as to the proper exercise of federal judicial power and shortcoming of Ocwen Loan Servicing, LLC were of such little concern that no one in any management level was responsible for insuring that Ocwen Loan Servicing, LLC did not continue to operate in violation of this basic obligation. Ocwen Loan Servicing, LLC has had years to address this basic requirement, all

the while offering excuses and invalid arguments why it can continue to hide the identity of the principal from least sophisticated consumers.

The "complexity" of the "solution" which Ocwen Loan Servicing, LLC failed to implement is belied by the other loan servicers who easily meet this basic federal requirement. They simply add to the signature block that the loan modification agreement is being executed by "XYZ, Servicer, as the agent for Big Bank, Trustee." (This presumes that they do not or cannot modify the line of the agreement in which the "Lender/Servicer/Agent of Servicer" line is amended to state that the parties to the agreement are "XYZ, Servicer, as the agent for Big Bank, Trustee."

As to Ocwen Loan Servicing, LLC's concern that this real party in interest requirement is being required or enforced only this one bankruptcy court, this judge will communicate with the other chief bankruptcy judges in the Ninth Circuit to confirm how they are addressing the issue for not only loan modification agreements, but proofs of claims and other pleadings. Those judges can then communicate with judges in other Circuits to the extent that they too have concern about the misidentification of the party who is entering into contract with least sophisticated consumer debtors.

At the hearing, xxxx

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Appear having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Appear is xxxx.

10. 14-26567-E-13 SAMUEL TAPIA
JGD-4 John Downing

CONTINUED MOTION TO APPROVE LOAN MODIFICATION
5-16-16 [74]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2016. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

INCOMPLETE INFORMATION PROVIDED TO AND BY DEBTOR

The court cannot rule on the Motion due to the Debtor not having, and not providing, evidence of the actual person with whom this consumer Debtor is purporting, and is being told, it is entering into a contract to
modify the loan. The court discusses below this shortcoming and non-disclosure by Ocwen Loan Servicing, LLC.

It may be that Debtor has the information and evidence and quickly provide it to the court. If so, notwithstanding Ocwen Loan Servicing, LLC having provided incomplete (and misleading) documents, the court could structure an order properly exercising federal judicial power with the real parties in interest who have an actual claim or controversy before the court.

If Debtor has further documentation or evidence identifying the other party to this loan modification, the creditor to whom the obligation is owed, the court can address the non or misleading

disclosures in the Loan Modification Agreement by separate order to appear and order to show cause, if necessary and appropriate.

Therefore, the court continues the hearing to July 19, 2016 (the next available Chapter 13 law and motion date) to afford this consumer debtor the opportunity to get the loan modification locked down.

If Ocwen Loan Servicing, LLC has not provided, or does not promptly provide the Debtor with a completed Loan Modification Agreement and identify the real party in interest with whom this consumer Debtor is contracting, the court may continue this hearing further. The court will not, so long as this consumer Debtor is attempting to prosecute the Motion in good faith; which includes propounding written discovery in this Contested Matter or through a written interrogatories 2004 examination (there appearing to be little utility in this consumer Debtor being forced to incur the cost and expense of an oral deposition or 2004 examination), just deny the Motion. Such may cause the actual lender to withdraw from the promised loan modification, which could possibly be part of a larger scheme of that creditor and Ocwen Loan Servicing, LLC to deprive consumer borrowers of a loan modification they are otherwise entitled.

REVIEW OF MOTION

The Motion to Approve Loan Modification filed by Samuel Tapia ("Debtor") seeks court approval for Debtor to incur post-petition credit. Ocwen Loan Servicing ("Ocwen"), whose claim the plan provides for in Class 4, has agreed to a loan modification that will reduce Debtor's mortgage payment to $1,102.52 (including escrow). The modification provides for a modified principal balance of $311,678.84. $75,128.64 of the modified principal shall be deferred, no interest will be paid on that amount and it is forgivable if Debtor does not default on payments for the first three years of the loan. The remaining $236,500.00 of the modified principal balance shall earn 2% interest.

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

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on June 13, 2016. Dckt. 92.

Identity of Creditor

Owen Loan Servicing, LLC has appeared many times in this court and has been ordered to appear and address the failure to identify the actual creditor in contracts and loan modifications it is presenting to consumer debtors. As in the present case, Ocwen Loan Servicing, LLC would prepare contracts in which it is ambiguously identified as “Lender/Loan Servicer/Agent for Loan Servicer.” Ocwen Loan Servicing, LLC was preparing and presenting to consumer and consumer attorneys loan modification agreements that were not with the creditor and for which Ocwen Loan Servicing, LLC was not identified as executing the agreement for a disclosed principal.

Two of the cases in which the court has ordered Ocwen Loan Servicing, LLC to appear and address it preparing and presenting contracts to be approved in this federal court which did not include the real parties with a case or controversy are *In re Nissen*, Bankr. E.D. Cal, 11-30546, and *In re Raposo*, Bankr. E.D. Cal. 09-27153.

No Proof of Claim has been filed. There is no indication on the actual Modification Agreement as to who is the real creditor in interest. The balloon payment agreement only identifies Ocwen as "Lender/Servicer or Agent for Lender/Servicer," appearing to be nothing but a "catch-all" in order to cover all possible roles Ocwen may be playing in a certain transaction without stating explicitly and affirmatively who they are in terms of the transaction.

Notably absent from the Motion itself is the identity of the creditor. Rather, the Motion remains silent as to what entity the Debtor is attempting to enter a modification. The Debtor, appearing to "hide the ball" instructs the court to search the "Motion, on the Declaration of Samuel Tapia and Exhibit" to discern the parties of the modification; the respective roles of the party (i.e. Ocwen as servicer or creditor); the actual change in mortgage payments and principal balance; etc. The court declines such invitation.

As discussed supra, Ocwen Loan Servicing, LLC has been ordered to appear before and, as the court has emphasized on these occasions, understands the creditor must be identified. However, notwithstanding Ocwen Loan Servicing, LLC's prior appearances, it appears that the modification documents in the instant case have been prepared to intentionally hide the identity from the court and circumvent the obligations of parties in federal court.

JUNE 28, 2016, HEARING

In light of the above, and Ocwen Loan Servicing, LLC's history at failing to identify the real creditor in interest, the court will issue an Order to Appear, in person, no telephonic, for Ocwen Loan Servicing, LLC to address (1) why the identity of the creditor is not disclosed and (2) why the documents do not have any completed signature blocks for the creditor.

The court continued the instant Motion to 3:00 p.m. on July 19, 2016. Supplemental pleadings if any, including an amended loan modification agreement, were ordered to be filed and served on or before July 14, 2016.

DEBTOR'S SUPPLEMENTAL DECLARATIONS

On July 13, 2016, John G. Downing filed his declaration in support of the Motion to Approve the Loan Modification. Dckt. 107. Mr. Downey testifies that he made several inquiries of Ocwen Loan Servicing, LLC, and received an email response on July 12, 2016. The response is attached as Exhibit 1 to the declaration. It states that Ocwen Loan Servicing, LLC obtained the "**servicing** rights of the loan from Bank of America, N.A. on December 1, 2013." [Emphasis added.] Further, that Ocwen Loan Servicing, LLC, is "[o]bligated **to service** the loan in accordance with the terms of the Note and Mortgage...." [Emphasis added].

Nowhere in the response does Ocwen Loan Servicing, LLC state that it is the creditor or that it is attempting to collect a debt that is owed to it. Rather, Ocwen Loan Servicing, LLC states that it acquired only the servicing right and that it is obligated to provide the services of a loan servicer.

Mr. Downing filed a second declaration on July 14, 2016, in which he testifies as to a second communication he received from Ocwen Loan Servicing, LLC. Dckt. 108. The document Mr. Downey testifies to receiving on July 14, 2016, from Ocwen Loan Servicing is provided as Exhibit 2 (Dckt. 109) and consists of the following:

A. It is titled "Notice of Servicing Transfer (RESPA), Welcome to Ocwen Loan Servicing, LLC."

B. It states that Samuel Tapia, the consumer Debtor in this case, is the "customer" of Ocwen Loan Servicing, LLC.

C. Effective November 30, 2013, Ocwen Loan Servicing, LLC will be servicing Mr. Tapia's mortgage instead of Bank of America.

D. "This communication is from a debt collector attempting to collect a debt; any information obtained will be used be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt."

E. "At Ocwen Loan Servicing, LLC we understand the importance of home ownership. We're dedicated to providing you with assistance and information you need about your mortgage loan, as well as additional products you may need as a homeowner. To get started, visit OcwenCustomers.com, select "New Customers" and sign up as a new user with your new Ocwen loan number."

In addition to not stating anywhere that Ocwen Loan Servicing, LLC is the creditor or owns the obligation that it is trying to collect, Ocwen Loan Servicing, LLC goes further to advise the Debtor that it is the Debtor who is Ocwen Loan Servicing, LLC's customer, not a third-party who owes a monetary obligation that Ocwen Loan Servicing, LLC owes a contractual duty and fiduciary duty, as a loan servicer, to collect. Ocwen Loan Servicing, LLC goes so far as to assure this Debtor that Ocwen Loan Servicing, LLC is dedicated to provide the Debtor with assistance, as well as to provide information about additional products that Debtor may need as a homeowner.

Though given time, unfortunately the efforts of Debtor's counsel were insufficient to get Ocwen Loan Servicing, LLC (which as previously been before this court) to disclose the simple information of who is the principal for which Ocwen Loan Servicing, LLC is the agent.

JULY 19, 2016, HEARING

At the hearing, no new information was provided. The court issued an order requiring Ocwen Loan Servicing, LLC to appear and state the basis for it being a party, as a principal, to this Loan Modification. The instant Motion was continued to August 23, 2016, at 3:00 p.m.

OCWEN'S RESPONSE

Ocwen Loan Servicing, LLC filed a response on August 12, 2016. Ocwen asserts that HSBC Bank USA, National Association, as Trustee for the Cerficateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates is the creditor in interest, while Ocwen is the servicer. Dckt. 133. This response is discussed in further detail in connection with the Order to Appear [Dckt. 110].

DISCUSSION

At the hearing, the parties addressed that Ocwen Loan Services, LLC identified on August 12, 2016, that the actual creditor is HSBC Bank USA, National Association, as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass- Through Certificates, and that Ocwen Loan Servicing, LLC represents that is the loan servicer and agent for that creditor which is authorized to execute the Loan Modification Agreement on behalf of that creditor.

With the actual real party in interest with whom Samuel Tapia is entering into the Loan Modification Agreement and such real party in interest who has a claim, case, or controversy with the Debtor, the court can exercise federal judicial power with respect to those claims and controversies.

The Motion is granted and the Debtor is authorized to enter into the Loan Modification Agreement with HSBC Bank USA, National Association, as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass- Through Certificates, acting thorough its agent Ocwen Loan Servicing, LLC, on the terms and conditions as stated in the Loan Modification Agreement filed as Exhibit 1 (Dckt. 77) in support of the Motion.

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 Samuel Tapia having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Samuel Tapia to enter into a post-petition loan modification with HSBC Bank USA, National Association, as Trustee for the Certificateholders of the J.P. Morgan Alternative Loan Trust 2006-A5, Mortgage Pass-Through Certificates (the "Creditor"), acting through its agent Ocwen Loan Servicing, LLC, on the terms and conditions stated in the Loan Modification Agreement filed as Exhibit 1 (Dckt. 77) in support of the Motion.

11. 14-26567-E-13 SAMUEL TAPIA — CONTINUED AMENDED MOTION TO MODIFY PLAN
JGD-5 John Downing — 5-25-16 [85]

No Tentative Ruling: The Amended Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 17, 2016. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is xxxxx.

Samuel Tapia ("Debtor") filed the instant Motion to Modify Chapter 13 Plan on May 25, 2016. Dckt. 85. FN.1. While the Certificate of Service does not document sufficient service on the Internal Revenue Service, there are no tax claims to be provided for in the Plan. As such, the failure to sufficiently serve the Internal Revenue Service

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FN.1. This is the amended Motion filed by the Debtor.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on June 10, 2016. Dckt. 89. The Trustee opposes the Motion on the following grounds:

1. The Debtor's Motion does not comply with applicable law and does not cite 11 U.S.C. § 1329.

   Though a motion is not a points and authorities providing extensive citations, quotation, arguments, conjecture, and speculation, it should at least identity the statutes and law upon which the relief is requested. Here, the Motion seeks confirmation pursuant to 11 U.S.C. § 1325. Since there is already a confirmed plan in this case, confirmation of a modified plan is pursuant to 11 U.S.C. § 1329 (which includes the requirements of §§ 1325, 1323, and 1322. This part of the Trustee's Opposition appears to, correctly, be more informational for counsel to update his motion to confirm a modified plan form, as opposed to a substantive opposition.

2. The Debtor is $1,201.00 delinquent in plan payments under the proposed plan.

3. The Trustee is uncertain of monthly payment for attorney fees to be paid through the plan. The Debtor's confirmed plan called for attorney fees of $3,000.00 to be paid through the plan. The box complying with Local Bankr. R. 2016-1(c) was checked. The order confirming authorized a monthly dividend of $200.00 as none was specified in the plan. The Debtor's proposed plan states additional fees of $4,750.00 shall be paid through this plan, which appears to be $1,750.00 of additional fees to the fees already approved. The box filing and serving a motion in accordance with 11 U.S.C. § 329 and 330 is checked. The plan does not specify in 2.07 a monthly amount to be paid. The attorney is owed $765.19 of the original $3,000.00 allowed.

4. The treatment of the secured Class 1 creditor is contingent on the court granting the Debtor's Motion fo Loan Modification set on the same calendar.

JUNE 28, 2016, HEARING

At the hearing on the Motion to Confirm the Plan, the court continued to 3:00 p.m. on July 19, 2016.

JULY 19, 2016, HEARING

At the hearing, the court continued the Motion to Confirm the Plan to August 23, 2016, at 3:00 p.m.

DISCUSSION

No supplemental papers have been filed in connection with the instant Motion.

With respect to the objection based on the failure to comply with 11 U.S.C. § 1329 is well taken. The Amended Motion appears to ignore that the modification must be sought pursuant to 11 U.S.C. § 1329, which incorporates portions of 11 U.S.C. §§ 1325, 1323, and 1322. While the difference is subtle, there is a difference. It appears that Debtor is using a motion to confirm an original Chapter 13 plan in the place of motion to confirm a modified plan.

While not sufficient pleaded, this Motion and the related Motion to Approve a Loan Modification has been on a tortuous path due to Ocwen Loan Servicing, LLC failing to disclose (until recently in response to an order of the court) the identity of a creditor which was seeking relief from this court to approve a loan modification. The modification of the Plan is to take into account the loan modification. The court is satisfied that Debtor's counsel appreciates the need to properly state the grounds and reference the correct law in seeking relief from the court. If Debtor's counsel had prepared a points and authorities he may have caught the shortcoming in the Motion.

However, the Trustee's second grounds for objection is that the Debtor is $1,201.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

As to the Trustee's third objection, the court's review of the proposed plan as well as the docket in total indicates that the Debtor is attempting to include additional unanticipated and substantial fees that the Debtor is seeking in the Motion for Additional Fees. Dckt. 94. The court granted the Motion for Additional Fees. Therefore, the Trustee's third objection is overruled.

As to the Trustee's final objection, the court has been forced to continue the hearing and Order Ocwen Loan Servicing, LLC because the identity of the creditor with which the loan modification is proposed is not disclosed and the modification documents presented are devoid of any identification as to who is signing the agreement and who affirmatively states that they have a claim in this case. That identity has now been extracted from Ocwen Loan servicing, LLC and the court has granted the motion to authorize the Debtor to enter into the post-petition loan modification.

At the hearing, xxxxx

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

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

12. 14-26567-E-13 SAMUEL TAPIA
JGD-6 John Downing

CONTINUED MOTION FOR COMPENSATION FOR JOHN G. DOWNING, DEBTOR'S ATTORNEY
6-14-16 [94]

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

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditors, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 14, 2016. By the court's calculation, 14 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

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

The Motion for Allowance of Professional Fees is xxxxx.

John Downing, the Attorney ("Applicant") for Samuel Tapia the Debtor in Possession ("Client"), makes a Additional Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period November 24, 2016 through May 25, 2016. The order of the court approving employment of Applicant was entered on June 24, 2014, Dckt. 7. Applicant requests fees in the amount of $1,750.00.

Unfortunately, the Applicant failed to provide the 21 days' notice that is required for a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000. Fed.

R. Bankr. P. 2002 (a)(6). The Applicant filed the Application for Additional Attorney's fees on June 14, 2016. Dckt. 94. Only 14 days' notice was provided.

While notice could be "fixed," there is a more significant impediment to granting fees now - the two items for which fees are requested, the motion to approve loan modification and motion to confirm modified plan, cannot be concluded. While the shortcomings in the motion to modify rest with the Debtor, it may well be that the Debtor and the bankruptcy estate may incur further substantial legal fees due to Ocwen Loan Servicing, LLC having failed (or intentionally hidden) the identify of the actual creditor with whom the consumer Debtor must enter into the loan modification.

JUNE 28, 2016, HEARING

The court continued the hearing to be conducted in conjunction with the hearings on the Motion to Confirm and the Motion to Approve Loan Modification (which fees Ocwen Loan Servicing, LLC can significantly reduce by promptly disclosing the identity of the creditor with whom the consumer Debtor will have to enter into the loan modification agreement).

JULY 19, 2016, HEARING

At the hearing, the court approved interim fees of $1,750.00 and authorized the Chapter 13 Trustee to pay such fees through the Chapter 13 Plan. The court continued the instant Motion to August 23, 2016, at 3:00 p.m. for further hearing on additional fees.

DISCUSSION

To date, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, xxxxx

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by John Downing ("Applicant"), Attorney for the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that xxxxx.

13. 13-28069-E-13 ROSENDA DESMOND MOTION TO MODIFY PLAN
DEF-3 David Foyil 7-8-16 [52]

Tentative Ruling: The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on July 8, 2016. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

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

Rosenda Desmond ("Debtor") filed the instant Motion to Confirm the Modified Plan on July 8, 2016. Dckt. 52.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to Debtor's Motion to Confirm the Modified Plan on August 8, 2016. Dckt. 62. The Trustee opposes confirmation on the following grounds:

A. Debtor is delinquent $5,215.00 under the proposed plan. Thirty-seven (37) plan payments have become due so far. $52,204.00 would be due currently under the proposed modified plan, but Debtor has paid only $46,989.00 to date.

B. Debtor's modified plan states that $8,454.14 has been paid to Nationstar Mortgage LLC, $240.00 will be paid in each of months 35 and 36, and $3,803.31 will be paid in month 37. The Trustee's records show that $9,037.24 has been disbursed and that

$3,700.21 remains to be paid. The modified plan is not clear about whether the Trustee will make ongoing payments in months 36 and 37.

DISCUSSION

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

The Trustee's opposition is well-taken.

The basis for the Trustee's objection is that the Debtor will be delinquent under the proposed modified plan by $5,215.00. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

As to Trustee's second opposition point, the court could order that the order confirming correct Section 6.03 of the proposed modified plan so that it reads: "As of June 20, 2016 (months 1 through 34), the Debtor has paid Nationstar Mortgage, LLC a total of $8,454.14. The remaining balance shall be paid *by the Trustee* in months 35-37. The dividends for Nationstar Mortgage, LLC in months 35 and 36 shall be $240.00 per a month. The dividend in month 37 shall be $3,803.31." Such language clarifies that the Trustee will make the payments required under the proposed modified plan to Nationstar Mortgage, LLC.

Unfortunately, the Debtor's continued delinquency under the proposed plan raises serious concerns over feasibility of the plan, especially that the Debtor has a delinquency under its terms prior to the plan even being heard for confirmation.

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

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

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

14. 11-21275-E-13 JAMES/BARBARA CROOK MOTION TO SELL
PGM-1 Peter Macaluso 7-21-16 [90]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, Chapter 13 Trustee, and Office of the United States Trustee on July 21, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits a Chapter 13 debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, James Crook and Barbara Crook ("Debtors") propose to sell real property commonly known as 6700 La Siesta Drive, Orangevale, California (the "Property").

The proposed purchaser of the Property is Moe Hirani and the terms of the sale are $239,000.00 purchase price; closing on twenty-one (21) days after acceptance, with the purchase agreement signed by the parties on June 30, 2016; $9,654.69 in net proceeds to Debtors.

TRUSTEE'S RESPONSE

The Trustee filed a response on August 9, 2016. In the response, the Trustee states that the Debtors contacted the Trustee on July 13, 2016, with an Ex Parte Motion to sell the Property. At the time, the Trustee did not think that the motion was appropriate because the creditor secured by the Property was classified as Class 3 under the Debtors' confirmed plan.

The Trustee notes that the Debtors' plan has been completed as of January 5, 2016. Dckt. 85. The Trustee does not oppose the proposed sale of the Property.

RULING

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Debtors completed their plan on January 5, 2016. The Trustee has filed a Final Report and Account on August 15, 2016. Dckt. 97. The Debtors have filed their 11 U.S.C. § 1328 Certificates on March 25, 2016. Dckt. 87 and 88. Furthermore, the Debtor states that the unsecured creditors received an actual 2.8% dividend when the plan only provided a minimum of a 0% dividend.

Therefore, in light of the Debtor having completed the plan, the Trustee having filed his Final Report and Account, and for cause, the Motion to Sell 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 Sell Property filed by James Crook and Barbara Crook, the Chapter 13 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 James Crook and Barbara Crook, the Chapter 13 Debtors, are authorized to sell pursuant to 11 U.S.C. § 363(b) to Moe Hirani ("Buyer"), the Property commonly known as 6700 La Siesta Drive, Orangevale, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $239,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 93, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Chapter 13 Debtors be, and hereby are, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The net proceeds of the sale, after payments of liens, costs, and expenses as provided in this order, may be disbursed directly from escrow to James

and Barbara Cook, the Debtors, who have completed their Chapter 13 Plan (Chapter 13 Trustee's final report filed August 15, 2016, Dckt. 97).

15. 15-22182-E-13 PGM-3 | **RUTH CLARK** **Peter Macaluso** | **CONTINUED MOTION TO CONFIRM PLAN** **2-11-16 [135]**

No Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 11, 2016. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is xxxxxx

Ruth Clark ("Debtor") filed the instant Motion to Confirm the Amended Plan on February 11, 2016. Dckt. 135. The Debtor and any Chapter 13 Plan has been a long tortuous path for the court, creditors, and other parties in interest. Much of this case has been driven by the Debtor's litigation strategy of "the Debtor wants, so the Debtor gets, no evidence or law required." Much of the necessary information prosecution of this case and confirmation of a plan has been drawn from the Debtor, Debtor's counsel, and Tom Carey (the financial savior for Debtor) drop by drop, only when they have faced significant potential adverse rulings.

Additionally, the Debtor's conduct has raised for the court a serious issue of whether she is legally competent to participate in these proceedings. It appears that she may well be, in light of her being represented by an attorney who owes her a fiduciary duty and Tom Carey having a power of attorney and also having a fiduciary duty to the Debtor. The court may order that Adult Protective Services evaluate the Debtor after confirmation of any plan.

Given how long this Motion has been pending, the court includes in this Ruling various holding and determinations from prior hearings.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on March 16, 2016. Dckt. 147. The Trustee opposes confirmation on the following grounds:

1. Debtor has failed to file a declaration in support of the Motion setting forth evidence to support findings of fact and conclusions of law for all the requirements of 11 U.S.C. § 1325(a).

2. The Declaration filed by Tom Carey does not offer any evidence of the source of the $810.00 income or why he is making this income available to the Debtor. Mr. Carey's prior declaration stated that he would contribute up to $400.00 per month. Dckt. 68. There is no explanation as to why the amount has been increased to $810.00.

3. Debtor's stated living expenses are not reasonable. The Debtor lists food and housekeeping expenses at $200.00, clothing/laundry/dry cleaning at $5.00, and personal care at $5.00. The Internal Revenue Service allowable living expense for one person as $585.00 per month. The Debtor also lists total utilities at $289.00 while the local housing and utilities standard is $529.00 per month.

4. The plan indicates that there are additional provisions but none are attached.

5. It appears that the Debtor has improperly altered the Form Plan by explicitly stating that the additional provisions are appended when they are not.

6. Debtor cannot confirm a plan. This case was filed March 19, 2015. A full year has elapsed since the filing. Four plans have been proposed but none have been confirmed. The Trustee does not believe the Debtor can confirm a plan.

EL DORADO SAVINGS BANK'S CONCURRENCE IN OPPOSITION

El Dorado Savings Bank filed a document entitled " joinder" in which it concurs and supports the Chapter 13 Trustee's Opposition. Dckt. 150.

RESPONSE OF RUTH CLARK

The Debtor first responds, that because the Chapter 13 Trustee and Creditor objected, she has now filed

her declaration. Additionally, a supplemental declaration of Tom Carey is provided. The Debtor believes that in her declaration she adequate addresses the issues relating to her stated living expenses.

In her Declaration, Dckt. 153, Debtor testimony includes the following:

A. As of March 24, 2016, Debtor has paid $12,809.09 to the Chapter 13 Trustee over 11 months. (Which averages $1,164 a month.)

B. Beginning with the March 2016 payment, Debtor will begin making payments of $1,560.00.

C. Telling the court that she "filed for protection under the bankruptcy code because my how was being foreclosed upon." [emphasis in original]

D. The source of income to fund the plan will be from:

1. Social Security (in an unstated amount);

2. Annuity from Worker's Compensation (in an unstated amount);

3. Food Stamps ($120 a month); and

4. Assistance from Tom Carey (in an unstated amount).

E. That the Debtor does not lie.

F. Because Debtor does not live in the city, people like her who live in the country use less money to live than those in the city.

G. Debtor is happy with her lifestyle.

H. Debtor seeks no social acceptance, as she is satisfied with herself.

I. Debtor follows the counsel of the Elders of her Church (unnamed).

In additional testimony of Tom Carey in his Supplemental Declaration, Dckt. 154, includes:

A. He is the Debtor's

1. Friend,

2. Parishioner, and

3. Family Member.

B. His source of income is:

1. State of California Retirement (in unstated amount);

2. Chevron/Texaco Retirement (in unstated amount);

3. Social Security;

4. His Investment Account Mandatory Withdrawals;

5. Wife's Retirement (in unstated amount);

6. Wife's Social Security; and

7. Wife's Investment Account Mandatory Withdrawals.

C. That Mr. Carey is providing the assistance because the Debtor is disabled and in recovery. Further, someday the Debtor will be gainfully employed and not need Mr. Carey's assistance.

APRIL 5, 2016 HEARING

At the hearing, the court issued the following order:

> **IT IS ORDERED** that the hearing for the Motion to Confirm the Amended Plan to 3:00 p.m. on June 14, 2016. Debtor shall file and serve supplemental pleadings on or before May 6, 2016, and Replies, if any, shall be filed and served on or before May 20, 2016.

Dckt. 158.

SUPPLEMENTAL DECLARATION OF THOMAS L. CAREY

Thomas L. Carey, a friend of the Debtor, filed a declaration on May 6, 2016. Dckt. 159. Mr. Clark states that after the Debtor was shot seventeen times, the Debtor requested that Mr. Carey be her Power of Attorney which Mr. Carey accepted. Debtor also requested that Mr. Carey be the Debtor's Durable Power, which Mr. Carey also accepted.

Since November 20, 2013, Mr. Carey states he has willing helped the Debtor meet some of her financial obligations, including some of the Debtor's utility bills and medicine. Mr. Carey states that he has provided transportation for the Debtor and has taken Debtor to the food banks twice a week where she receives free food. Mr. Carey declares that Debtor "spends $200 per month, or less, to supplement what she receives from the food banks."

Mr. Carey states that he will continue to assist Debtor until she is self-sufficient. Mr. Carey states that he does not have any verbal or written agreements for the repayment of any time or expenditures spent on her.

Mr. Carey declares that he will "send a bank check in the amount of $1,560.00 to the Trustee

by the 25th day of each month, which is the amount in [Debtor's] bankruptcy plan." Dckt. 159.

TRUSTEE'S RESPONSE

The Trustee filed a response on May 11, 2016. Dckt. 161. The Trustee states that after reviewing the Declarations of Debtor (Dckt. 153) and of Mr. Carey (Dckts. 154 and 159) that he is satisfied on the matters of Debtor's low living expenses and the reason for the financial assistance.

The Trustee requests that the reference to additional provisions in Section 6 of the Third Amended Plan be stricken in the Order Confirming Plan.

The Trustee agrees that the Debtor is current under the plan at this time and the Trustee no longer opposes confirmation of the Debtor's plan.

JUNE 14, 2016 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on July 19, 2016. Dckt. 164.

JULY 19, 2016, HEARING

At the hearing, the court issued the following order:

> **IT IS ORDERED** that the hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on August 23, 2016. Debtor shall file and serve supplemental pleadings on or before August 5, 2016.
>
> **IT IS FURTHER ORDERED** that Ruth Clark, the Debtor, shall attend the continued hearing. No telephonic appearances are permitted for the Debtor.

SUPPLEMENTAL RESPONSE OF RUTH CLARK

The Debtor filed a supplemental response on August 5, 2016. Dckt. 170. The Debtor states that she has added an amendment to a Proposed Order Confirming Plan regarding monthly support payments from Mr. Carey. Dckt. 171.

The Proposed Order Confirming includes the following language:

> **IT IS FURTHER ORDERED** that, pursuant to 11 U.S.C. § 1323, the Plan is amended as follows; Mr. Carey is to make the support payment of $1,560.00 to the Chapter 13 Trustee for each month of the Plan. Further payments must be made until further order of the court.

Dckt. 171.

TRUSTEE'S RESPONSE

The Trustee filed a response on August 8, 2016. Dckt. 173. The Trustee acknowledge's the Debtor's proposed amendment and asks the court to consider that amendment accordingly.

DISCUSSION

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

Adequate Facts Withheld from the Court

Only after having her "back to the wall," was the Debtor willing (or forced) to provide a declaration to support the relief she was requesting. Such begrudging providing of the minimal evidence and prosecution of her case is not indicative of a debtor who commenced the case and is proposing the Chapter 13 Plan in good faith.

Once again, the declaration of Tom Carey fails to provide sufficient evidence as to how and why Mr. Carey is committing $810.00 per month to the Debtor. This is especially worrisome when Mr. Carey's previous declaration indicated a contribution of only $400.00. The one-page declaration filed by Mr. Carey does not address why the contributions has doubled or where and how Mr. Carey is able to provide this substantial assistance. When a plan relies on the contribution of a third party, the Debtor must provide competent evidence that the third party is pledging these funds in order to determine that the plan is feasible. The declaration as filed does not provide this assurance.

In his Supplemental Declaration Mr. Carey did not provide any economic specifics, but that he intends to fund the $810.00 gift (over $40,000.00) from both his income and his wife's income. Mr. Carey's wife does not provide her declaration, though it now appears that her income is part of the funding.

Debtor's Unreasonable Statement of Expenses

As to the Trustee's third objection, the court also find these expenses unreasonably low. The Debtor is proposing a budget that is nearly half of what the Internal Revenue Service proposes for a single-person household. The Debtor, not having filed a declaration, does not provide any explanation at how this dramatic reduction in expenses is possible. Absent explanation from the Debtor as to how he proposes to achieve this drastic decrease in expenses, the court does not believe the Debtor's projection is in good faith. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

Other than saying that the Debtor is happy with her "country lifestyle," Debtor offers no explanation as to how she can maintain at least a subsistence standard of living for the five years of the Plan. The court takes judicial notice that even persons living in the country need: food, clothing, personal care products, insurance, transportation, health supplies, medical treatment, household goods, and home maintenance.

The Debtor's latest financial information purports to state her expenses to be:

Expense	February 12, 2016 Amended Schedule J; Dckt. 142	May 6, 2015 Amended Schedule J; Dckt. 57	Original Schedule J; Dckt. 19

Property Ins.	$60	$60	$60
Home Maintenance	$100	$100	$100
Electricity/Gas	$165	$165	$165
Water, Sewer, Garbage	$44	$44	$44
Phone, Internet, Cable	$80	$80	$80
Food and Housekeeping Supplies	$200	$200	$250
Clothing, Laundry	$5	$5	$0
Personal Care Products	$5	$5	$20
Medical, Dental	$100	$100	$160
Transportation	$130	$180	$0
Entertainment	$7	$7	$0
Charitable	$0	$0	$0
Health Ins	$105	$105	$105
Total Expenses	$1,001	$1,051	$984

What the Debtor has shown through the incarnations of Schedule J is that her expenses are not based on what her expenses are, but only what needs to be the bottom line number to show that she can "afford" to make the monthly mortgage payment.

The glaring deficiencies are for:

A. Food - Debtor dropping from $250.00 a month to $200.00, without showing that such represents her real, three meals a day, food bill and housekeeping supplies expenses. If the court assumes only $25.00 a month for housekeeping supplies, that would leave $175.00 a month for food.

Assuming a thirty-day month and three meals a day, Debtor must pay for food for 90 meals. With $175.00 a month for food, that allows for $1.94 per meal. The Debtor makes no showing that she can properly provide for herself and put basic, low cost meals on the table for five years at $1.94 per meal.

B. Clothing/Laundry – Here, Debtor provides the court with no evidence of how she will cloth herself for five years, spending on average $5.00 per month.

C. Debtor does not explain her $130.00 transportation expense. Debtor no owing a vehicle, it may be for taxis, Uber, or bus fare. However, the Debtor fails (or is unwilling) to disclose such information to the court.

From the Debtor's declaration it is clear that she has made the determination that this is her Plan and that is shall be confirmed. Debtor has drawn her conclusions and states them to the court. In substance, Debtor is withholding actual facts from the court, and instead is dictating the conclusions of law and findings of fact to the court.

This court has many "country folk" who seek relief in this court and successfully either reorganize or obtain a fresh start through a Chapter 7 discharge. Those "country folk" do not come to this court purporting to spend $1.94 per meal for food and $5 a month for clothing. Even someone living in the country needs more than that to scratch out even a basic survival lifestyle.

Inconsistent Statements in Plan

The Trustee's third and fourth objection also deal with the improper and incomplete form of the instant proposed plan. The plan, in Section 6, modified the plan form to explicitly and clearly state "Additional Provisions are appended to this plan." Dckt. 139. However, no such provisions are attached. The court nor any party in interest can determine the viability and feasibility of a plan when the plan, as filed, does not have all the terms.

The Debtor does address this in her Reply, seeking the court to allow this to be corrected as a clerical error in the order confirming.

Benefactor's Incorrect Premise

In his Supplemental Declaration, Tom Carey states under penalty of perjury his opinion that, "Some day, she [Debtor] will be gainfully employed and will no longer need my assistance." Declaration, p. 2:6.5-7.5; Dckt. 154. This statement conflicts with Debtor's repeated statements under penalty of perjury that she is "Retired/Disabled." Second Amended Schedule I, Dckt. 142 at 4; First Amended Schedule I, Dckt. 57 at 10; and Original Schedule I; Dckt. 19 at 18 (stating occupation as "Retired/Disabled RN," employer as "SSDI," and having been "employed" for 18 years).

It appears that Mr. Carey's statement that the Debtor will not need his assistance because "someday" she will be gainfully employed conflicts with the statements by Debtor under penalty of perjury that she is retired (age 59, Debtor's Declaration ¶ 6; Dckt. 152) and disabled.

Consideration of Additional Financial Information

On the Original Statement of Financial Affairs Debtor stated under penalty of perjury that she had no income in 2015, 2014, or 2013. Statement of Financial Affairs Questions 1 and 2, Dckt. 1; filed by Debtor in pro se. This was corrected in May 2016, with the assistance of counsel, in which Debtor reported the total gross income for each of the three years:

	2015 YTD of March 19, 2015 Filing	2014	2013
Statement of Financial Affairs Question 1	$0	$0	$0
Statement of Financial Affairs Question 2	$5,400	$21,004	$21,000
Total	$5,400	$21,004	$21,000
Average Per Month (3 months)	$1,800	n/a	n/a
Average Per Month (12 months)	n/a	$1,750	$1,750

FURTHER AMENDED FINANCIAL INFORMATION

Amended Statement of Financial Affairs, Question 1 and 2; Dckt. 57 at 17.

Based on this information, it appears that the Debtor's Annuity, SSI income, and the utility credit (as reported on the Amended Statement of Financial Affairs) average out to be income of $1,800.00 a month.

In Debtor's latest Amended Schedule I (Dckt. 142 at 4-5), in which Debtor states that she is "Retired/Disabled," she states that she has SSI, Utilities Discount, and Worker's Compensation benefits totaling $1,750 a month.

Buried in paragraph 17 of Debtor's late filed Declaration, she states under penalty of perjury that she now receives $120 a month in food stamp benefits. Adding that to the $1,750 stated by Debtor, she has $1,870 a month in income.

Even adding in all of her benefits (in case Debtor was listing a food expense net of the food stamp benefits), the stated expenses do not make economic sense.

Debtor's Inability to Confirm a Plan

The Trustee's last objection is a summation of the concern the Trustee and the court has had with the instant case. In the year since the instant case has been filed, the Debtor has been unable to confirm a plan. The Debtor either does not properly provide sufficient explanation and evidence to support confirmation.

RULING

The Chapter 13 Trustee has become convinced that the Debtor, with the support of Mr. Carey, will have the ability to perform the Chapter 13 Plan. Usually, the court gives great deference to such a determination by the Chapter 13 Trustee. However, in this case, the court is not convinced that such deference can be given.

The Chapter 13 Debtor in this case, Mr. Carey, and the Debtor's very experienced consumer

counsel have been reluctant to provide financial information - doing so only when pushed by creditors and the Trustee. It was only belatedly told that Mr. Carey was not merely a "friend," but is a fiduciary exercising a power of attorney for Debtor. Debtor affirmatively misrepresented that she was paying all of her expenses and living on her income and the assistance provided by Mr. Carey. But when the court concluded that her "expenses" were unreasonably, unrealistically, and illogically low, she and Mr. Carey then (after the possible source of assistance was mentioned by the court) stated that, "yes, Mr. Carey takes the Debtor to the food closet to obtain free food."

To assuage the court's concerns, the Debtor testifies under penalty of perjury,

> "14. I was taught by my parents and elder relatives to always tell the Truth, especially concerning legal matters. actually, speaking, I don't posses the mental capacity to keep track of lies as they other stack upon each other. Therefore, I tell the truth to minimize the stress of trying to falsify events of my life. I personally understand what the National Average has determined for living expenses."

Declaration, 153. In reading the statements under penalty of perjury by the Debtor in this case, and the above paragraph particularly, the court is reminded of the famous quote from Hamlet, ""The lady doth protest too much, methinks." The court does not find the Debtor's statement above to be credible. She has repeatedly withheld information, provided selective information, and provide inaccurate information concerning her finances. This was done by the Debtor because the Debtor wanted what she wanted, and would say whatever she thought was necessary to get what she wanted – irrespective of the legal accuracy of what she stated.

Mr. Carey has also provided qualified, incomplete statements to the court. The most recent is (with the assistance of Debtor's counsel), that "8. I will continue to assist Clark until she is self sufficient." Declaration, Dckt. 159. While this could be charitably read as Mr. Carey stating that he will be in it for the long-haul, there is a darker side to it. If Mr. Carey's other testimony that the Debtor is permanently disabled (based on the description of the Debtor's travails), then she will never be self-sufficient. Therefore, the statement could well indicate that Mr. Carey will provide the support only to when he concludes that the Debtor is self sufficient, then he will cut off the support, and if the Debtor fails to provide for her expenses, will then use the power of attorney to deal with Debtor's property.

Debtor's attorney, surprisingly, has been complicit in these inaccurate, incomplete, and qualified statements. This is surprising, and may well be grounded in o23verly empathizing with his client.

The Debtor's precarious financial and emotional state warrant the court being overly cautious before confirming the plan.

At a minimum, given the qualified commitment in the declaration by Mr. Carey (which declaration was prepared by Debtor's counsel) any order confirming the plan must also include an express mandatory injunction ordering Mr. Carey to make the support payment of $1,560.00 to the Chapter 13 Trustee for each month of the Plan, when payment must be made until further order of the court.

AUGUST 23, 2016 HEARING

Mr. Carey and the Debtor have agreed to an order confirming the plan for which the court issues

a mandatory injunction requiring Mr. Carey to make a monthly support payment of $1,560.00 to the Debtor for the full sixty months of the plan. This is necessary because a plan can be confirmed only with this support payment. The Debtor, left to her own finances, does not have adequate funds to pay her expenses and make her monthly mortgage payment. Debtor asserts that she has more than $100,000.00 in equity in her home and almost lost it due to her pre-petition defaults. The court is relying on, and conditioning confirmation of the Plan for Mr. Carey to have an obligation, which can be enforced by civil and punitive incarceration if he fails to make the required payments.

The language in the proposed order (Dckt. 171) is not sufficient. The language required for the order will be substantially in the following form:

> **IT IS FURTHER ORDERED**, pursuant to the stipulation of Ruth Clark and Thomas Carey, and each of them, that Thomas Carey is ordered to make a monthly payment directly to the Chapter 13 Trustee in the amount of $1,560.00 to fund this Chapter 13 Plan. The $1,560.00 a month payments from Thomas Carey commence with the month of xxxxxxxxx, 2016, and continue through the sixtieth month of this Chapter 13 Plan.
>
> This consented to mandatory injunction is necessary to avoid any appearance of, or put Ruth Clark, at risk of loss of her home or be subject to a scheme or plan to have her lose her home to foreclosure. Thomas Carey consents to and agrees that this mandatory injunction may be enforced by the civil contempt power of this court and the civil and punitive contempt power of the United States District Court. Due to her age, infirmities, and age, Debtor Ruth Clark is susceptible to elder abuse.
>
> The court has also relied upon the information that Thomas Carey holds and exercises a power of attorney given by Ruth Clark, and as such owes a fiduciary duty to and must act in the interests of Ruth Clark and not his or other's financial or personal interests.
>
> At the hearing, xxxxx

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 **xxxxxxxxxxxxxxx**.

16. **16-23894-E-13** **RICHARD CARTER** **MOTION TO VACATE DISMISSAL OF CASE**
DPC-1 **Pro Se** **8-2-16 [32]**

DEBTOR DISMISSED: 07/22/2016

Final Ruling: No appearance at the August 23, 2016 Hearing is required.

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

Correct Notice Not Provided. The Debtor failed to file a Proof of Service.

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

The hearing on the Motion to Vacate is continued to 3:00 p.m. on August 30, 2016.

Richard Clark ("Debtor") filed the instant Motion to Vacate Dismissal on August 2, 2016. Dckt. 32.

The instant case was filed on June 16, 2016. Dckt. 1. No plan was confirmed.

On June 20, 2016 , the court filed an Amended Notice of Incomplete Filing and Notice of Intent to Dismiss Case due to not timely filing documents. Dckt. 19. Debtor moved for a time extension to file documents. Dckt. 21. The Court granted that motion and set Debtor's filing deadline as July 14, 2016. Dckt. 23.

On July 22, 2016, the court ordered Debtor's case dismissed for failure to timely file documents. Dckt. 29.

On August 2, 2016, Debtor filed this instant Motion to Vacate Dismissal of Case claiming confusion due to Debtor's case being filed as a Chapter 7 one day before being corrected the following day. Debtor states that the confusion caused him to neglect filing a Chapter 13 plan in the time required by the court.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on August 5, 2016. Dckt. 34. The Trustee states that the Motion was not served on all parties, the court's error did no prevent the Debtor from filing any documents, and the plan filed by the Debtor is not feasible.

DEBTOR'S RESPONSE

The Debtor filed a response on August 16, 2016. Dckt. 38. The Debtor states that he is unavailable to attend the hearing because he will be in Phoenix Arizona moving his daughter into college. The Debtor requests that the Motion be continued to a date after August 26, 2016.

REVIEW OF BANKRUPTCY CASE

The Debtor has filed a Chapter 13 Plan concurrently with his motion to vacate dismissal. A summary of the Chapter 13 Plan reveals the following:

A. Monthly Plan Payment.....$85.85

B. Term of Plan.....60 Months

C. Distribution on Claims:

1. Class 1 Secured
   a. Current Monthly Installment.....($3,476.52)
   b. Arrearage Payment.....($ 0.00)

2. Class 2 Secured..... None

3. Class 3 Secured, Surrender..... None

4. Class 4 Secured, Direct Payment,..... None

5. Class 5, Priority Unsecured..... None

6. Class 6, Special Treatment Unsecured..... None

7. Class 7 General Unsecured
   a. Dividend of $5,151 General Unsecured..... 4%

Plan, Dckt. 33. (It appears that the $5,151.00 is the 4% the $103,014 of general unsecured claims listed on Schedule E/F. $5/151.00 divided by 60 months would be $58.85 a month.)

As drafted by the Debtor, the Plan requires a monthly payment of approximately (including a 7% Trustee fee) of $3,811.74. However, Debtor provides for only $85.85 a month - dramatically under-funding the plan. Thus, it does not appear that there is a feasible plan or a likelihood of success if the order vacating the case was granted.

In reviewing the Schedules, the court notes the following:

A. Schedule A, Real Property

1. Waterboro Square.....$586,082 FMV

B. Schedule D, Secured Claims

1. Deeds of Trust, Waterboro Square.....($225,047.97)

C. Schedule E/F

1. E Priority..... None

2. F General Unsecured.....($103,014)

D. Schedule I, Income

1. Debtor is unemployed.....$0.00

2. Non-Debtor Spouse Gross Wages.....$8278

3. Deductions.....($3,143)

4. Take-Home Income.....$5,143.32

E. Schedule J, Expenses

1. Total.....($7,037)

2. Net Monthly Income.....($1,894)

3. Expenses Include
   a. Mortgage.....($2,886.57)
   b. Transportation (2 cars; gas, repairs, registration).....($165)

4. States that Debtor is working on a loan modification, which is anticipated to reduce the mortgage payment by more than $2,000 a month. It appears that the Schedule J expenses show an already reduced payment, not the actual payment which may be the $3,476.52 listed in the Plan.

Dckt. 26.

The court reconsidering or vacating a judgment or order is governed by Federal Rule of Civil Procedure 60(b), as made applicable in this case by Federal Rule of Bankruptcy Procedure 9024, which incorporates minor modifications that do not apply here. Grounds for relief from a final judgment, order, or other proceeding are limited to:

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

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

(3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or

misconduct by an opposing party;

(4) The judgment is void;

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

(6) Any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The court uses equitable principles when applying Rule 60(b)Fed. R. Civ. P. 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3rd ed. 1998). A precondition to the granting of such relief is that the movant show that he or she has a meritious claim or defense. See 12-60 Moore's Federal Practice Civil § 60.24; *Brandt v. American Bankers Insurance Company of Florida*, 653 F.3d 1108, 111 (9th Cir. 2011); *Falk v. Allen*, 739 F.2d 461, 462(9th Cir. 1984) ("We agree with the Third Circuit that three factors should be evaluated in considering a motion to reopen a default judgment under Rule 60(b): (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. See *Gross v. Stereo Component Systems*, 700 F.2d 120, 122 (3d Cir. 1983) ("Gross"); see also *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983) (adopting Third Circuit test).")

Additionally, the Ninth Circuit Court of Appeals has instructed in *Aurich American Insurance Company v. International Fibercom, Inc. (In re International Fibercom, Inc.*) 503 F.3d 933, 941. (9th Cir. 2007),

> We have stated in the past that Rule 60(b)(6) should be "liberally applied," *Hammer*, 940 F.2d at 525, "to accomplish justice." *Yanow v. Weyerhaeuser S.S. Co.*, 274 F.2d 274, 284 (9th Cir. 1959) (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)). At the same time, "[j]udgments are not often set aside under Rule 60(b)(6)." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006). Rather, Rule 60(b)(6) should be "'used sparingly as an equitable remedy to prevent manifest injustice' and 'is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.'" *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Accordingly, a party who moves for such relief "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with . . . the action in a proper fashion." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).

DISCUSSION

A review of the files in this case do not reflect a debtor asserting a meritorious defense to the Motion to Dismiss. It appears that this Debtor is seeking to obtain a loan modification, but none exists. It is likely that the Debtor is in default on the mortgages, which requires that they be paid through the plan. While a debtor can propose and confirm a Chapter 13 Plan which provides adequate protection payments to the creditor while a loan modification is being processed in good faith, no such plan is proposed. (Such

plan provisions are commonly called in this court the "Ensminger Loan Modification Additional Provision." Mr. Ensminger is a consumer attorney who worked with creditors's attorneys and other consumer attorney to structure the additional provisions to allow for the prosecution of a loan modification and adequate protection payments consistent with the Bankruptcy Code through a confirmed Chapter 13 Plan.)

The court identifies the above issues in the tentative ruling posted for the August 23, 2016 hearing that is being continued for the benefit of the parties.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Vacate Dismissal of Case 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 hearing on the Motion to Vacate the Dismissal is continued to 3:00 p.m. on August 30, 2016.

17. **11-34363-E-13** **SAMUEL/ROMA STOUT** **MOTION TO SELL**
SS-2 **Scott D. Shumaker** **8-9-16 [56]**

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

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

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

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, Chapter 13 Trustee, and Office of the United States Trustee on August 9, 2016. By the court's calculation, 14 days' notice was provided. 21 days' notice is required. Fed. R. Bankr. P. 2002(a)(2), 21 day notice.

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

The Motion to Sell Property is denied without prejudice.

Samuel and Roma Stout ("Debtor") filed the instant Motion to Sell on August 9, 2016. Dckt. 56. The Bankruptcy Code permits a Chapter 13 debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, the Debtors propose to sell real property commonly known as 377 Shoup Avenue, Twin Falls, Idaho (the "Property").

However, the Debtor only provided 14-days' notice. Pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(2), a Motion to Sell must be set and heard on a minimum of 21-days' notice. Given that the Debtor only provided 14-days, the Motion is denied without prejudice.

Additionally, the Debtor has failed to provide information as to the buyer of the Property and

a copy of the actual sale agreement.

The court notes that the Trustee has already filed a Final Report and Account on August 15, 2016. Dckt. 61. The Final Report indicates that the case was completed on March 12, 2016. The Debtor have filed their 11 U.S.C. § 1328 Certificates. Dckt. 54 and 55.

While the court is cognizant that the case is imminently closing, that does not excuse the parties from complying with all requirements under the Bankruptcy Rules and Bankruptcy Code.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Samuel Stout and Roma Stout, the Chapter 13 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES

ALTERNATIVE RULING

The Bankruptcy Code permits a Chapter 13 debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, the Debtors propose to sell real property commonly known as 377 Shoup Avenue, Twin Falls, Idaho (the "Property"). The terms of the sale are $50,000.00 purchase price; $32,019.71 estimated payment to Chase Bank on a first deed of trust mortgage; $5,714.21 fees and costs; $12,266.08 cash to Debtors; closing on August 26, 2016; closing in Twin Falls, Idaho; sold through real estate agent Bryan Newberry of Magic Valley Realty.

The court notes that the Debtors failed to file a purchase agreement and the buyer's name.

At the hearing, the Debtors informed the court that the buyer's name is xxxxx. The Debtors also informed the court that the terms of the purchase agreement are xxxxx.

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Samuel Stout and Roma Stout, the Chapter 13 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 Samuel Stout and Roma Stout, the Chapter 13 Debtors, are authorized to sell pursuant to 11 U.S.C. § 363(b), the Property commonly known as 377 Shoup Avenue, Twin Falls, Idaho ("Property"), on the following terms:
>
> 1. The Property shall be sold for $50,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit xx, Dckt. xx, and as further provided in this Order.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Chapter 13 Debtors be, and hereby are, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 5. After payment of the liens, costs, and expenses as authorized in this order, the net sales proceeds may be disbursed directly from escrow directly to Samuel and Roma Stout, the Debtors.