UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

September 16, 2014 at 3:00 p.m.

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1. 14-27203-E-13 JOSE VALLEJO
DPC-1 Thomas Gillis

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-20-14 [16]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 20, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

the basis that:

1. The Debtor's Plan **fails to provide for Springleaf Financial Services, Inc.'s secured lien against Debtor's 2004 Kia Sorento**. On August 8, 2014, Springleaf Financial Services, Inc. filed Claim #1, indicating a secured claim of $4,284.36. This claim is not listed on Schedule D or provided for in the plan although it appears the claim should be paid in Class 2. While treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment could indicate that the Debtor either cannot afford the payments called for under the Plan because they have additional debts, or that the Debtor wants to conceal the proposed treatment of a creditor.

2. It appears that the Debtor cannot make the payment required under 11 U.S.C. § 1325(a)(6). The **Debtor lists Bank of America's Second Deed of Trust in Class 4 of the Plan, but fails to deduct the amount of the payment $180.00 per month on Schedule J. FN.1.** It appears the Debtor does not have sufficient income to pay the Plan payment and continue making ongoing mortgage payments outside the Plan.

FN.1. On September 6, 2014, Bank of America, N.A. filed a Notice of Mortgage Payment Change which states that the mortgage payment for the Second Deed of Trust will be reduced to $172.41 per month starting September 29, 2014. Dckt. 20.

Dckt. 16.

DISCUSSION

First, the Trustee asserts that Springleaf Financial Services, Inc.'s claim of $4,284.36 is not provided for in the Plan nor in the Debtor's Schedule D. In essence, the Trustee alleges that the absence of the claim in the Plan violates 11 U.S.C. § 1322(b)(2) because the Plan contains no provision for payment of Springleaf Financial Service, Inc.'s claim, which is secured by the Debtor's vehicle.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that the Debtor adequately fund the plan with future earnings or other future income that is paid over to the Trustee, 11 U.S.C. § 1322(a)(1), provide for payment in full of priority claims, 11 U.S.C. § 1322(a)(2) & (4), and provide the same treatment for each claim in a particular class, 11 U.S.C. § 1322(a)(3). But, nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims, 11 U.S.C. § 1322(b)(2), cure any default on a secured claim, including a home loan, 11

U.S.C. § 1322(b)(3), and maintain ongoing contract installment payments while curing a pre-petition default, 11 U.S.C. § 1322(b)(5).

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

1. provide a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A),

2. provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan, 11 U.S.C. § 1325(a)(5)(B), or

3. surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

However, these three possibilities are relevant only if the plan provides for the secured claim.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claim holder may seek the termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the Debtor's reorganization and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for the respondent creditor's secured claim, raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). This is reason to sustain the objection.

As to the Trustee's second objection, the Trustee alleges that the Plan is not feasible, *See* 11 U.S.C. § 1325(a)(6), because the Plan does not account for Bank of America's Second Deed of Trust on Schedule J. Because Schedule J does not account for the monthly $180.00 (or the $172.41 which takes effect September 29, 2014) expense, the disposable income calculated in Debtor's petition does not accurately reflect Debtor's actual income and expenses. **Due to this inflated disposable income from the absence of Bank of America, N.A. Second Deed of Trust mortgage payments, Debtor may not be able to make the Plan payments. Thus, the plan may not be confirmed.**

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

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

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

upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

2. 11-37906-E-13 CHRISTOPHER COSTNER — MOTION TO SELL
S.B.-5 Scott de Be — 8-14-14 [76]

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 Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 14, 2014. 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 the Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to short sell the "Property" described as follows:

A. 909 Arbor Oaks Drive, Vacaville, CA 95687

The proposed purchaser of the Property are Jonathan S. Taylor and Megan M. Taylor and the terms of the sale are:

1. Sale price of $350,000.00.

2. All creditors with liens and security interests encumbering the Property **not voluntarily released will be paid in full simultaneously with the transfer of title to the buyer or held by the escrow holder until agreement by the parties or further court order.**

3. All costs of sale, such as escrow fees, title insurance, and commissions will be paid in full from the proceeds.

4. The sale price is all cash.

5. Debtor will not relinquish title to, or possession of, the subject property prior to payment in full of the purchase price.

David Cusick, Chapter 13 Trustee, filed a notice of non-opposition on August 19, 2014.

For this Motion, the Movant has established the sale price represents the fair market value for the property and that the short sale of the Property is in the best interest of the estate. The Movant has established that the short sale is acceptable and beneficial to the Creditors.

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 Christopher George COSTNER 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 Christopher George COSTNER, the Debtor/Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Jonathan S. Taylor and Megan M. Taylor or nominee ("Buyer"), the Property commonly known as 909 Arbor Oaks Drive, Vacaville, CA 95687("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $350,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 79, and as further provided in this Order.

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

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

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

3.	**13-34907-E-13** **LBG-3**	**VICTORIA VALENTE** **Lucas Garcia**	**OBJECTION TO CLAIM OF NATION STAR MORTGAGE, LLC., CLAIM NUMBER 2** **8-1-14 [57]**

Final Ruling: No appearance at the September 16, 2014 hearing is required.

The Debtor having filed a Withdrawal of the Motion to Objection to Claim No. 2 (Dckt. 87), pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

4. 13-34907-E-13 VICTORIA VALENTE — MOTION TO CONFIRM PLAN
LBG-4 Lucas Garcia — 8-1-14 [62]

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 Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 1, 2014. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

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

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

Victoria Valente ("Debtor"), through her attorney, filed the instant Motion to Confirm Second Amended Chapter 13 Plan on August 1, 2014.

DEBTOR'S MOTION

Debtor moves to confirm her Second Amended Chapter 13 Plan. The debtor proposes this plan in good faith and represents that she is current on plan payments to the Trustee.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, has filed opposition to this motion. The Trustee objects to confirming the proposed modified plan based on:

1. All sums required by the plan have not been paid. 11 U.S.C. § 1325(a)(2). **The Debtor is $11,907.00** behind in plan payments to the Trustee to date and the next scheduled payment of $3,973.00 is due on September 25. The Debtor has paid $23,850.00 into the plan to date.

2. The Debtor may not be able to make the payments under the plan or comply with the plan. 11 U.S.C. § 1325(a)(6). **Debtor's plan calls for two lump sum payments of $5,000.00 each to be paid in the 18th month and the 30th month. Debtor fails** to indicate the source of those payments. The trustee is unable to determine the feasibility of the plan where Debtor has not disclosed all sources of income projected into the plan.

Dckt. 74.

DEBTOR'S REPLY

Debtor has filed a reply to the Trustee's objection. Counsel for Debtors alleges that:

1. The Debtor has rectified their delinquent payments as of September 5, 2014.

2. The **lump sum payments are intended to come from Debtor's tax returns, which the Trustee pointed out at a 341 hearing as being fairly high.**

Dckt. 84.

However, Debtor provides no evidence that the default has been cured. Further, Debtor has not provided any evidence as to how he has an "extra" $12,000.00 to cure the default, and than the required $3,973.00 for the current monthly payment. Even more concerning is that Debtor offers no explanation (and no credible evidence) as to where the $11,907.00 in plan payments have been diverted, why the payments were not made, and why defaults will not continue to occur.

Counsel for Debtor casually states in the "Reply" (which consists of three sentences spread over five lines) that two lump sum payments will come from the Debtor's tax refund. Counsel does not argue (and no evidence is presented) (1) why the Debtor has such large tax refunds and (2) what has been done to prevent such large tax refunds from recurring.

DISCUSSION

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

The arguments (unsupported by evidence) stated by Debtor's Counsel does not resolve the Trustee's objections to confirmation. They also raise troubling concerns first, no explanation given as to (1) how the Debtor is able to have an "extra" $12,000.00 in one month to cure the default. In her declaration in support of the present motion, Debtor states that she has $8,432.02 a month for expenses (not including the mortgage, property taxes, and

insurance to be paid through the Plan), she has $3,984.07 of projected disposable income. As events has transpired, this is not correct – she has failed to make at least three of the monthly payments.

A closer look at Amended Schedule J (Dckt. 20) shows why Debtor's statement of income and expenses under penalty of perjury in her declaration is not accurate. Though Amended Schedule J is made under penalty of perjury, it appears that the dollar amounts stated for expenses are fabrications by Debtor, made only to generate a pre-determinated Monthly Net Income to create an illusion that the proposed plan was feasible. (These outcome determinative, inaccurate, income and expense statements by debtors under penalty of perjury are commonly called "Liar Declarations" in this court. Such "Liar Declarations" do not only show false statements under penalty of perjury by a debtor, but that such consumer counsel obtaining and filing such statements are equally culpable in the improper (and illegal) conduct of submitting such false statements to the court.

Amended Schedule J, under penalty of perjury, states that the Debtor's monthly expenses average the following:

A.	Electricity/Heating	($ 50.00)
B.	Water/Sewer	($ 0.00)
C.	Telephone	($ 25.00)
D.	Cable/Internet	($ 48.00)
E.	Home Maintenance	($ 0.00)
F.	Food	($ 150.00)
G.	Clothing	($ 25.00)
H.	Laundry	($ 30.00)
I.	Medical/Dental	($ 0.00)
J.	Transportation	($ 185.00)
K.	Recreation	($ 25.00)
L.	Health Ins	($ 0.00)
M.	Auto Ins	($ 65.00)
N.	Taxes (not deducted)	($ 0.00)
O.	Business Expenses	($3,763.01)

So, of the $4,372.02) of monthly expenses, only ($609.00) of the expenses are for the Debtor's personal and living expenses.

Though under penalty of perjury, the court does not find this statement

of expenses to be credible — or truthful. No explanation is provided as to how electricity and heating expenses for someone living in Northern California is only $50.00 a month. Further, Debtor lists no water or sewer expenses. If Debtor is on a well and septic tank, then there are expenses which go with that (power to fun pump, maintenance, and repairs).

The court does not find it credible that Debtor has $0.00 in maintenance expenses for her home. Further, no credible evidence has been presented that Debtor spends only $150.00 a month on food and has no medical or dental expenses over the five years of this proposed plan. The statement under penalty of perjury that this Debtor, who lives in Penn Valley, California has only $185.00 of transportation expenses (fuel and maintenance) is problematic. Assuming maintenance costs of $50.00 a month, that leaves $135.00 for fuel costs. Further assuming a $3.85 per gallon cost of gas, Debtor could afford to buy 30 gallons of gas. If her vehicle averages 20 miles to the gallon, Debtor could travel a total of 600 miles a month.

The court takes Judicial Notice of the fact that Penn Valley California is 30 miles from Yuba City, California; 62 miles from Sacramento, California; and 109 miles from Stockton, California. Two round trips from Penn Valley, California to Sacramento, California would exhaust most of Debtor's transportation expense for gas.

On Schedule B filed by the Debtor she does not list any business as an asset on Schedule B. Dckt. 1 at 10-13. This statement which fails to disclose any such business is made under penalty of perjury by the Debtor. No business is claimed as exempt on Schedule C. *Id.* at 14.

However, on Schedule I Debtor states under penalty of perjury that she is, and has been for thirty years, the "Owner/Operator" of a business known as "Victoria's Sweet Elegance." *Id.* at 20. In response to Question No. 1 on the Statement of Financial Affairs, Debtor states under penalty of perjury that her gross income from business was $29,076.53 2013 year to date, $125,677.00 for 2012, and $26,828.00 for 2011. *Id.* at 23. In response to Question 2 of the Statement of Financial Affairs, Debtor states under penalty of perjury that she received income tax refunds of $15,192.00 for 2012, $12,053.00 for 2011, and $20,218.00 for 2010. *Id.* at 23-24.

Debtor has included an Amended Business Income and Expense Statement for Debtor's Business (which is not listed on Schedule B). Of the ($3,763.02) in expenses, ($1,494.50) is for "Office Expenses and Supplies." The next major expense is ($990.59) for "Inventory Purchases." No provision is made for the payment of any taxes as an expense of the "business." Schedule J makes no provision for the payment of income taxes and self employment taxes of the Debtor.

By her own evidence, with the assistance of her attorneys, Debtor has demonstrated that the proposed Plan is not feasible. She cannot afford to make the plan payments. Her expenses are a fabrication solely to create the illusion that she can prosecute a Chapter 13 Plan to provide for curing her substantial arrearage on the loan secured by her home. If it was the Debtor's intention to confirm a plan which includes a loan modification negotiation provision with adequate protection payments to the creditor, that has not been presented to the court. For almost four years attorneys in this court have

utilized such an Ensminger Additional Plan Provision (so named after the consumer attorney who worked with creditor attorneys and other consumer attorneys to develop such a provision which is consistent with the Bankruptcy Code). Instead of using such a provision, Debtor has fabricated expenses, and has demonstrated that such expenses (stated under penalty of perjury) are a fabrication by her defaulting in at least three required plan payments.

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

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

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

5. 14-27422-E-13 LONNIE/SHARON SHURTLEFF
CAH-1 C. Anthony Hughes

MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
8-15-14 [18]

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

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

Below is the court's tentative ruling.

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 JPMorgan Chase Bank, N.A., Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 15, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

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

The Motion to Value filed by Lonnie and Sharon Shurtleff ("Debtors") to value the secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 308 Savoy Avenue, Rio Linda, California ("Property"). Debtor seeks to value the Property at a fair market value of $175,000.00 as of the petition filing date. As the owners, Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

OPPOSITION

Creditor has filed an opposition on September 2, 2014. Creditor objects to both the Debtors' valuation of the Property and the balance of the first deed of trust on the Property. **Creditor alleges that the balance of the first deed of trust is $214,000.00 and the value of the Property is approximately $233,000.00. Dckt. 37. Creditor** states that it is in the process of getting a valuation of the Property in support of this allegation.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $284,133.33. FN.1. Creditor's second deed of trust secures a claim with a balance of approximately $30,661.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. FN.2. 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.

FN.1. The court notes that Creditor, who is also the holder of the first deed of trust, disputes the outstanding balance on the first deed of trust. However, Creditor has offered no evidence of supporting its contention that the first

deed of trust secures a claim of less than $284,133.33, the amount shown on Debtors' Schedule D. Exh. B, Dckt. 21. A review of the record shows that Creditor has not filed a proof of claim in this case for either of its liens on the Property. The court notes that Creditor has filed a request for judicial notice on August 29, 2014 (Dckt. 34), asking the court to take notice of a claim transfer, there remains no claims in this case for either the Creditor nor the original claim holder.

FN.2. The court also notes that Creditor alleges that the Property is worth a considerably higher value than Debtors put forward in their motion and declaration. At this time, the record shows no evidence of Creditor's valuation of the property to compete with Debtors' supported valuation.

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 Lonnie and Sharon Shurtleff ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of JPMorgan Chase Bank, N.A., secured by a second in priority deed of trust recorded against the real property commonly known as 308 Savoy Avenue, Rio Linda, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $175,000.00 and is encumbered by senior liens securing claims in the amount of $284,133.33, which exceed the value of the Property which is subject to Creditor's lien.

6. 13-31632-E-13 JANELLE GILMORE
PGM-2 Peter Macaluso

MOTION TO MODIFY PLAN
8-7-14 [71]

Final Ruling: No appearance at the September 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 7, 2014. 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 Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on August 7, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order

confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

7. 09-38433-E-13 GARY/SHERYL RAWLINSON
RLC-3 Stephen Reynolds

MOTION FOR COMPENSATION BY THE LAW OFFICE OF STEPHEN M. REYNOLDS FOR STEPHEN M. REYNOLDS, DEBTOR'S ATTORNEY(S)
7-24-14 [123]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 24, 2014. By the court's calculation, 54 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted in the amount of $1,500.00 and denied for all other fees requested.

FEES REQUESTED

Stephen M. Reynolds, the Attorney ("Applicant") for Gary and Sheryl Rawlinson the Chapter 13 Debtor ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period January 6, 2012 through July 21, 2014. The order of the court approving employment of Applicant was entered on December, 30 2009, Dckt. 46.

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

General Case Administration: Applicant spent 3.0 hours in this category in which the Applicant:

1. Assisted Client with preparing, reviewing and finalizing Chapter 13 schedules and Statement of financial affairs;

2. Communicated with Debtor regarding case strategy;

3. Communicated with various parties regarding claims and the status of the case;

4. Attended the 341 and communicated with the Chapter 13 Trustee on multiple occasions.

Adversary Proceedings: Applicant spent 2.0 hours in this category. Applicant attended multiple hearings in the case beyond the 341 meeting.

Significant Motions and Other Contested Matters: Applicant spent 7.5 hours in this category in which the Applicant:

1. Prepared and filed six Chapter 13 plans with supporting pleadings;

2. Prepared and filed two Motions to Incur Debt;

3. Filed a Motion to Approve financing of a vehicle and a residence;

4. Prepared and filed a motion for additional fees and expenses;

5. Filed a motion for hardship discharge after one of the Debtor's lost her long term employment.

Applicant notes that several unforseen events have occurred during this Chapter 13 case which include divorce of the Debtors, remarriage of one of the Debtors, and loss of one Debtor's long term employment. These developments caused for the case to go beyond the normal amount of work required in a Chapter 13 case.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

NO-LOOK FEES

The pre-confirmation payment that counsel receives is viewed by the court as generally sufficient to fairly compensate counsel for all pre-confirmation and most post-confirmation services such as reviewing notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to claims filed.

Local Rule 2016-1 governs no-look fees in Chapter 13 cases and states in relevant part:

(c) **Fixed Fees Approved in Connection with Plan Confirmation**. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

1. The maximum fee that may be charged in $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.

2. The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

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

Bankr. E.D. Cal. R. 2016-1.

The United State Bankruptcy Court for the Eastern District of California issued the *Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases*, which states in relative part:

> 4. If counsel has filed an executed copy of the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys," but the initial fee is not sufficient to fully compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The court will not approve, however, additional compensation in cases in which no plan is confirmed, or for work necessary to confirm the initial plan. Further, counsel should not view the fee permitted by these Guidelines as a retainer that, once exhausted, automatically justifies a fee motion. This fee is sufficient to fairly compensate counsel for all preconfirmation services and most post-confirmation services such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. . .

Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases.

Benefit to the Estate

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must still demonstrate that the work

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

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including successfully filing a Chapter 13 Plan and two Motions to incur debt. Additionally, the Applicant served as the communicator between the Debtors and Trustee. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

SUBSTANTIAL AND UNANTICIPATED FEES REQUESTED BY COUNSEL

While the Motion consists of four pages, buried in a 14 line paragraph is a statement of why "substantial" and "unanticipated" legal expenses were incurred by Debtor. These are stated to be (1) divorce of the Debtors, (2) Debtor lost her employment, (3) Counsel filing five motions to confirm or modify the Chapter 13 Plan, and (4) Counsel filing a motion for a hardship discharge. This general characterization constitutes of sum total of the grounds stated with particularity (Fed. R. Bankr. 9013) for these critical requirements for the allowance of additional fees when counsel has elected the set fee he agreed to in this case.

Counsel's declaration provides little more, merely repeating verbatim the portion of the one sentence in the Motion. No explanation is provided (nor alleged in the motion, why counsel had to file five motions to confirm or modify the Plan. Normally, one would expect one motion to modify a plan (as the motion to confirm is covered by the set fee which counsel agreed to accept in this case).

The Supplemental Declaration provided by Counsel (Dckt. 132) does not help to explain why five motions to confirm or modify were reasonable or necessary.

TRUSTEE'S OPPOSITION

The Trustee notes that the Declaration on page 3, lines 11-13 indicate that "the time records were not contemporaneous records, but were created through a review of the docket and counsel's calendar." (Dckt. 125). Additionally the Trustee has noted that the billing indicates $1,050.00 for the preparation of the instant Motion for Compensation. The Applicant indicates that a filing of a Motion for Hardship Discharge was made which Trustee points out was denied based on insufficient evidence. (Dckt. 97). Additionally, Applicant indicated that six filings of the plan were made with the Trustee points out that:

1. "Motion to Confirm 2nd Amended Plan" (Dckt. 65) was opposed by the Trustee (Dckt. 69), which was why the confirmation was denied (Dckt. 72).

2. "Motion to Confirm Third Amended Plan" (Dckt. 74) was opposed by the Trustee (Dckt. 80), and Applicant filed a Notice of Withdrawal (Dckt. 83).

3. Debtor's "Motion to Confirm First Modified Chapter 13 Plan and Offer Proof Thereon" (Dckt. 101) was opposed confirmation based on Trustee's Objection and the Court's determination of bad faith.

DISCUSSION

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

Category	Hours	Description	Fees
Case Administration	3.00	6/8/12 Prepare and File Motion to Incur Debt LR-6 (1.0) 2/6/14 Prepare and file motion for hardship discharge RLC-1 (2.0)	$900.00
Plan Statement	4.00	1/6/12 Prepare and file motion to modify Chapter 13 Plan, LR-2 with supporting documents. (2.0) Prepare and file Motion to Modify Chapter 13 Plan, LR-3 with supporting documents. (1.0) 3/24/14 Prepare and file Motion to Modify Chapter 13 Plan RLC-2, along with Amended Summary of Schedules for Schedules I & J, and supporting documents (1.0)	$1,200.00
Litigation	2.00	2/14/12 Prepare for and attend hearing on Motion to Modify Chapter 13 Plan, LR-2. (1.0) 5/20/14 Prepare for and attend hearing on Motion for Hardship Discharge, RLC-1 as well as Motion to Modify Chapter 13 Plan RLC-2 (1.0)	$600.00
Fee Application	3.50	5/20/14 Prepare and file Motion for Compensation as Counsel for Debtor, RLC-3 (3.5)	$1,050.00
Total	**12.5**		**$3,750.00**

All fees have been billed by Counsel, Stephen Reynolds, at the rate of $300.00 per hour.

Working in reverse chronological order through the docket in this case, the court first identifies the ruling on the motion for hardship discharge. The Motion for Hardship Discharge was denied by the court, the issue arising how this Debtor could obtain a hardship discharge when her former co-debtor, and continuing co-debtor under the confirmed plan in case no. was performing the plan. The court further determined that Debtor had failed to provide sufficient evidence in support of granting a hardship discharge. Civil Minutes, Dckt. 119.

At the May 20, 2014 hearing on the Motion to Modify the Plan in this case, the court denied the Motion. In denying the Motion, the court identified significant defects in the motion, supporting pleadings, and the evidence. Civil Minutes, Dckt. 117. These included:

> (1) Debtor Gary Rawlinson (with income of $14,279.97 a month) not prosecuting the motion in good faith in his effort to improperly avoid paying the required dividend to creditors holding general unsecured claims. The court states in the

ruling, "However, he [Gary Rawlinson] has demonstrated that he is not prosecuting this case in good faith, attempting to squeeze a few extra bucks from creditors. For the want of paying possibly an additional $6,000 to $7,000 in dividend to creditors holding general unsecured claims the Motion is denied. Quite possibly Mr. Rawlinson has so impugned his credibility that he cannot, 56 months into the case, modify the plan to provide for paying his truthful, accurate and honest projected disposable income into the case."

(2) In concluding that the proposed modified plan was not in good faith, the court held, "In addition to the First Modified Plan not being feasible based on the evidence presented, the Debtors have demonstrated that the First Modified Plan has not been presented in good faith. Mr. Rawlinson wants the
benefit of Sheryl Brewer having lost her job to decrease the monthly plan payment, but seeks to hide his actual family household income which has increased. Further, he attempts to divert money to pay his current wife's [not the co-debtor Sheryl Rawlinson] share of the household expenses, asking creditors to subsidize their lifestyle."

(3) Relevant to the bad faith finding which doomed the Motion to Modify Plan, the court concluded, "Mr. Rawlinson has hidden from the court his current wife's actual income and has failed to provide any testimony about that income. The court does not believe that his failure to provide such testimony is mere inadvertence. Rather, the court infers that this high income debtor has done so to try and avoid paying his actual projected disposable income for the final five months of the Chapter 13 Plan."

(4) Various claims previously provided in the prior plan merely "disappeared" without explanation from the proposed modified plan.

Civil Minutes, Dckt. 117.

The court did grant the Motion for authorization to obtain credit for Debtor Gary Rawlinson to purchase real property. June 13, 2012 filed Order, Dckt. 87, and amended Order, Dckt. 91.

The Motion to Confirm the Third Modified Plan filed on February 23, 2012 (Dckt. 74) with dismissed without prejudice by the Debtors. Dismissal, Dckt. 83. This was after the Chapter 13 Trustee filed a Opposition which asserted: (1) Debtors failed to provide the required 35 days notice pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(b); (2) failure to properly identify secured claim and collateral; and (3) failure to provide sufficient evidence in support of confirmation. Opposition, Dckt. 80.

The court denied Debtors' Motion to Confirm 2nd Modified Plan. Civil Minutes, Dckt. 72; Order, Dckt. 73. Grounds for denying confirmation include,

(1) Debtors failing to provide their projected disposable income for a plan which provided less than a 100% payment to creditors holding general unsecured claims, (2) failure to provide for a secured claim for which disbursements were made under the then existing confirmed plan, and (3) plan sought to reduce dividend to creditors holding general unsecured claim without evidence to support such reduction.

The court did grant Debtors' motion to incur credit to purchase a vehicle. Civil Minutes, Dckt. 62; Order, Dckt. 63.

The court confirmed the Debtors' Amended Plan by order filed on November 12, 2009. Order, Dckt. 29. Confirmation of this Plan is included in the set fees which counsel has agreed to accept in this case. See December 30, 2009 Order Confirming Plan (which was prepared by Counsel for Debtors) which approves the set fee of $3,500.00 to be paid Counsel in this case.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided, for the fees which are approved.

However, the court finds that only fees for the post-petition credit was reasonable, necessary, and for motions prosecuted by the Debtors in good faith. These fees total $900.00, based on the evidence provided by Counsel. For a $900.00 fee application (which could have been done ex parte and without a hearing), the court allows two hours of legal fees (for a properly prepared motion) in the amount of $600.00.

The court allows Counsel $1,500.00 of additional fees.

For the balance of the fees requested, Counsel's requests fails on several grounds. First, they were not "necessary." Rather than being part of the Debtors' good faith efforts to prosecute the case, it has been clearly been demonstrated that these were attempts by Debtor to circumvent the Bankruptcy Code. Merely because these Debtors told Counsel to go out and try to subvert the federal court and judicial process does not mean that the court blindly does Debtors' bidding – either in granting such requests or allowing counsel fees under the Bankruptcy Code.

The work done was not "substantial." Time may have been spent, but it was not "substantial" work which presented the court with good faith motion supported by credible evidence and competent testimony. Rather, they were "shots in the dark" intended to mislead the court and improperly modify the plan. Counsel could choose to do the Debtors' bidding in advancing such improper, unsupported motions – but again that does not bind the court to be deaf, mute, and blind to the conduct of Debtors and services of counsel.

Further, the work done did not address and fix any "unanticipated" events for Debtors. The work was to undo the terms of the confirmed plan and improperly reduce the payments required thereunder. Attempting to circumvent the provisions of the Bankruptcy Code and terms of a confirmed plan do not constitute "unanticipated" work for which additional fees above and beyond the set fee which counsel agreed to accept for the case.

All fees in excess of the $1,500.00 for all of the post-petition credit

motions and the $600.00 for the fee application are denied. No additional costs have been requested.

After reviewing Applicant's motion and declaration and taking into consideration the Trustee's objections, the court finds that Additional Fees in the amount of $1,500.00 pursuant to 11 U.S.C. § 330, in addition to the fees and costs allowed by the court pursuant to the Order Confirming the Amended Chapter 13 Plan (Dckt. 46), to be paid by the Chapter 13 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant is allowed, and the Chapter 13 Debtor is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	1,500.00
Costs and Expenses	$ 0.00

pursuant to 11 U.S.C. § 330.

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 [name of applicant] ("Applicant"), Attorney for the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Stephen M. Reynolds is allowed the following fees and expenses as a professional of the Estate:
>
> Stephen M. Reynolds, Professional Employed by Chapter 13 Debtor
>
> Fees in the amount of $ 1,500.00
> Expenses in the amount of $ 0.00,
>
> **IT IS FURTHER ORDERED** that all other fees in excess of $1,500.00 are not allowed by the court.
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $1,500.00 approved pursuant to prior Initial Application are approved as final fees and costs pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

8. 10-53637-E-13 G./KATHLEEN ULBERG — MOTION TO MODIFY PLAN
JGD-7 John Downing — 8-10-14 [166]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 12, 2014. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

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

Wendell and Kathleen Ulberg ("Debtor") filed the instant Motion to Confirm First Modified Plan on August 10, 2014.

TRUSTEE'S OBJECTION

David Cusick, Chapter 13 Trustee, filed an objection to Debtor's motion to confirm first modified plan on the basis that:

1. The Debtor has not correctly utilized the Chapter 13 Plan standard form. Local Rule 3015-1(a) **states that the mandatory form plan EDC 3-080 shall be utilized as the standard form. According to the court's website, form EDC** 3-080-12 is effective May 1, 2012. The Debtor filed an amended plan using

EDC 3-080-05 on August 10, 2014 (Dckt. 168).

2. The Debtor has not provided for the priority portion of court claim #4, Internal Revenue Service, in the amount of $690.51.

3. Debtor modified plan proposes to reduce the commitment period from 60 months to 44 months. **Debtor's Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, Form B22C (Dckt. 20) indicates Debtor is under median income and the commitment period is 3 years.** Debtor's Motion and Declaration, however, provide no reason for the reduction in plan term. Section 2.03 specified a 44 month commitment period. However, Section 7.03 states the final payment will be made in September 2014 which is the 45th month of the plan. The petition was filed December 27, 2010.

4. The Debtor proposes in Section 7.02 a payment to the creditor of $78,000.00 less any Trustee fees. The court approved the Settlement which is the subject of this Section by Order filed on August 29, 2014, Dckt. 173. Page 2 of the Release and Settlement Agreement states: "K. The Chapter 13 trustee currently has $78,000.00 on hand to pay PCP damages." Page 2 of the Operative Provisions states: "1.C. Authorize the Chapter 13 trustee to release all of the Injunction Funds directly to PC**P." The Trustee is uncertain if $78,000.00 is to be paid the creditor or if $78,000.00 less trustee fees is to be paid.**

5. The feasibility of the plan depends on the treatment of the creditor Pacific Crest Partners, Inc. The plan is not feasible if the payment to the creditor is $78,000.00 not including trustee fees.

Dckt. 174.

DISCUSSION

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

The Trustee raises several objections, some of which cause the court to deny confirmation. First, Debtors use a Chapter 13 Plan form from 2009 – which has now long been out of date. While the court would like to get this case wrapped up and "out of here" in light of the protracted (unsuccessful) litigation by the Debtors over a pre-petition foreclosure, all consumer attorneys were provided with more than adequate notice that the plan form changed effective May 1, 2012. All of the judges have been uniform in not accepting excuses for using the form plan form in light of the significant and continual notice of the required form provided attorneys.

With respect to the disbursement of the $78,000.00 from the fund created pursuant to order of the court (in the nature of a self-funded Fed. R. Civ. P. 65(c) bond), the Settlement Agreement provides that the Debtors shall, "Authorize the Chapter 13 Trustee to release all of the [$78,000.00] directly to [Pacific Crest Partners, the party who asserted the right to possession of the property by virtue of the pre-petition foreclosure sale]." Stipulation, Dckt. 157 at 3 (Operative Provision 1.c.). No party raised an issue as to

whether this term meant "the full $78,000.00" or "the amount remaining of the $78,000.00 after payment of Chapter 13 Trustee's fees thereon."

The court's order requiring the $2,000.00 a month payment which created the $78,000.00 fund, states that the monies will be held by the Chapter 13 Trustee pending further order of the court. The order expressly states,

> "If the court ultimately determines that the Defendants have been wrongfully restrained in this case, the court monies shall be used for costs and damages, as determined by the court, incurred by Defendants. If the restraining of the Defendants is determined to be proper, the monies shall first be used to pay any post-petition monthly installments and pre-petition arrearage on the secured claim of the Defendants or creditor holding the secured claim which was the subject of the non-judicial foreclosure, and any monies in excess of such amounts shall be disbursed for administrative expenses and creditor claims through the Chapter 13 plan."

Order, Adv. Pro. 11-2122, Dckt. 41.

The court did not fully consider the costs of a Chapter 13 Trustee holding this fund, and no one raised the issue when the settlement was approved. The above order, the court's intention that the gross funds first go to compensate Pacific Crest Partners for improper injunction damages or pay the creditor on the secured claim. After payment on this claim, then the monies would go to pay administrative expenses and claims. Based on this language, the court concludes that it is the gross $78,000.00 which would be paid. In the Motion to Confirm 1st Modified Plan Debtors state, "The Chapter 13 trustee currently has $78,000 on hand to pay PCP damages...The settlement essentially involves a release of all claims with PCP and Mudget to receive the $78,000 held by the Chapter 13 trustee." Motion, Dckt. 166 at 4.

The Trustee correctly identifies this as an issue. If the court were to confirm the 1st Modified Plan as written and as stated in the Motion (which are inconsistent), in light of the stipulation executed by Debtors and approved by the court, such could then set off a new round of attorneys' fees and costs over whether it is a net or gross $78,000.00 payment. Debtors need to clearly address this in the next modified plan, and clearly state both in the motion and plan whether it is a net or gross payment. If a net payment, then to clearly state that and notify PCP. If the Chapter 13 Trustee believes that the disbursement should be subject to the Chapter 13 Trustee fee, then he can assert such if the next modified plan is not to his liking.

As to the term reduction, the Trustee is correct, Debtors provide no basis for the court finding that reasonable. The court can envision such a grounds to possibly be that the original plan was based on the projected litigation time for the foreclosure dispute. With that now resolved by summary judgment and settlement, there is no purpose to prolong the plan to 44 months – so long as creditors under the existing plan are not shortchanged for the amount that they are to be paid under the confirmed plan.

Taking into account the Trustee's objection and the lack of response

from the Debtor to correct or explain the Trustee's objections, 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.

9. 09-44339-E-13 GLEN PADAYACHEE
PLC-15 Peter Cianchetta

CONTINUED MOTION TO DETERMINE FINAL CURE AND MORTGAGE PAYMENT RULE 3002.1
5-30-14 [186]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 30, 2014. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

The Motion to Determine Final Cure and Mortgage Payment is granted.

Debtor seeks an order confirming that they have cured their mortgage default and made all post-petition mortgage payments required under the plan, pursuant to Federal Rule of Bankruptcy Procedure 3002.1(h). Debtor asserts that the Trustee filed a Notice of Final Cure Payment for U.S. Bank, N.A. and in response, U.S. Bank, N.A. filed a Response to Notice of Final Cure Payment claiming six (6) payments in the total amount of $11,530.34 was owed. Debtor disputes these amounts and asserts that all payment have been paid on time. Declaration, Dckt. 189. Debtor argues that U.S. Bank, N.A.'s website records indicate the payments were in fact made and statements from his bank

acknowledge the payments.

The Motion was set for hearing on June 24, 2014. The court continued the hearing to be conducted at 3:00 p.m. September 16, 2014. The court ordered that Amended Opposition and supporting pleadings must be filed and served on or before July 23, 2014, and any Reply thereto filed and served on or before July 30, 2014. Order, Dckt. 200.

U.S. Bank, N.A. did not provide any declarations or properly authenticated exhibits in opposition to the Motion. Fed. R. Evid. 601, 602, 901, 902. This Creditor's counsel filed an opposition which argued facts which U.S. Bank, N.A. asserted showed that the additional amounts owning were correct. Unauthenticated Exhibits (Dckt. 196) were filed, which U.S. Bank, N.A. sought to have the court rely.

To address this evidentiary shortcoming, the court continued the hearing to allow U.S. Bank, N.A. to file supplemental pleadings. The court's review of the docket shows that there has not been any supplemental filings by the Debtor or U.S. Bank, N.A. in connection with this Motion.

Pursuant to Federal Rule of Bankruptcy Procedure 3002.1(h), on motion of the debtor or trustee, after notice and hearing, the court shall determine whether the debtor has cured the default and paid all required post-petition amounts. Here, Creditor filed a Response to Notice of Final Cure Payment within 21 days after the service of the notice as required by Federal Rule of Bankruptcy Procedure 3002.1(g) stating that Debtor has not made all required payments. However, a review of the Notice of Final Cure Payment indicates that debtor made all payments under the plan for arrears to U.S. Bank, N.A. and Debtor's records show that payments were in fact made for the dates disputed by U.S. Bank, N.A.

Therefore, the court finds Glen Padayachee, Debtor, has cured the mortgage default and made all appropriate payments to U.S. Bank, N.A., as required by the Chapter 13 Plan.

The Motion is granted and the court shall issue an order thereon consistent with this Ruling.

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 Determine Final Cure and Mortgage Payment filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the court finds Glen Padayachee, Debtor, has cured the mortgage default and made all payments to U.S. Bank, N.A. for its claim, including arrearage, as required by the Chapter 13 Plan, as of the date completion of this Chapter 13 Plan – March 7, 2014

(Chapter 13 Trustee's Final Report, Dckt. 191).

10. 14-25140-E-13 KEN JIMENEZ
DPC-1 Todd Peterson
OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
8-20-14 [37]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 19, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Debtor's plan calls for the sale of real property to pay off the secured liens on the property and pay off the plan at 100%. Debtor has failed to propose a deadline date or sales process for the sale to occur.

2. The Debtor's plan payment is insufficient to fund the plan. In Class 1 of the plan, Debtor lists ongoing mortgage payments to Greentree Servicing in the amount of $800.00, Siskiyou County Tax Collector #1 in the amount of $751.18, and Siskiyou County Tax Collector #2 in the amount of $502.93, however, Debtor proposes a plan payment of only $25.00 per month.

3. The Debtor's plan proposes to pay interest on arrears to Class 1 creditor Greentree Servicing and to two claims to Siskiyou County Tax Collector. As according to Section 2.08(a)(1) of the plan, if the provision for interest is left blank, interest at the rate of 10% per year will accrue.

4. It appears that Debtor has improperly classified Greentree Mortgage in Class 1 of the plan. In Section 6.01 (additional provisions) of the plan, Debtor indicates that he is current on his obligation to the loan. Based on this information, it appears that the ongoing mortgage payments should be in Class 4 of the plan, paid by Debtor direct.

5. Debtor has improperly classified Siskiyou County Tax Collector in both Class 1 and Class 2 of the plan. It appears that the appropriate class to list past-due property tax would be Class 2 of the plan, where claims are due and payable in full at the time of filing.

6. Debtor has improperly classified Greentree Servicing in Class 2b of the plan. Debtor has listed his mortgage claim in Class 1, Class 2, and also in the additional provisions has asked the Trustee to instruct him on where in the plan the Trustee would like the mortgage to be paid.

7. It appears that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). The Debtor's projected disposable monthly income listed on Schedule J is $5.00 and the Debtor proposes a plan payment of $25.00.

8. The Debtor may be over-claiming his allowable exemption under California Code of Civil Procedure § 704.710. Debtor is not of the age of 65 years. Debtor claims $103,000.00 total exemption for real property located at 1025 Mott Airport Road, Mt. Shasta, CA, which appears to be separated into two parcels. Debtor claims $43,000.00 and $60,000.00 on Schedule C. Debtor has not exhibited that he is eligible for an exemption beyond the standard $75,000.00 for a single person.

9. The Debtor has failed to provide the Trustee with a tax transcript or a copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, specifically, the 2013 tax return, or written documentation of no such documentation exists. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). This is required 7 days before the date set for the first meeting. 11 U.S.C. § 521(e)(2)(A)(I).

DEBTOR'S RESPONSE

The Debtor has not filed any opposition to this Objection.

DISCUSSION

The Trustee objects to the plan because the Debtor has not stated a deadline for the proposed sales of property. This prevents the Trustee and the court from being able to determine that the properties will be sold during the plan's duration to fund the Debtor's plan payments. *See* 11 U.S.C. § 1325(a)(4). The objection is sustained.

The Plan is not feasible. *See* 11 U.S.C. § 1325(a)(6). The proposed payments of $25.00 are insufficient to pay the plan, including the Trustee's fee, administrative fees, the Class 1 monthly contract installment, the Class 1 dividend, and the Class 2 dividends. Thus, the plan may not be confirmed.

The Trustee also objects to Debtor's leaving the interest rate blank for interest on arrears for the Greentree Servicing and Siskiyou County Tax Collectors claims. However, The Trustee does not state why this prevents the plan from being confirmed, especially since the Debtor listed in the plan that these claims are not in arrears and the Trustee later acknowledges explicitly that the Greentree Servicing claim is not in arrears. If not stated, the default interest will be 10%.

The court understands this portion of the objection to first highlight the problem for Debtor. Second, to assert that a 10% interest rate is unreasonable, with no showing by Debtor that 10% interest, in today's market is reasonable. This objection is sustained.

The Trustee also alleges that Debtor has mis-classified Greentree Mortgage and Servicing's claims and the Siskiyou County Tax Collectors' claims as Class 1 claims (arrearage to be cured). If the Debtor is correct that there is no arrearage, then the claim is properly classified as Class 4 - paid directly by Debtor, without the Chapter 13 Trustee deducting a Chapter 13 administrative fee.

The Debtor's amended Schedule J, filed May 30, 2014, lists a $5.00 monthly net income, while the Plan provides for a $25.00 monthly payment. Taken together, this also suggests the plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

The Trustee also alleges that the Debtor has over-exempted property as his homestead. The Debtor states in his petition that he is unmarried. The appropriate homestead exemption for a single person under 65 years of age is $75,000.00. Cal. Code Civ. Proc. § 704.730(a)(1). Debtor has exempted $103,000.00 in property made up of two conjoined parcels of land, which exceeds the maximum exemption the Debtor can take. The Trustee has filed an objection to claim of exemptions. Dckt. 41.

The Trustee alleges that the Debtor has not provided his tax returns for the most recent pre-petition tax year. The court has reviewed the docket, and Debtor has not filed these tax documents. Tax returns are required to be

filed pursuant to 11 U.S.C. § 521(e)(2)(A).

After considering the Trustee's objections and the lack of response from the Debtor correcting or explaining the deficiencies, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

11. 09-38742-E-13 GUIDO/VANESSA BUCHELI — MOTION TO MODIFY MORTGAGE
BLG-2 Paul Bains — 8-18-14 [78]

Final Ruling: No appearance at the September 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 18, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Guido and Vanessa Bucheli ("Debtor") seeks court approval for Debtor to incur post-petition credit. Nationstar Mortgage, LLC ("Creditor") has agreed to a loan modification which will reduce Debtor's loan principal to $240,536.55 with interest rate of 4.750%. The total monthly payment will be $1,526.39 which consists of principal and interest of $1,120.27 plus escrow of $406.12 which may adjust periodically.

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.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Guido and Vanessa Bucheli 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 Guido and Vanessa Bucheli ("Debtor") to amend the terms of the loan with Nationstar Mortgage, LLC, which is secured by the real property commonly known as 3362 Colchester Ave, Sacramento, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 81.

12. 08-36047-E-13 JOHN/CHARLENE JOHNSON — CONTINUED MOTION TO APPROVE LOAN MODIFICATION
PGM-6 Peter Macaluso — 7-23-14 [141]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 23, 2014. By the court's calculation, 34 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 hearing on the Motion to Approve Loan Modification is denied without prejudice

The Motion to Approve Loan Modification filed by John and Charlene Johnson ("Debtor") seeks court approval for Debtor to incur post-petition credit.

The Motion to Approve Loan Modification was originally set for hearing on August 26, 2014. The court continued the hearing to September 16, 2014 at 3:00 p.m.

Since the continuance, no party has filed any supplemental responses or objections on the Motion.

The Modification that is the subject of the motion is with another person named "Lender." On the face of the Motion the court cannot identify who this "Lender" is, or if "Lender" actually exists.

The Motion continues to that the agreement with the person named "Lender" provides,

A. The first modified payment will be in the amount of $2,345.19, at 5.000%, will be due on June 1, 2014. Debtor is to make 480 payments. [On its face, the Motion does not state the amount fo any payments other than the first payment, and that the first payment is "at 5.00%."

B. The Modified Principal Balance will be $387,285.19. {Movant does not state the prior principal balance.]

C. There are Unpaid Amounts being added to the Principal Balance. [Movant does not say what amount of "Unpaid Amounts" are being added to the Principal Balance.]

Motion, Dckt. 141.

Though not referenced in the Motion, an exhibit has been filed in conjunction with the Motion. This Exhibit is a Home Affordable Modification Agreement. Exhibit A, Dckt. 144. This Loan Modification Agreement is not with the person named "Lender" in the Motion, but is between Nationstar Mortgage, LLC and the Debtors. Buried in paragraph 3 of their declaration, the Debtors state that they have been offered a "loan modification by our lender, Nationstar Mortgage, LLC, under HAMP."

The court is troubled when parties file generic motions which fail to state with particularity the grounds and relief sought (Fed. R. Bankr. P. 9013) and use made-up placeholder names for parties. If the court were to grant the Motion, it would grant the motion for Debtors to enter into a loan modification with a person named "Lender" and no other person. It appears that the Debtors are not seeking to modify a loan with a person named "Lender" but another entity.

The court is also troubled by a motion which hides the terms of the modification. It may well be that the principal balance is being increased from $101,000 to $387,285.19, which the Debtors agreeing to pay a $250,000 document fee, $10,000 processing fee, and $16,285.19 for miscellaneous expenses. If challenged later, the person named "Lender" would blunt any consumer challenges to the propriety of such changes, arguing that the bankruptcy court approve them. This court does not blindly sign order approving secret, unstated, no pleaded terms. FN.1

FN.1. To the extent that Debtors want to argue that it's really simple and all the court has to do is read all of the pleadings to figure out what is being done, the response is – if it is that simple, then the Debtors could have simply stated such grounds and relief with particularity in the Motion.

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by John and Charlene Johnson 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.

13. 14-21349-E-13 MARK/TRISHELE SWASEY — MOTION TO CONFIRM PLAN
AJP-4 Al Patrick — 7-31-14 [78]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 30, 2014. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

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

Mark and Trishele Swasey filed the instant Motion to Confirm the Amended Plan on July 31, 2014.

DEBTORS' MOTION

Debtors filed a motion to confirm their Second Amended Plan. The proposed plan will include monthly payments over a 60-month period. The Debtors assert that the plan cures the Trustee's prior objections and that Debtors have amended their Schedules A and D to reflect that the actual cost of home repairs was lower than the Debtors had originally estimated.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, has filed an opposition to the motion to confirm. Dckt. 90. The Trustee objects to the motion on the following grounds:

1. It appears that the Debtors cannot make payments required under 11 U.S.C. § 1325(a)(6). The Debtors are delinquent $4,300.00 in plan payments, or $5,730.00 if the August 25 payment is not paid. To date, Debtors have paid in $2,850.00 into the plan. The last payment of $1,420.00 was received May 9, 2014.

2. The Debtor's plan does not provide for a priority claim in the amount of $25,947.78 filed by Douglas J. Buncher on June 6, 2014. Claim 13. Therefore, it appears that Debtors' plan does not comply with 11 U.S.C. § 1322(a)(2).

3. Section 2.06 of the Debtors' plan filed July 30, 2014 states the Debtors' attorney was paid $1,000.00 prior to the filing of the case. Dckt. 81. Additional fees of $3,500.00 shall be paid through the plan. Both the Debtors Rights and Responsibilities filed April 16, 2014 and the Disclosure of Compensation of Attorney for Debtor filed February 13, 2014 state that $1,500.00 was paid prior to filing. Dckt. 40, 1. It is not clear how much should be paid through the plan due to the $500.00 discrepancy.

4. The Chapter 13 plan in Section 6, Additional Provisions, provides "Additional Provision are appended to this plan," however, none exist.

SUROVIK'S OPPOSITION

Robin Surovik ("Surovik") has also filed an opposition to the Debtors' motion. Dckt. 94. Surovik joins the Trustee's objection and additionally alleges that:

1. The Debtors' plan ignores a significant claim for child support asserted by Surovik which is a "domestic support obligation" as defined by 11 U.S.C. § 101(14A), entitled to priority pursuant to 11 U.S.C. § 507(a)(1)(A) and is nondischargeable pursuant to 11 U.S.C. § 523(a)(9).

2. Surovik filed a timely proof of claim on June 6, 2014. The Debtors recently filed their objection to Surovik's claim and a status conference is scheduled in that matter for September 30, 2014. Until the claim objection is resolved, the plan is unconfirmable on its face.

3. The Debtors' plan is not confirmable under 11 U.S.C. §§ 1322 and 1325 because the plan fails to provide for full payment, in deferred cash payments, of Surovik's priority claim.

DEBTORS' REPLY

Debtors have not filed replies to either the Trustee's or Surovik's objections.

DISCUSSION

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

However, the proposed Amended Plan does not address any of the concerns of both the Trustee and Surovik. The Debtors are delinquent in payment, the Amended Plan does not provide for domestic support obligations, the Amended Plan does not provide for certain priority claims, and the Amended Plan is missing the Additional Provisions that should be attached.

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

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

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

14. 14-24955-E-13 ANTOINETTE TRIGUEIRO
DPC-1 Sally Gonzales

CONTINUED AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
6-18-14 [31]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 18, 2014. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor failed to appear and be examined at the First Meeting of Creditors held on June 12, 2014. The Debtor is required to attend the meeting under 11 U.S.C. § 343 and the Debtor has not presented any evidence to the Court as to why she failed to appear. The Meeting was continued to July 17, 2014 at 10:30 am.

The Trustee confirmed at the hearing the Debtor attended the continued First Meeting of Creditors.

Trustee also argues that while the plan proposes to pay the attorney $500.00 through the plan under LBR 2016-1(c), the Disclosure of Compensation of Attorney for Debtors appears to list in item #7 that the attorney services do not include some services required under LBR 2016-l(c), such as relief from stay actions. The Trustee believes that the Attorney is effectively opting out of 2016(c)(l) and will oppose attorney fees being granted under that section, requiring a motion for any attorney fees.

Lastly, the Trustee states the Debtor has not filed her tax returns during the 4-year period preceding the filing of the Petition. The Internal Revenue Service filed a claim on May 21, 2014 (Claim #1), which shows that no returns were filed for 2010, 2011, 2012 and 2013. The Franchise Tax Board filed a claim on June 17,2014 (Claim #2), which shows no returns were filed for 2010, 2011 and 2012. See 11 U.S.C. §§ 1308 & 1325(a)(9).

JULY 22, 2014 HEARING

The Debtor and Trustee requested a continuance to allow the IRS to process the Debtor's recently filed tax returns.

DISCUSSION

The court has reviewed the docket for this case and it does not appear that the Debtor has filed her most recent tax return documents. The Debtor must file her tax returns in order to confirm a plan. 11 U.S.C. § 1325(a)(9).

Though the hearing was continued for 55 days, no supplemental pleadings have been filed by Debtor.

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

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

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

15. 14-26456-E-13 JUANITA BRAMASCO **MOTION TO CONFIRM PLAN**
MC-7 Muoi Chea **7-29-14 [48]**

Final Ruling: No appearance at the September 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2014. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

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

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

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

Chapter 13 Plan filed on July 29, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

16. 11-23658-E-13 WESLEY/JULIE KAWAGISHI — MOTION TO MODIFY PLAN
MOH-5 Michael O Hays — 8-7-14 [103]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 7, 2014. 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 deny the Motion to Confirm the Modified Plan.

DEBTORS' MOTION

Debtors seek confirmation of their Second Modified Chapter 13 Plan. The Debtors move for confirmation based on the following:

1. The Chapter 13 Trustee has filed a notice of default and application to dismiss on July 9, 2014 alleging failure to make all payments due under the plan and a modification of their Chapter 13 Plan has become necessary. Also, certain claims that have to be paid were filed for amounts originally estimated and these increased amounts have to be provided for.

2. Debtors were below median income with their case was filed to avert a scheduled foreclosure of their residence and to determine that the second mortgage obligation on their residence was unsecured. The motion to value Debtors' residence was granted and the $47,091.33 second mortgage obligation owed to Chase has been treated as unsecured in Debtors' previously confirmed plan.

3. Debtors have been making monthly payments toward their first mortgage, mortgage arrears of $10,128.37, a secured arrearage owed to their Paradise Pines Homeowners Association of $1,486.24, a priority claim owed to the Butte County Tax Collector for surrendered unimproved real property for $2,369.82, and a priority claim to the Internal Revenue Service for $1,438.88. Due to Debtors being below median income, Debtors' previously confirmed plan made no provision for any dividend to their unsecured creditors. This proposed Second Modified Chapter 13 Plan continues to make no provision for any dividend to the unsecured creditors, as the Debtor remain substantially below median income.

4. Debtors' original confirmed plan scheduled their secured obligations to Milton and Valerie Hull and Vickie Dault in Class 3 for the surrender of the collateral, consisting of vacant land in Yankee Hill, California. These creditors remain scheduled in Class 3 in the proposed plan, even though no claims were filed just to make it clear what treatment was proposed for these scheduled creditors.

5. A secured claim was filed by a Kaunai Island Utilities in connection with a condo that was previously being purchased by Debtors. This debt is also scheduled in Class 3 for surrender of the collateral. Debtors' attorney's contention is that this is not a priority claim.

6. The Butte County Property Tax claim is for property taxes owed on the vacant lost that were surrendered to the secured creditors in Class 3. Debtors' attorney is of the opinion that the claim retains its secured stature notwithstanding the surrender of the collateral. At the very least, it would remain a priority claim. Accordingly, the claim is scheduled as a priority claim in Class 5.

7. Debtors' proposed plan provides for a total of $40,055.00 to be paid through July 25, 2014 and ongoing monthly payments of $1,140.00 on August 25, 2014 and thereafter for the duration of the 60-month plan.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, has filed an opposition to the motion to modify the plan. The Trustee objects to the motion for the following reasons:

1. It appears that the Debtors cannot make the payments required under 11 U.S.C. § 1325(a)(6). The Debtors are delinquent $1,140.00 under the terms of the proposed modified plan. According to the proposed modified plan, payments of $41,195.00 have become due. The Debtor has paid a total of $40,055.00 to the Trustee, with the last payment posted on July 28, 2014 in the amount of $1,140.00.

2. The Trustee is uncertain of the treatment of the Butte County Tax Collector. Debtors' modified plan proposes to reclassify Butte County Tax Collector from Class 3 to Class 5 regarding taxes on the 4 parcels in Butte County which were surrendered by Debtor. It is unclear to the Trustee what Debtor is proposing regarding this creditor. Butte County has filed a secured claim regarding four parcels. The creditors claim does not indicate any amount of the claim is entitled to priority and the Debtors' motion and declaration are conflicting regarding the treatment.

3. Debtor has not provided current income and expense statements. Debtors' most recent Schedules I and J were filed February 28, 2011 and support a plan payment of $931.00. At that time, Wesley Kawagishi was a grocery clerk with a net income of $1,750.00 and Julie Kawagishi was unemployed. Debtor is currently proposing a plan payment of $1,140.00. While Debtors' proposed plan payment is only $30.84 more than their current plan payment of $1,109.16 (increased due to mortgage adjustments) and Debtors indicate in their Declaration that they can reduce their clothing budget by $20.00 and entertainment by $10.00, Debtors should file updated Schedules I and J that represent their current income and expenses.

DEBTORS' RESPONSE

The Debtor has replied to the Trustee's objection. Counsel for Debtors states that:

1. The delinquency complained of by the Trustee of one month's payment should be received by the date of the hearing, as the Debtor has told Counsel that the August 25, 2014 payment was mailed on August 29, 2014.

2. The inconsistency between the motion and the Debtors' declaration in regard to the Butte County Tax Collector was an omission of counsel. Counsel for Debtors states that the Debtors fully intend to pay the claim of the Butte County Tax Collector, as is stated in the Declaration.

3. The Debtors have moved Butte County Tax Collector from Class 3 to Class 5 as a priority claim because Counsel for Debtors understood the instructions for Class 3 to mean that the claim can only be satisfied if it is not a priority creditor.

4. Debtors have filed an amended Income and Expense schedules on August 21, 2014. Dckt. 108. The Debtors have been able to afford the increased mortgage and plan payments since Mr. Kawagishi's income as a grocery clerk has increased.

DISCUSSION

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

There appears to be no dispute that the Butte County Tax Collector remains unresolved, even under Class 5, Butte County Tax Collector's claim is secured by the real property. Proof of Claim No. 16, claim secured by real property. Such real property tax liens are senior to various other liens recorded against the property.

Under California law, real property tax liens are senior to all other liens, regardless of the recording date of the lien. Cal. Rev. & Tax. Code § 2192.1. The statute, in relevant part, states that "[e]very tax declared in this chapter to be a lien on real property, and every public improvement assessment declared by law to be a lien on real property, have priority over all other liens on the property. *Id.* This priority extends to consensual liens, like deeds of trust, even if they have been in place on the property for many years prior to the recording of the tax lien. *Redevelopment Agency v. Pacific Vegetable Oil Corp.*, 241 Cal. App. 2d 606, 611 (1st Dist. 1966). Property tax liens run with the land and become binding on any subsequent transferees. *See* Cal. Rev. & Tax. Code § 2187. Here, the Butte County Tax Collector's claim, as a real property tax lien, remains senior to all other liens and retains its priority status.

This secured claim is improperly provided for as a Class 5 priority unsecured claim.

"D. Unsecured Claims

> 2.13. Class 5 consists of **unsecured claims** entitled to priority pursuant to 11 U.S.C. § 507. These claims will be paid in full except to the extent the claim holder has agreed to accept less or 11 U.S.C. § 1322(a)(4) is applicable. When section 1322(a)(4) is applicable to a claim, the claim holder and the treatment of the claim shall be specified in the Additional Provisions. The failure to provide the foregoing treatment for a priority claim is a breach of this plan."

Proposed Second Modified Chapter 13 Plan, Section 2D Unsecured Claims, ¶ 2.13; Dckt. 106.

By the plan as proposed, Debtors seek to pay a secured claim as an unsecured claim, diverting monies which should properly be paid to other

creditors. There is no "deficiency" unsecured claim. The County must properly proceed against the collateral, not be given "special" treatment with the Debtors ignoring its lien.

Debtors offer no evidence in response to Trustee's Opposition. While promising to cure the arrearage, there is no evidence that it has been cured. More importantly, there is no evidence as to (1) why the default occurred, (2) why it is not likely that such default will occur in the future, and (3) the source of the "extra" monies the Debtors have to cure the default and make the regular monthly plan payment.

It appears that Debtors have excess monies which have not been properly accounted for by Debtors.

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 the Motion is denied.

17. 14-27360-E-13 ALP-1 — EDITH INGRAM — Chinonye Ugorji — OBJECTION TO CONFIRMATION OF PLAN BY ONEWEST BANK, N.A. — 7-30-14 [16]

Final Ruling: No appearance at the September 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on July 30, 2014. By the court's calculation, 48 days' notice was provided. 14 days' notice is required.

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

The Objection is overruled as moot and confirmation is denied.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on September 2, 2014. Dckt. 28. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot and the plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation of the Chapter 13 Plan filed by the Creditor having been presented to the court, Debtor having filed an amended plan which is to be presented to the court at a later date, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

18. 14-27360-E-13 EDITH INGRAM — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
DPC-1 Chinonye Ugorji — 8-20-14 [23]

Final Ruling: No appearance at the September 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 20, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The Objection is overruled as moot and confirmation is denied.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on September 2, 2014. Dckt. 28. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot and the plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation of the Chapter 13 Plan filed by the Creditor having been presented to the court, Debtor having filed an amended plan which is to be presented to the court at a later date, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

19. 14-22763-E-13 PHILIP BROWN
JMC-1 Joseph Canning

MOTION TO APPROVE LOAN MODIFICATION
8-15-14 [40]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 15, 2014. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

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

The Motion to Approve Loan Modification is denied without prejudice.

The Motion to Approve Loan Modification filed by Philip Brown ("Debtor") seeks court approval for Debtor to incur post-petition credit. National Bank/Ocwen Loan Service aka Ocwen Loan Servicing, LLC ("Creditor"), whose claim the plan provides for in Class 4 in the Amended Plan currently awaiting confirmation, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $2,433.00 a month to $2,215.54 a month. The modification will cure any arreages that may exist.

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.

The court cannot identify this Creditor stated (subject to the provisions of Fed. R. Bankr. P. 9011) to be "City National Bank/Owen Loan Service aka Ocwen Loan Servicing, LLC" in the motion. The California Secretary of State does not list any entity with this name registered to do business in California. The FDIC does not list any entity with this name as a federally insured financial institution.

Exhibit A filed in support of the Motion is the proposed Loan Modification Agreement. Dckt. 43. The Agreement states that "Ocwen Loan Servicing, LLC" is offering Debtors a loan modification. The Agreement is signed by Ocwen Loan Servicing, LLC.

The Loan Modification Agreement does not state that Ocwen Loan Servicing, LLC is the creditor of the Debtors and does not state that it has any interest in the note to be modified. The Loan Modification Agreement does contain the following admission by Ocwen Loan Servicing, LLC,

> This communication is from a debt collector attempting to collect a debt; any information obtained will be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is purely provided to you for informational purposes only with regard to our secured lien on the above property. It is not intended as an attempt to collect a debt from you personally."

Id. at 5. It appears that Ocwen Loan Servicing, LLC is not the creditor, as that term is defined in 11 U.S.C. § 101(10) and (5), but the debt collector for that creditor. Whether a debt collector or loan servicer, it may well be performing a very valuable, valid business function for both creditors and debtors – proper and efficiently handing of these obligations and getting loan modifications in place. But such does not supplant the requirement that parties be properly identified and that the court be satisfied that there is an actual case or controversy between the real party in interest in any federal court proceeding. U.S. Constitution Art. III, Sec. 2.

The Claims Registry for this case does not reflect a proof of claim being filed for the loan which is to be modified.

It may be that a "City National Bank" is the actual creditor and Ocwen Loan Servicing, LLC is the loan servicer for that creditor. The Motion does not state that. To the extent that Debtor contends that "the court can clearly understand that it should separate "City National Bank" from "Owen Loan Service aka Ocwen Loan Servicing, LLC," the court has a "simple" response. It is even easier for Debtor and Debtor's counsel to correctly identify parties which are the subject of motions and complaints.

Additionally, the FDIC identifies 15 federally insured financial institutions with the words "City National Bank" in their names. The court, if left to guess how to separate the combined names, has no idea which of the fifteen federally insured financial institutions is the subject of the Loan Modification Agreement and the Motion.

The court denies the Motion without prejudice.

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

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

20. 14-23365-E-13 FLOYD/DAWN WEBB **MOTION TO MODIFY PLAN**
PGM-2 Peter Macaluso **8-8-14 [37]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2014. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Floyd and Dawn Webb filed the instant Motion to Confirm the Modified Plan on August 8, 2014.

DEBTORS' MOTION

Debtors move to modify their confirmed Chapter 13 Plan. Debtors seek confirmation of the modified plan for the following reasons:

1. Due to changed circumstances, the Debtors cannot complete the plan as originally confirmed. Debtors state in their Declaration that at the time of the plan's confirmation, Dawn Webb had started a new job that incurred significant travel expenses. She has since been paid off and after a time has secured new employment that requires much less transportation costs.

2. As of August 7, 2014, Debtors have paid a total of $4,800.00 to the Chapter 13 Trustee pursuant to the confirmed plan. The Debtors have missed 0.83 payments.

3. The Debtors propose that the total amount of missed payments, equaling $1,860.00 be forgiven and plan payments of $2.450.00 will begin September 2014 for 56 months to complete the plan within the maximum term. Debtors have filed updated Schedules I and J to reflect their current financial situation.

4. The modified plan proposes to increase the dividend to general unsecured creditors from 0% to 15.6%.

Dckt. 37.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, has filed limited opposition to this motion. Dckt. 43. The Trustee objects to the modified plan based only on the fact that the total amount paid to the Trustee through August 2014 is $3,300.00. The Trustee would not object to this being corrected in the order modifying the plan.

DEBTORS' REPLY

Debtors have filed a reply to the Trustee's limited objection. Dckt. 46. Counsel for Debtors states that a scrivener's error resulted in the modified plan showing an erroneous amount paid into the plan to date. Debtors request that this figure be corrected to $3,300.00.

DISCUSSION

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

Because the Trustee's objection is a scriviner error which may be corrected through an order, the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on August 8, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, which states that amendment

that the amount paid to the Trustee through August 2014 to reflect $3,300.00, 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.

21. 11-20868-E-13 ACW-1 — WAYNE WILKINSON AND DENISE ARMENDARIZ — MOTION FOR COMPENSATION BY THE LAW OFFICE OF FINANCIAL RELIEF LAW CENTER FOR ANDY C. WARSHAW, DEBTOR'S ATTORNEY(S) 8-7-14 [195]

Final Ruling: No appearance at the September 16, 2014 hearing is required.

The Applicant having filed a "Withdrawal of Motion" for the pending Motion to Compensate the Bankruptcy Case, 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 Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, and good cause appearing, **the court dismisses without prejudice the Applicant's Motion for Compensation.**

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 for Compensation having been filed by the Applicant, the Applicant 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 for Compensation is dismissed without prejudice.

22. 13-29769-E-13 JOHN JAMES
PGM-5 Peter Macaluso

CONTINUED MOTION TO CONFIRM PLAN
4-14-14 [90]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on April 14, 2014. 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. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to deny the Motion to Confirm the Amended Plan without prejudice.

John James ("Debtor") filed the instant Motion to Confirm the Amended Plan on April 14, 2014. Dckt. 90.

TRUSTEE'S OBJECTION

On May 19, 2014, David Cusick, Chapter 13 Trustee, filed opposition to confirmation.

First, Trustee argues that the Plan is not feasible, because the Plan will complete in 69 months as opposed to the 60 months proposed . On February 2, 2014, the Internal Revenue Service filed Amended Court claim NO. 1, which

indicates that Debtor owes $54,987.75 in priority unsecured tax. Debtor's plan proposes to pay the Internal Revenue Service $37,757.84. According to the Trustee's calculations, the Plan will complete in 69 months, as opposed to the 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

Second, Trustee states that the amount of payments has been misrepresented. Debtor's Plan proposes to pay $900 per month for 60 months. As of April 2, 2014, Debtor has paid in a total of $7,200.00 for a total of eight payments. Debtor's motion indicates that Debtor paid only $3,600.00 through April 2, 2014, which is incorrect.

Third, Debtor has not demonstrated that he can set aside the monies to afford the plan payment with an additional unpaid tax liability for 2013. On Debtors' Schedule J and Amended Schedule J, Debtor deducted $500.00 for a tax offset. Where the Debtor has incurred an unpaid 2013 tax liability, the Debtor has not proven that they will set aside the monies to afford the plan payment under 11 U.S.C. § 1325(a)(6), and the plan does not provide any reporting requirement so that the Trustee can make certain that these monies were set aside, such as a quarterly reporting of the balance in the account by supplying bank statements to the Trustee, along with copies of his state and federal tax returns for each year. In addition, any portion of funds held for this purpose not used to pay the tax should be turned over to the trustee for additional payment toward unsecured claims, Trustee argues.

These concerns had been raised in the Trustee's previous opposition to the Motion to Confirm Plan, filed on December 3, 2013, Dckt. No. 51, and on February 25, 2014. Dckt. No. 78.

Fourth, Trustee states that not all assets have been reported. Debtor did not disclose a potential claim against Victoria Casteneda on Schedule B, nor does the Debtor list his pending action, #13SC03813 filed in Sacramento County on Statement of Affairs Question No. 4.

DEBTOR'S RESPONSE

Debtor's counsel argues in a Response (no evidence having been presented) that the unsecured priority claim of the Internal Revenue Service should be reduced to $21,998.00 and the Internal Revenue Service general unsecured claim increased by $5,000.00.

Counsel responds that the misstated payment amount can be corrected to $3,600.00. However, the Trustee's objection is that the Debtor has actually paid $7,800.00 - indicating that the proposed correction perpetuates the misstatement.

Counsel argues that the Debtor "appreciates" the Trustee's concern that the Debtor cannot make the required tax payments, and that the Debtor will make non-specific proof of quarterly tax payments as a condition of confirmation. Counsel does not argue that the Debtor will establish a segregated tax account to be funded monthly, which can be documented by the Trustee, but merely that each month the Debtor will pay the amounts (which the Debtor has defaulted previously).

Counsel argues that the Debtor will amend his Schedule B and the Statement of Financial Affairs to disclose the labor claim. However, no explanation is provided as to why this asset was not previously disclosed or why it has taken until the eve of an objected to confirmation hearing for the Debtor to be dragged into disclosing the existence of this asset.

In his declaration in support of confirmation the Debtor provides no disclosure about this asset, its value, and what it will cost to prosecute. While the Debtor states under penalty of perjury "all of my assets are exempt," such is not necessarily an accurate statement. There is an undisclosed asset of unknown value which has not been claimed as exempt. The Debtor has refrained from providing a supplemental declaration where he can truthfully and accurate explain this asset – further keeping the court in the dark.

JUNE 3, 2014 HEARING

At the hearing on June 3, 2014, the court continued the Motion to Confirm the Amended Plan to 3:00 p.m. on September 16, 2014 to allow debtor to resolve tax issues.

DISCUSSION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, the Chapter 13 Trustee has filed opposition to the proposed plan.

On September 5, 2014, the Internal Revenue Service filed an Amended Proof of Claim, No. 1, which now states a priority claim of $54,978.75 and a general unsecured claim of $14,583.48. This does not reduce the priority claim by the $21,998.00 argued by Debtor from Prior Amended Proof of Claim No. 1 filed on February 11, 2014, and increases it from the $43,371.84 stated in Original Proof of Claim No. 1 filed on August 16, 2013.

The Third Amended Plan does not provide for the prosecution of the labor claim or it proceeds. Rather, it appears that the Debtor has failed to disclose its existence, fails to provide for it in the plan, and intends to divert this asset from creditors. While the Debtor has filed several amended schedules to add creditors or restate his expenses, he has failed to amend Schedule B, failed to disclose this asset to the court, and failed to provide for it in the Third Amended Chapter 13 Plan.

Additionally, the Debtor has not provided any supplemental documentation to the court reflecting that the Debtor has resolved the tax issues.

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

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

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

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

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

23. 10-26174-E-13 SDB-4 — IGNACIO/LOURDES RIVERA — Scott de Bie — MOTION TO VALUE COLLATERAL OF DEUTSCHE BANK NATIONAL TRUST COMPANY — 8-12-14 [71]

Final Ruling: No appearance at the September 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Bank of America, N.A., Deutsche Bank National Trust Company, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 12, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Deutsche Bank National Trust Company, "Creditor," is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Ignacio and Lourdes Rivera ("Debtors") to value the secured claim of Deutsche Bank National Trust Company ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 705 Maryland Street, Fairfield, California ("Property"). Debtor seeks to value the Property at a fair market value of $165,000.00 as of the petition filing date. As the owners, Debtors' opinion of

value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $268,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $66,879.76. 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 Ignacio and Lourdes Rivera ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments

of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Deutsche Bank National Trust Company secured by a second in priority deed of trust recorded against the real property commonly known as 705 Maryland Street, 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 $165,000.00 and is encumbered by senior liens securing claims in the amount of $268,000.00, which exceed the value of the Property which is subject to Creditor's lien.

24. 14-25376-E-13 KEVIN/BREE SEARS
DBJ-1 Douglas Jacobs
FINAL HEARING RE: MOTION TO EXTEND AUTOMATIC STAY
5-23-14 [8]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2014. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest

were not required to file a written response or opposition to the motion. At the hearing **----------**.

The Motion to Extend the Automatic Stay is granted.

PRIOR HEARING

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 13-27044) was dismissed on May 18, 2014, after Debtors were unable to confirm a plan. *See* Order, Bankr. E.D. Cal. No. 13-27044, Dckt. 119, May 18, 2014. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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

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

1. Why was the previous plan filed?

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

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

Here, Debtors state that they have had an opportunity to live within their means and get a better hold on their expenses and the monthly income they receive. Debtors state Bree Sears has gotten a significant raise and Kevin Sears took on a County Contract position, which has taken him some time to adjust to.

Debtors argue that the previous case failed because the Debtors failed to properly access the arrearage owed to their mortgage company and because of the failure to accurately access their income and expenses. Debtors state now that the mortgage company has filed a proof of claim, the Debtors know how much they are in arrears and what changes need to be made in their budget to pay the arrears along with their on-going mortgage payment. Debtors argue they have been able to stabilize their income. Debtors argue that they now recognize the

need for accurate and complete information to confirm a plan and have gone to appropriate measures to provide that in their schedules. Declaration, Dckt. 10.

Counsel for Debtors also testifies that he has spend the last few weeks working with the Debtors to ensure that the amounts listed on Schedule I and J are accurate and represent their best effort to fund the plan. Declaration, Dckt. 11.

INTERIM ORDER

Following the June 10, 2014 hearing held on this matter, the court issued a civil minute order, granting the Motion and extending the automatic stay on an interim basis pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

DISCUSSION

Cory Adams, the active creditor in this case, objects to the extension of the automatic stay. Mr. Adams is a former client of Kevin Sears and asserts that his claim is nondischargeable. *Adams v. Sears*, Adv. 13-2284. It was an "opposition" in which Mr. Adams counsel advised the prior bankruptcy case of the Debtors in Department E and that this case should be transferred to Department E (which it was).

On September 9, 2014, Cory Adams filed a motion to dismiss this Chapter 13 case. Motion, Dckt. 55. The motion to dismiss raises significant issues, which may well play in the court deciding whether dismissal (again) of a case for Debtor or possible conversion to Chapter 7 (so that an independent fiduciary for the estate may address the rights and interests of the estate) is proper.

The court was very clear of significant failings by the Debtors which led to denial of confirmation of the Chapter 13 Plan in this case. Civil Minutes, Dckt. 51 (Trustee's Objection) and Dckt. 49 (Adams Objection). Quite possibly, having one prior case dismissed and now having the "defects" in their strategy laid bare in the spotlight of the court's rulings, the Debtors may develop a plan with the assistance of their knowledgeable bankruptcy case in which a reorganization, consistent with the Bankruptcy Code, can be advanced which properly addresses the rights of Mr. Adams and is reasonably advantageous to the Debtors.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. The court will let this case play out and see which, if any, of the parties continue in the prosecution or dismissal.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by 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 and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

25.	**14-25585-E-13** **LBG-2**	**SCOTT OLNEY** **Lucas Garcia**	**OBJECTION TO CLAIM OF SYSTEMS & SERVICES TECHNOLOGIES, INC., CLAIM NUMBER 1** **7-30-14 [32]**

Final Ruling: No appearance at the September 16, 2014 hearing is required.

The Debtor, Scott Olney, having filed a Withdrawal of the Objection to Claim of Systems and Services Technologies, Inc., Claim No. 1, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the** Objection to Claim **was dismissed without prejudice, and the matter is removed from the calendar.**

26. 12-27387-E-13 ERROL/MELANI LAYTON
Mary Ellen Terranella

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, NATIONAL ASSOCIATION
5-23-12 [30]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2012. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

FN.1. The moving party is also reminded that the Local Rules require the use of a new Docket Control Number with each motion or objection. Local Bankr. R.

9014-1(c). Here the moving party did not assign a Docket Control Number. This is improper. The Court will consider the motion, but counsel is reminded that noncompliance with the Local Rules is grounds, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Objection is dismissed as moot and confirmation is denied.

CONTINUANCE

At the July 29, 2014 hearing on this matter, the parties agreed to a continuance based on settlement discussions. The court continued the hearing to this date. Civil Minutes, Dckt. No. 101.

REVIEW OF OBJECTION

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

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

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

OPPOSITION BY DEBTORS

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

Debtors argue that only $33,502.00 in property taxes have come due since Debtors purchased the property. The advance is almost the exact same number that Creditor filed in its proof of claim in Debtors' previous Chapter

13 case, Case No. 08-28167. As of June 2008, only $13,734.00 in property taxes had come due. Debtors objected to the Proof of Claim filed by Creditor in the previous case, and the court determined that the correct pre-petition arrearage was $18,186.75. Civil Minute Order, January 16, 2009, Exhibit F. Dckt. No. 38.

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

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

PROCEDURAL HISTORY

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

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

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

The parties represented that they were actively engaged in settlement discussions, that they are effectively communicating, and that further time extended to the parties would be consistent with the proper administration of

this case. The hearing on the Objection to Confirmation was continued to October 17, 2012.

On October 3, 2012, the parties filed a second status report, stating that Creditor's counsel anticipated that an amended proof of claim will be filed that resolves the issue of arrearages resulting from escrow advances before the hearing date. The report stated that Creditor's counsel spoke with Debtors' counsel on October 2, 2012 to inform her that Creditor's counsel was in the process of receiving final approval to amend the proof of claim. Dckt. No. 51.

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

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

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

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

Debtors filed Exhibits on June 5, 2012 in this matter, Dckt. Nos. 37 and 38, but did not file declarations or testimony to authenticate the offered exhibits under Federal Rule of Evidence 901. Debtors did not provide declarations testifying that the exhibits are what they purport to be. Thus, the court does not have admissible evidence from the Debtors to challenge and

meet the burden of proof in overcoming the prima facie validity of Creditor's listed values for the arrearage owed by Debtors in this case.

There exists a clear evidentiary dispute concerning the amount of arrearage owed on the Creditor's claim, and the court lacks sufficient evidence to determine the amount at this time. The court cannot yet determine whether the Debtors' Chapter 13 Plan, filed in April 17, 2012, complies with 11 U.S.C. §§ 1322 and 1325(a). The court has on multiple occasions, on the Stipulation of the Parties, extended the discovery in this Contested Matter. Discovery has now closed. Final Order Extending Discovery, Dckt. 96.

The "factual disputes" which are the subject of the discovery in this Contested Matter are ones that should be readily determinable. This Objection to Confirmation was originally filed on May 23, 2014. The court noted that the parties have been lumbering through discovery for two years.

Amended Plan

On September 9, 2014, the Debtors filed an Amended Plan, and a Motion to Confirm the Amended Plan. The Motion to Confirm Plan, Dckt. No. 102, states that the "objection has been finally resolved," since the Debtors have removed JP Morgan Chase Bank, N.A., as a Class 2 claimant. The Motion states that the parties have resolved the instant objection through the negotiation of a loan modification settlement agreement.

The Amended Plan, Dckt. No. 205, shows that Debtors have removed JPMorgan Chase Bank, N.A. as a Class 2 claim as a claim that will be modified by the Plan, and have reclassified the claim as a Class 4 claim to be paid directly to the Creditor. The Creditor is listed as Chase Home Finance, and the collateral as "106 Suisun Court, Vacaville, CA - purchased in 2005 for $550,000," with monthly contract installment payments of $2,372.84 to be maid by the Debtors.

The Debtors having reclassified the Creditor as a Class 4 claim, and the Motion to Confirm representing that the Creditor and Debtors have entered into a loan modification agreement providing for the monthly contractual payments listed in the Debtors' Amended Plan (although the Debtors have not yet filed a Motion to Approve the modification agreement), the grounds to Creditor's Objection to Confirmation appears to have been addressed in the amended plan.

Additionally, the filing of a new plan is a *de facto* withdrawal of the pending Plan. The filing of the Amended Plan was filed after the submission of the instant Objection. Thus, the objection is dismissed as moot.

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

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

and good cause appearing,

IT IS ORDERED that Objection is dismissed as moot and the Chapter 13 Plan filed on April 17, 2012, is not confirmed.

27.	12-30588-E-13 ET-5	**DIANE/OSVALDO MALDONADO** **Matthew Eason**	**CONTINUED MOTION TO APPROVE LOAN MODIFICATION** **6-13-14 [93]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on June 13, 2014. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is denied without prejudice.

The Motion to Approve Loan Modification filed by Diane and Osvaldo

Maldonado ("Debtor") seeks court approval for Debtor to incur post-petition credit. The Debtors state in their Motion, however, that Green Tree Servicing, LLC is the holder of the loan that Debtors wish to modify, and that Green Tree Servicing, LLC has submitted a formal loan modification to Debtors.

Debtors state that Green Tree Servicing, LLC, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $2,163.81 a month. The modification will capitalize the pre-petition arrears and provide for a fixed interest rate of 4.625% for the duration of the mortgage (40 years).

The Motion is supported by the Declaration of Diane and Osvaldo Maldonado. 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.

Debtors seek modify the loan "held" by "Green Tree Servicing LLC." However, it has been repeatedly represented in this court that loan servicing companies including Green Tree Servicing are not creditors (as that term is defined by 11 U.S.C. § 101(10)), but are mere loan servicing agents with no ownership of or in the secured claim. To state that the subject loan "held by Green Tree Servicing," after the claim was transferred from Bank of America, N.A. to Green Tree Servicing LLC indicates that Debtors have no knowledge of who the actual creditor in interest is.

The Notice of Intent to Transfer Claim cited by Debtors, as filed on November 21, 2012, provides no information on the transferor, the transferee, and whether the underlying obligation (the Promissory Note) of the loan was transferred along with a deed of trust against the Debtors' property. The Notice of Transfer of Claim Other than for Security, designated as Dckt. No. 47. states only that an interest has been transferred from Bank of America, N.A. to Green Servicing, LLC.

The transfer notice gives scant detail on what is actually being transfer; even when an Assignment of Deed of Trust appears in the court record, that document may not actually assign the Note which is secured by the Deed of Trust. The mere assignment of a deed of trust does not in and of itself transfer the obligation it secures. It is also well established law that an assignment of a deed of trust (or other security) is of no force and effect if would work to transfer the security to anyone other than the person who is the creditor on the obligation secured. *Cervantes v. Countrywide Home Loans, Inc. et. al.*, 656 F.3d 1034 (9th Cir. 2011); *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); *accord Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); and Cal. Civ. Code §2936.

No assignment or transfer of claim appears on the docket transferring the Note. The court is not certain how Debtors can name Green Tree Servicing, LLC as the actual lender for an obligation that appears to be owed to another originating entity. The court will not approve an loan modification that will not be effective against the actual owner of the obligation.

Green Tree Servicing, LLC, filed Proof of Claim No. 13 in this case in September 19, 2012, asserting a claim for money loaned in the amount of $376,059.73. The basis for perfection is listed as a mortgage/ deed of trust.

Green Tree Servicing, LLC. identifies the Creditor as Bank of America, N.A., and states in the Proof of claim that payments on the claim should be sent to Bank of America, N.A., at that entity's Dallas, Texas address. The Claim is signed by an attorney from Pite Duncan, LLP.

The court is not certain how Green Tree Servicing, LLC, can name themselves as "Lender" in a Loan Modification for an obligation that appears to be owed to Bank of America, N.A. The court will not approve an loan modification that will not be effective against the actual owner of the obligation, which here appears to be Bank of America, N.A.

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

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

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

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

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

The court acknowledges that Green Tree Servicing, LLC has, and most likely will, in connection with this matter be responsive and address the

court's concerns – as well as educating the court to the current practical business issues, and challenges, of maintaining a nationwide business providing these types of services. However, it appears that the impact of these changes is limited or fleeting.

Further, if Green Tree Servicing, LLC has expanded its business to purchase notes, how it will provide that information to the federal courts.

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

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.

FAILURE TO COMPLY WITH FRBP 4001(c)

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

Here, Debtors have not provided a copy of the subject loan modification agreement. While some terms are included in the motion, Local Bankruptcy Rule 4001(c)(1)(a) requires that a copy of the agreement must be provided to the court. Without a copy of the loan modification agreement that Debtors seek to be approved, the court cannot determine whether the modification agreement is reasonable and beneficial to the Chapter 13 Debtors' interests. The court has no idea what other terms and conditions may be stated (or buried) in the actual loan modification agreement.

Additionally, the utility and import of attaching the loan modification agreement becomes even greater, given Debtors' assertion that Green Tree Loan Servicing, LLC, a loan servicing agent, is the actual lender in the obligation and holder of the subject claim. The actual loan modification agreement will

help shed some light for the court and for the debtors on whether Green Tree Servicing, LLC, is the actual entity offering the modification, or whether there is another actual creditor listed who is entering into a contract with the Debtors to modify the loan.

Without this agreement, however, the court cannot review the precise terms of the agreement and the language of the agreement, to determine who is an actual party to the modification. For now, the court will not speculate and hope that it has named a real creditor and that it's order will have any legal effect. The court also refuses to blindly approve the terms of an modification agreement that has not been shown to the court.

CONTINUANCE

The hearing on the Motion was continued to this hearing date. At the July 22, 2014 hearing on this matter, the court issued an order for Bank of America, N.A. and Green Tree Servicing, LLC to appear and present evidence upon which they assert a claim in this case, assert that they are or are not a creditor, and if they were a creditor but no longer are a creditor, evidence by which they purport to have divested themselves of the claim in this case. Civil Minutes, Dckt. No. 98.

Nothing further on this matter has filed on the docket to date.

SEPTEMBER 16, 2014 HEARING

At the hearing held on September 16, 2014, XXXXXXX.

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 Diane and Osvaldo Maldonado 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 XXXXXXX.

28. 11-32689-E-13 SNM-4 | **JOSE CHAPA AND ESTHER SWENSEN-CHAPA** Stephen Murphy | **MOTION TO MODIFY PLAN** 8-7-14 [57]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, all creditors, and the Office of the United States Trustee on August 7, 2014. 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 deny the Motion to Confirm the Modified Plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee has filed opposition to the proposed plan, on the basis that the Debtors are delinquent $2,320.00 under the proposed plan. The case was filed on May 20, 2011, and 39 payments have come due under the plan; payments totaling $99,840.00 have become due under the proposed modified plan.

The Plan states that "95,200 shall be paid into the plan as of June 2014; and payments of $2,320.00 per month shall commence July 2014 through the end of the plan." The Debtors have paid the Trustee $97,520.00 with the last payment of $2,320.00 posted on July 28, 2014.

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.

29. 13-32494-E-13 CAH-2 — THEODORE/MOLLY MCQUEEN — C. Anthony Hughes — CONTINUED MOTION TO CONFIRM PLAN — 1-20-14 [58]

Final Ruling: No appearance at the September 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 20, 2014. By the court's calculation, 64 days' notice was provided. 42 days' notice is required. That requirement was met.

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

The Motion to Confirm the Amended Plan is dismissed as moot, a Second Amended Plan and motion to confirm the Second Amended Plan having been filed by Debtors..

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

confirmation. Here, the Chapter 13 Trustee ("Trustee") and G and K Heaven's Best, Inc. ("Creditor"), a creditor with a secured claim against Debtors, have filed objections to the Motion to Confirm the Amended Chapter 13 Plan for several grounds.

On July 25, 2014, the Debtors filed a Motion to Confirm the Second Amended Plan, with the proposed Second Amended Chapter 13 Plan to arrange payments to creditor G&K Heaven's Best, Inc., pursuant to the term of their stipulation. The Motion states that it is Debtors' counsel's understanding that according to the court's instructions at the trial hearing on June 23, 2014, that the Second Amended Chapter 13 Plan can only be filed as an exhibit in support of the Motion to avoid potential multiple amendments to be filed on the docket.

Debtors have attached the proposed Plan as an Exhibit to the Plan. Dckt. No. 139. Debtors state that upon the court's approval of the motion, the Second Amended Chapter 13 Plan will be filed on the docket as an amended plan.

A Motion to Confirm a new Second Amended Chapter 13 Plan having been filed, the filing of a new plan is a *de facto* withdrawal of the pending Motion. The Motion is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm Plan filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm Plan is dismissed as moot, and the proposed Chapter 13 Plan, filed on January 20, 2014, is not confirmed.

30. 13-32494-E-13 THEODORE/MOLLY MCQUEEN — MOTION TO CONFIRM PLAN
CAH-4 C. Anthony Hughes — 7-25-14 [137]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 25, 2014. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

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

The court's decision is to xxxxx the Motion to Confirm the Amended Plan.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Here, both the Chapter 13 Trustee and Creditor G and K Heaven's Best, Inc., have filed opposition to the confirmation of the proposed Second Amended Plan filed by Debtors, Theodore and Molly McQueen ("Debtors").

The Motion before the court is to confirm the Second Amended Plan filed by Debtors. Motion, Dckt. 137. However, no Second Amended Plan has been filed by Debtors. Filed as Exhibit A is a document titled "CHAPTER 13 PLAN - Second Amended." Dckt. 139. However, no such Second Amended Plan has been filed with the court. It is merely an exhibit, of what possibly could be filed in the future.

The active creditors and Chapter 13 Trustee have responded to the Motion and addressed the exhibit plan. The court will address the merits of

the Motion.

The terms of the Second Amended Plan filed as Exhibit A are summarized by the court as follows:

A. Plan Funding by Debtors

1. Months 1-4.....$ 875.00 per month

2. Month 5.....$ 480.00 per month

3. Months 6-51.....$2,650.00 per month

B. Additional Provision provides that upon completion of the Plan the Debtors and Heaven's Best, Inc. shall dismiss Adversary Proceeding 14-20027 (Debtors' adversary to avoid preference and determine lien) and 14-2004 (Creditor's adversary to determine debt nondischargeable pursuant to 11 U.S.C. § 523).

C. Class 1 Secured Claims.....None

D. Class 2 Secured Claims

Creditor	**Secured Claim**	**Monthly Plan Payment**
Golden 1 Auto	$10,657.56	$318.22
G&K Heaven's Best (Claim filed by Creditor for $235,000)	$105,000.00	$2,100.00

E. Class 3 Secured, Surrender of Collateral.....None

F. Class 4, Secure, Debtors Pay Directly

1. Bank of America, N.A. (Home).....$1,419.23 per month

G. Class 4, Unsecured Priority.....None

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

I. Class 7, General Unsecured

1. Estimated $197,697 in Claims.....0.00% Dividend.

Debtors have filed current financial statements for Income and Expenses, Exhibit B, Dckt. 139, and filed as Supplemental Schedules I and J, Dckt. 135. For Income, Debtors state,

A. Business Gross Income.....$11,000.00

B. Business Expenses.....($ 5,834.00)

C. Self Employment Taxes.....($ 1,397.00)

D. Income Taxes, Business.....($ None Stated)

E. Co-Debtor Gross Wages.....$ 2,708.16

F. Co-Debtor Tax and SS Deductions.....($ 266.88)

G. Co-Debtor Union Dues.....($ 97.62)

H. Co-Debtor Nursing Waiver Program
for taking care of son.....$ 1,269.42

Average Monthly Income.....$ 7,382.00

The Business Expenses are detailed on Exhibit B/Supplemental Schedule J to be,

A. Costs of Goods.....($ 800.00)
B. Advertising.....($ 145.00)
C. Vehicle Expense.....($ 685.00)
D. Credit Card Service Charges.....($ 250.00)
E. Equipment Maintenance.....($ 610.00)
F. Franchise Fee.....($ 480.00)
G. Insurance.....($ 751.63)
H. Meals and Entertainment.....($ 20.00)
I. Office Supplies.....($ 110.00)
J. Employee Wages.....($1,488.17)
K. Employer Payroll Taxes.....($ 138.85)
L. Postage.....($ 5.00)
M. Professional Fees (CPA, Payroll)...($ 224.00)
N. Bookkeeper.....($ 40.00)
O. Telephone.....($ 87.15)

For non-business and non-withholding Expenses, Debtor's list ($4,731.51) on Exhibit B/Supplemental Schedule J (after excluding the ($5,834.80) business expenses and ($1,397.00) self employment taxes listed above in computing the Average Monthly Income). These amounts include,

A. Mortgage, Insurance and Taxes.....($1,427.09)
B. Food.....($ 675.00)
C. Income Taxes.....($ None)
D. Transportation.....($ 400.00)
E. Health Insurance.....($ 400.00)

After deducting the expenses, the Debtors state that they have $2,649.77 of Monthly Net Income.

In their Declaration in support of the Motion Debtors state that a settlement has been reached with G&K Heaven's Best to provide for a $105,000.00 secured claim which will be paid $2,100.00 a month under the Plan. The

Stipulation is set forth in this court's order filed June 23, 2014, Dckt. 132. Notwithstanding this Stipulation, G&K Heaven's Best opposes confirmation of the Second Amended Plan.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee objects to the confirmation of the proposed Chapter 13 Plan on two grounds. First, the Debtors did not list a monthly amount for attorney fees in Section 2.07 of the Plan. Debtors' attorney has opted out of the no look fee, and will be required to file a motion for attorney fees. The Debtors' Plan states that the "monthly dividend is to be determined by debtor attorney's motion for attorney fee."

Second, it appears that a prior order of the court has not been addressed. The court entered an order on March 20, 2014, in Adversary Case NO. 14-0302, Dckt. No. 23, which ordered that certain funds be paid or transferred to the Chapter 13 Trustee. The plan does not address if it proposes to superseded this order and allow the monies paid to the Chapter 13 Trustee to be treated as plan payments to be paid out to allowed claims under the proposed plan, possibly increasing the percentage paid to unsecured claims.

DEBTORS' REPLY TO TRUSTEE'S OPPOSITION

Debtor responds to the Trustee's Opposition by stating that the counsel's motion for attorney fee has been or will be filed on September 9, 2014. Additionally, Debtors request that the funds transferred from debtor counsel to Chapter 13 trustee in compliance with court's order in the March 20, 2014, Adversary Proceeding Case No. 14-02004, Dckt. No. #23, be treated as plan payments to be paid out to the debtor counsel for attorneys fee upon the court's approval, and as plan payments to be paid out to allowed claims if any funds are left.

Debtors' counsel's attorneys fees, upon the Court's approval, has priority over class 7 general unsecured claims. The Trustee shall not make any distribution to class 7 general unsecured claims until month 60, if there is any fund left to be paid to class 7 general unsecured claims.

OBJECTION BY CREDITOR G AND K HEAVEN'S BEST, INC.

Creditor, G and K Heavens's Best, Inc. ("Creditor") submits its Objection to Confirmation of the Chapter 13 Plan of the Debtors.

I. Debtors' Plan Does Not Meet the "Current Monthly Income Test," Debtors Are Both Over the Median Income, and Line #59 Is Positive

Creditor argues that the Debtors' Plan does not meet the Current Monthly Income test, since Debtors are both over the median income, and Line #59 is positive, and Debtors' Currently Monthly Income and Calculation of Commitment Period and Disposable Income reflects that they are both under the median income, and as a result have no Monthly Disposable Income pursuant to 11 U.S.C. § 1325(b)(2). The Current Monthly Income Test, abbreviated by both parties as the "C.M.I. test" is a part of the means test determining whether debtors qualify for eligibility for bankruptcy.

The "current monthly income" received by the debtor consists of average monthly income received over the six calendar months before commencement of the bankruptcy case, and includes regular contributions to household expenses from nondebtors and including income from the debtor's spouse if the petition is a joint petition. 11 U.S.C. § 101(10A). The means test compares debtors' annualized current monthly income against their state's median income for a household of the same size. The means test is a strict standard for those filing for Chapter 7 bankruptcy. For Chapter 7 debtors, if debtors' current monthly income is below the state median, then the debtors automatically qualify to file for Chapter 7 bankruptcy. If debtors' current monthly income is greater than the state median, the debtors must calculate national and local living expense standards to determine if debtors are eligible to file for Chapter 7.

The Debtors here having filed a Chapter 13 bankruptcy, however, the Chapter 13 debtors are not bound to this means test agreement. In a Chapter 13 bankruptcy, the means test determines the length of Debtor's repayment plan and the dividend paid to unsecured claim holders, rather than the Debtors' eligibility to file.

Creditor argues that Debtors did not disclose any income from the business they transferred to themselves prior to bankruptcy. While Debtors propose earnings of $11,000.00 per month, no payments have been made to Creditor since April 2013. In this respect, Creditor asserts that the Debtors have not met their burden of persuasion in demonstrating that they are under the median income, nor have they proposed a plan that meets the demands of 11 U.S.C. § 1325(b)(2).

Debtors also assert that they had "Gross wages, salary, tips, bonuses, overtime, commissions, $1,900.00, and $2,805.57." The accompanying schedule I, docket #9, reflects that debtor Theodore M. McQueen is the "Owners" of Heaven's Best of Sacramento 1 month, and that Co-debtor Molly A. McQueen has received income from "In-Home Support Services" for a matter of 20 Years. Debtors reflect a gross income in that 1 month of $11,000.00, but account for no income received by the Heaven's Best Corporation.

Creditor argues that there is no reflection of the $11,000.00 that was assumed obtained by the Heaven's Best Corporation since Debtors owned, operated, and received the benefits of the corporation. Debtors' statement of financial affairs merely reflect $15,200.00 year to date in 2013 for "Draws from Eliminator Enterprises, Inc. (Estimated)". However, this income is not listed, nor are any other profits, salaries, commissions, refunds, or other benefits received from the Heaven's Best Corporation prior to the transfer to Debtors.

II. Debtors' Plan Does Not Meet Disposable Income Test,

1. Payments as Proposed Pays $16,980 to Creditors Under Class 7

Debtors have not filed an amended Schedules I and J to support the disposable income projected as $2,650 per month.

However, given such an ability, Debtors' Payment is:

$2,650
-Class 2(b): $2,100
-Class 2(b): $ 200 *Plan front loads Payments
-Trustee Fee: $ 265
-Unsecured: $ 283 *$16,980 over 60 months

2. Deduction for Credit Card Service Charges Pays $15,000 to Creditors Under Class 7

Debtors assert a $250.00 deduction for credit card charges, which Creditor asserts has not been properly described as a necessary expense. Over 60 months, this accounts for a $15,000 savings to the disposable income.

3. Account Receivables Pays $20,769 to Class 7

Debtors' evidence lists accounts receivables of $20,769.50, which is not accounted for in the future income or as part of the regular monthly projected income.

In this case, Creditor disputes that this is a "0%" plan as Debtors' payments as proposed pay no less than $16,980.00, + $15,000, + $20,769.50 for a total of $52,749.50, which should be earmarked for unsecured creditors, or a 27.7% plan.

III. Schedules and Disclosures Need Corrections

Creditor argues that Debtors have not properly completed their schedules and disclosures which arose from the evidentiary hearing. The Assets, Franchise Agreement, Type of Business Entity, Attorney Fees, and disclosures have not been properly disclosed and require corrections before confirmation can be proctored.

Creditor argues that it is apparent that Debtors were represented by counsel within one year prior to the filing of the bankruptcy. However, no attorney fees paid to Debtors' counsel pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b) are disclosed. Debtors' counsel certified prior to filing of having received no more than $3,500.00 from Debtors. Debtors have not completed their schedules and disclosures and thus a material disputed fact arises.

IV. Debtors' Plan Is Proposed In Bad Faith

Creditor argues that the Motion to Confirm Second Amended Chapter 13 Plan is strikingly absent of any evidence or documentation to serve or support a declaration that supports any value in this bankruptcy. Debtors have not met their burden with evidence, and thus the motion should not be granted.

DEBTOR'S REPLY TO CREDITOR'S OPPOSITION

I. Debtors pass the Current Monthly Income Test.

Debtors state that over 50% of debtors' debts are non-consumer debts, therefore, a "Current Monthly Income test" is not needed. The Debtors state that the following are the debts claimed in this case:

Consumer debt: $182,150 (home mortgage) + $10,657.56 (car loan) + $54,698 (credit cards) = $247,505.56

Non-consumer debt: $235,000 (business debt to G and K Heaven's Best) + $12,999 (Cash Call personal loan taken out to fund the business around April 2013) = $247,999.00

Because over 50% of debtors' debts are non-consumer debts, a Current Monthly Income Test is not needed.

2. Debtors' income for the six months prior to bankruptcy filing for Current Monthly Income Test test was accurate.

Debtors state that even if a Current Monthly Income test is needed for this bankruptcy case, Debtors' income for the six months prior to bankruptcy filing for the Current Monthly Income test was accurate. The Debtors' carpet cleaning business was operated by Eliminated Enterprises, Inc. until September 2013, when the debtors decided to close the business. For the six months prior to bankruptcy filing, Debtors' income from the corporation was about $1,900/month owner's draw.

The 2013 Debtor YTD $15,200 (draws from Eliminator Enterprises, Inc.) disclosed on Statement Financial Affairs was about 8 month's owner's draw from the corporation.

3. Debtors still pass the Current Monthly test.

Debtors argue that, even if the $11,000 gross income generated from the business when the business was operated by the corporation were considered debtors' personal income for the six months prior to bankruptcy filing, debtors still pass the Current Monthly Income test. Attached as Exhibit "A" to the Motion is a Current Monthly Income **test assuming that the $11,000 gross income generated from the business when the business was operated by the corporation were considered debtors' personal income.** The monthly disposable income is negative $271.03.

II. Debtors' plan meets disposable income test.

1. Amended Schedules I and J were filed on 7/25/2014, docket # 135.

Creditor contends that debtors did not file amended Schedules I and J to support the disposable income as $2,650 per month.

Debtors filed amended Schedules I and J on July 2, 2014, Dckt. No. #135, with an average monthly income of $14,613.08, average monthly expense of $11,963.31, leaving a disposable income of $2,649.77. Debtor is proposing a monthly payment plan of $2,650 starting month 10.

2. Class 7 general unsecured creditors are entitled to 0%.

As shown in amended schedules A, B, and C filed on July 25, 2014, Dckt. No. 136, accounts receivables were considered part of the business, collateral for G and K Heaven's Best, Inc for purpose of the second amended plan. All of

debtors' assets are exempted.

Accounts receivables:

Creditor contends that accounts receivables need to be accounted for in future income or part of regularly monthly projected income. Debtors state that if they were to utilize the accounts receivables as a future income or part of regularly monthly projected income as contended by creditor, Debtors would also have to reduce their expected monthly gross income in Schedule I line 7 because there is usually a lag between the time the debtors perform the carpet cleaning services and the time the debtors get paid. After making the adjustment, debtors' projected regular income from operation of business would remain about $11,000 per month.

Credit card service charge and advertising:

Creditor contends that $250 credit card charge is not a necessary expense. The $250 credit card charge is the amount that debtors budget for the expenses incurred by allowing clients to make payments by credit cards. If debtors do not spend as much as budgeted on credit card charges or any other business expense items, debtors will spend more than budgeted on advertising because they have to advertise aggressively to keep the business profitable and fund the Chapter 13 plan payments for the next four years. This month debtors spent $200 for advertising with Google, $100 for advertising with Luxury Home Magazine and $37 for advertising with Better Business Bureau. The total amount spent on advertising in August was $337, exceeding the budgeted advertising expense of $145. Debtors plan on spending more on Google advertising in the near future in order to get more clicks.

Additional Attorney Fees:

Even though the total payments into the Chapter 13 plan under the second amended plan exceed the total amount of class 2 payments and trustee fee, the second amended plan does not propose any payment to class 7 general unsecured claims because debtor counsel opts out of the no-look fee and will file motion(s) for additional attorney fee to be paid out from the plan payment. Class 7 general unsecured claims shall not be distributed any funds until month 60, if there is any fund left after payment(s) to debtor counsel.

III. Debtors already made full disclosure in schedules.

Creditor contends that debtors did not complete their schedules and disclosures properly, and that debtors did not properly disclose the assets, franchise agreement, etc.

Debtors state that on line 13 of amended Schedule B (Docket #135, page 6), Debtors disclosed that "Debtors own a corporation called Eliminator Enterprises, Inc. which has ceased operations as of September 1, 2013. The corporation was the Debtors carpet cleaning business dba Heaven's Best of Sacramento. The debtors are now operating the carpet cleaning business dba Heaven's Best of Sacramento under sole proprietorship.

Debtors and creditor G & K Haven's Best, Inc. stipulated the value of the business at $105,000. Details of the business assets is attached to the end

of Schedule B." Page 9-14 of Dckt. No. 135 is an attachment to amended Schedule B disclosing details of the business. Page 9 of Dckt. No. 135 is a list of all the business assets including the franchise agreement, and page 10-14 of docket 135 is a detailed list of business vehicles and equipment.

Creditor also contends that debtor counsel did not disclose any attorney fees received prior to bankruptcy filing. Debtor's counsel filed a disclosure of compensation of attorney on October 8, 2013, Dckt. No. #9 (page 44), disclosing the $3,500 received from debtors for bankruptcy filing.

IV. Debtors' plan is proposed in good faith.

Debtors merely assert that they filed their proposed their second amended chapter 13 plan in good faith, "with all schedules and statements filed properly."

DISCUSSION

Current Monthly Income Test

Since the Debtors' debt is not primarily consumer debt, the means test as based on Debtor's disposable monthly income and whether the income is higher the floor amount of their debts, is inapplicable to Debtors' bankruptcy case. The Debtors having listed $247,505.56 as the figure for their consumer debt, and $247,999.00 as the amount for their non-consumer debt, the Debtors' non-consumer, business debt appears to be more than 50% of the debt listed in Debtors' case.

The Trustee and Creditor have also, on previous occasions and in this instance, challenged Debtors' reporting of their pre-petition and current monthly income.

According to the Trustee's Objection to the First Amended Plan, it appears that the Debtors owned a corporation dba Heaven's Best of Sacramento prior to filing. Dckt. No. 78. Beginning September 1, 2013, Debtor began operating the business as a sole proprietor. Debtor lists gross income from the Business on Schedule I at $11,000.00 per month; however, Form B22C reflects the six month average income of only $1,900.00.

Although Debtors state that Debtors' carpet cleaning business was operated by Eliminated Enterprises, Inc. until September 2013, when the debtors decided to close the business, Debtors have stated that they owned Eliminator Enterprises, Inc., which did business as "Heaven's Best of Sacramento" and ceased doing operations as of September 1, 2013. Debtors are still operating the sole proprietorship of "Heaven's Best of Sacramento." Dckt. No. 76.

Where Debtors apparently took possession of the accounts receivable, and equipment of their corporation prior to filing, and those accounts receivable totaled enough to put the Debtor over the applicable state median income, Debtors may be above the median income. Debtors state, however, that for six months prior to bankruptcy filing, Debtors' income from the corporation was about $1,900 a month owner's draw.

Credit Card Charges and Accounts Receivables

Debtors state in their plan that the $250 Credit Card Service Charges expense is incurred when Debtors allow clients to make payment with debit/credit cards. Debtors explain that whenever a client uses a debit/credit card to make payment, Debtors pay a small percentage for the credit/debit card services.

Debtors do not explain, however, how they calculated this fee as the amount for credit card processing fee and rates, subcharged by the card-issuing banks or their credit card processor. Perhaps Debtors have calculated the $250 amount as the average fees Debtors' business incurred in base fees and markups charged by the Debtors' business's credit card processor or bank.

Debtors assert that whatever funds are not spent on credit card charges, that such funds will roll over to their advertising services. Although Debtors state that the advertising costs for August, 2014, exceeded their budgeted expense of $145, the correlation between Debtors' credit card and advertising fees is not made clear in the plan.

Accounts Receivable

Creditor raises the issue that Debtors' accounts receivables total $20,769.50, but are not accounted for in the future income or as part of the regular monthly projected income.

Debtors contend that if they were to utilize the accounts receivables as a future income or part of regularly monthly projected income, Debtors would also have to reduce their expected monthly gross income in Schedule I "because there is usually a lag between the time the debtors perform the carpet cleaning services and the time the debtors get paid." After making the adjustment, debtors' projected regular income from operation of business would remain about $11,000 per month.

Here, the accounts receivable were incurred by Debtors' sole proprietorship; as such, the assets and liabilities of Debtor's business are property of Debtor's personal bankruptcy, even if they were acquired in the post-petition period. Presumably the accounts are open for services rendered by the Debtors themselves, and should be considered earnings for services performed by the Debtors either before or after the commencement of the case under 11 U.S.C. § 546(a)(6). These accounts were not exempted in Debtors' Amended Schedule C, Dckt. No. 136.

As 11 U.S.C. § 348(f) sets forth, the property of the estate in the converted case shall still consist of property of the estate as of the date of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion. As 11 U.S.C. § 546(a)(6) makes clear, after-acquired assets of the estate are still considered to be the property of the estate.

The Debtors' accounts receivables of $20,769.50 have not been properly listed in Debtors' schedules, and have not been factored into the future income or projected monthly income as possible contributions toward payment of the unsecured claims provided for in the Plan. Debtors have not specified whether there are anticipated collection dates, allowances for doubtful accounts, whether accounts that are unpaid are sent to collection agencies for recovery,

how the net value of these accounts were computed, or payment terms for these outstanding transactions.

ATTORNEY FEES

On March 20, 2014, the court issued an order in the Adversary Proceeding filed by the Objecting Creditor, against Debtors, Adversary Case No. 14-2004, Dckt. No. 23. In its Order Continuing the Status Conference, the court ordered that all payments of $1,000.00 a month received by Hughes Financial Law or Anthony Hughes from the Debtors since the September 25, 2013 commencement of their Chapter 13 case be transferred to the Chapter 13 Trustee on or before 3:00 p.m. on March 24, 2014.

Additionally, the court ordered that Hughes Financial Law filed with the court and serve on Plaintiffs, Chapter 13 Trustee, and U.S. Trustee on or before March 29, 2014, an accounting documenting the receipt of the $1,000.00 a month payments, the deposits of the payments, the account(s) in which the monies were held and transferred, and the tracing of such monies to the funds delivered to the Chapter 13 Trustee.

Debtors were ordered to make a $1,000.00 a monthly payment described in the First Amended Plan as to be made to Hughes Financial Law, to the Chapter 13 Trustee. The payment of the $1,000.00 shall be made with the regular monthly plan payment to the Trustee. The court also ordered that the Chapter 13 Trustee hold and retain the monies received from the Hughes Financial Law and the Defendants/Counter Claimants. Any attorneys' lien which may exist on the monies held by Hughes Financial Law in its client trust account were ordered to be turned over to the Chapter 13 Trustee and the $1,000.00 a month payments received from the Defendants/Counter Claimants are maintained on such monies held by the Chapter 13 Trustee.

The Chapter 13 Trustee has objected to confirmation of the plan on the basis that it was unclear to the Trustee whether the Plan proposed to supersede this March 10, 2014 order and allow the monies paid to the Chapter 13 Trustee to be treated as plan payments to be paid out to allowed claims under the proposed plan.

Debtors state that Counsel's motion for attorney fee has been or will be filed on September 9, 2014 and indeed, a Motion for Compensation was filed on September 9, 2014. Dckt. No. 147. Debtors have requested that the funds transferred from debtor counsel to Chapter 13 trustee in compliance with court's order in be treated as plan payments to be paid out to the debtor counsel for attorneys fee upon the court's approval, and plan payments to be paid out to allowed claims if any funds remain.

However, the provision for attorney's fees as being paid through the plan has not been made clear in the proposed plan, and Debtors have not requested that additional terms clarifying this issue be incorporated in the order confirming.

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

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

holding that:

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

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

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

~~**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 25, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

31. 14-26695-E-7 ARNOLD CHRISTAIN
CAH-1 C. Anthony Hughes

CONTINUED MOTION FOR DETERMINATION OF VIOLATION OF THE AUTOMATIC STAY AND/OR MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY
7-2-14 [8]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, the respondent Creditor, and the Office of the United States Trustee on July 2, 2014. By the court's calculation, 34 notice was provided. 28 days' notice is required.

The Motion for Damages for Violation of the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Damages for Violation of the Automatic Stay is continued to 3:00 p.m at XXXXXX.

The present Motion for Damages for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by the Debtor in this case, Arnold Brent Christian (the "Debtor"), against Cal-Western Reconveyance, LLC.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

1. The debtor initiated the above-entitled Chapter 13 bankruptcy on June 27, 2014 at 10:02 a.m. to 10:03 a.m.

2. The purpose of the filing was to stop a trustee sale of the debtor's residence located at 104 Westport Lane, Vallejo, CA 94591. The sale date was set for June 27th, 2014 at 10:30 a.m.

3. After the bankruptcy was filed Cal-Western Reconveyance was called and notified of the bankruptcy. Further, a fax was sent to them along with a cover letter letting them know that a bankruptcy was filed.

4. However, despite receiving notice of the filed bankruptcy, Cal-Western Reconveyance went ahead and sold the debtor's home.

5. Further calls and notices to Cal-Western Reconveyance have been futile. Currently, they are insisting that the sale is valid and that the debtor's bankruptcy did not occur prior to the sale date.

6. The debtor is therefore seeking a determination that Cal- Western Reconveyance, LLC has willfully violated the automatic stay.

7. The factual and legal arguments for this motion are stated in the attached Memorandum of Points and Authorities.

The Motion for Damages for Violation of the Automatic Stay does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion fails to state any legal authority and grounds on which Debtor's Motion rests.

Rather, Debtor instructs the court to ascertain the legal and factual arguments that serve as a basis for this motion by reviewing the "attached Memorandum of Points and Authorities." The basis for the requested relief is not contained in the body of Debtor's Motion. The details of the Creditor's alleged violation of the automatic stay, as well as the legal authority for the relief sought is drafted and included in Debtor's Memorandum of Points and Authorities. This is not sufficient.

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

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the

elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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

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

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

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

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

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall*

> *state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

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

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

This pleading requirement for the motion is important for most contested matters and critical for the present motion. A person alleged to have violated the stay must be clearly presented with the grounds in the motion, in the same manner as would be set out in a complaint (which a higher pleading standard required in the motion). A person should not be required to dig through a series of pleadings, arguments, evidence, quotations, and contentions to divine the actual grounds.

Memorandum of Points and Authorities in Support of Motion

Debtor's Memorandum of Points and Authorities provide further detail into the Creditor's alleged knowledge of Debtor's bankruptcy filing, and its subsequent violation of the automatic stay. Debtor states that he initiated his Chapter 13 bankruptcy to halt the Trustee sale of his residence, located at 104 Westport Lane, Vallejo, California. The sale date was set for June 27th, 2014 at 10:30 a.m. Exhibit C, Foreclosure Profile Report, Dckt. No. 14.

Debtor states that he filed his bankruptcy at 10:03 am, on June 27, 2014. The Memorandum states that, after the bankruptcy was filed, Cal-Western Reconveyance was called and notified of the bankruptcy. A fax was sent to Cal-Western, along with a cover letter informing the company that a bankruptcy was filed. ¶ 5, Declaration of Robert Gee, Dckt. No. 11.

At 10:30 a.m. on June 27, 2014, however, Cal-Western Reconveyance authorized the sale of debtors home despite being notified of the bankruptcy. Debtor's counsel states that further calls were made to Cal-Western Reconveyance to resolve the issue. On July 1, 2014, an employee of Debtor's counsel spoke to an "April" from Cal-Western Reconveyance, LLC. "April" told Debtor's counsel's employee that the sale was final and valid, and that the bankruptcy was not filed before the sale date. ¶ 4, Declaration of Courtney Pearson, Dckt. No. 10.

Debtor is therefore seeking a determination that Cal- Western Reconveyance, LLC willfully violated the automatic stay. Debtor additionally requests actual damages accrued as a result of trying to enforce the automatic stay.

Notice

Debtor states that Cal-Western Reconveyance had actual notice of the automatic stay. The first notice came via a phone call by employee Robert Gee at 10:12 a.m. on June 27, 2014. Declaration of Robert Gee, Dckt. No. 11. During this phone call the bankruptcy case number was provided to Cal- Western Reconveyance.

The second notice came approximately 7 minutes later via a fax transmittal that also provided the case number and debtor identification. Exhibit A, Dckt. No. 13.

The third notice came that same day at 10:30 am when employees were again told of the bankruptcy filing. Debtor's counsel states that further efforts to inform Cal-Western Reconveyance, LLC, of the bankruptcy were made on June 27, June 30, and July 1, 2014. Declaration of Courtney Pearson, Dckt. No. 10. Debtor argues that Cal-Western Reconveyance had notice of the debtor's bankruptcy and the imposition of the automatic stay and yet still authorized the sale of the debtor's home.

Intentionality

Debtor argues that Cal-Western Reconveyance's actions were intentional and done in bad faith. Debtor asserts that this is not an instance where the foreclosing party had a good faith belief that the debtor did not file for bankruptcy or that the automatic stay did not apply to them.

Debtor claims that Cal-Western Reconveyance is a well-known foreclosure company that regularly processes trustee sales and notices to stop a sale due to the filing of a bankruptcy. Debtor argues that Cal-Western had actual physical proof (in the form the first 3 pages of the debtors bankruptcy petition) that the debtor was in a bankruptcy prior to the 10:30 a.m. sale. Debtor's counsel and his employees made multiple attempts afterward to rescind the sale, but to no avail, since Cal-Western Reconveyance would not accept that the bankruptcy occurred prior to the sale of the property.

Debtor's Exhibit D, Dckt. No. 14, consists of an eCalWebFiling Submission Summary, Notice of Filing of Voluntary Petition transmitted by this court's automation system, and an EFiling History showing that the first docket entries for Debtor's case appeared on June 27, 2014, at 10:03:14 am.

OPPOSITION BY CREDITOR

Cal-Western Reconveyance, LLC (or "Cal-Western," "Creditor"), acknowledges that Debtor's attorney called Cal-Western at 10:12 am on June 27, 2014, to inform the company of Debtor's bankruptcy case, and that Debtor's attorney sent a fax a minute later. Cal-Western states, however, that according to PACER, Debtor's case was not filed until 11:15 am. Cal-Western states that according to its records, the Rental Property was sold at 10:40,

before the Debtor's case was filed.

After it received the phone call and the fax, Cal-Western tried to verify Debtor's filing and could not find Debtor's case listed. The Creditor states that a search done as late as 10:46 a.m. showed "No match found." ¶ 5, Declaration of Barbara R. Gross in Support of Opposition to Motion, Dckt. No. 27. Debtor's attorneys state that they received confirmation that Debtor's Petition was submitted for filing at 10:02, but Creditor states that this information was not provided to them.

The "Notice of Filing," that Debtor provides as Exhibit D in support of the Motion, states the Petition was received at 10:03. Cal-Western states that when they tried to verify Debtor's filing at 10:46, however, it was unable to do so because the Petition had not been processed and "filed.

The Creditor's employees apparently took this to mean that Debtor's bankruptcy case has not yet been filed. The Creditor states that included in the District's FAQs for e-Filing, in response to "How Does e-Filing Work?," the Court directs an ECF user to "click the Submit button to submit [a document] to the court for filing. Creditor interprets the procedures outlined on the court's website indicates that "submitting" a document to a court for filing is not the same as "filing" a document. Creditor states that elsewhere, the protocol is different. Creditor's attorney states that e-Filers in the Southern District of California upload documents directly to the docket, with no lag time. This makes verification of a filed document easy and "fool-proof."

Creditor states that Debtor's attorneys, whose office is in Sacramento should be aware of the delay between uploading a document and having that document filed. Cal-Western states that it did not know of the stay: it received a telephone call and faxed correspondence comprising of a letter and a Petition.

Cal-Western states that receives "scores of faxes" every day purporting to notify it of the automatic stay. Most of these include a time-stamped Petition or a Notice of Case Commencement or a receipt from a Bankruptcy Court, which allows Creditor to search for the case on PACER and confirm it is actually filed. ¶ 7, Declaration of Barbara R. Gross in Support of Opposition to Motion, Dckt. No. 27.

Cal-Western describes its protocol when being informed of bankruptcy flings thusly: when Cal-Western is notified of an bankruptcy filing, its staff "immediately" researches the case on PACER, and when it verifies the bankruptcy filing, it halts the foreclosure sale. In cases where the Petition is filed before a sale but Cal-Western is not notified until after, Cal-Western client rescinds the sale. Gross Declaration, ¶ 8, Dckt. No. 27. When Cal-Western cannot verify that a bankruptcy case is valid, Cal-Western does not halt the sale.

Cal-Western states that it "did everything correctly in Debtor's case." Cal-Western states that the PACER records show that Debtor's case was not filed until 11:15 a.m, which is after the sale took place, and that Cal-Western did not violate the stay because no stay was in effect at the time of the sale.

RESPONSE TO OPPOSITION BY DEBTOR

Debtor responds to Creditor's claims that the bankruptcy case was filed after the trustee sale is incorrect. Debtor states that PACER does not provide the time a bankruptcy case is filed, but rather, that PACER provides the month, day and year of the filing-and not the time.

Debtor states that Creditor's cited time of 11:15 a.m. is the time that the document was made available to view by PACER, which is not the same time as "when a case is filed." Debtor states that a case is filed as soon as all of the documents are submitted through the e-filing system, and that is common for the filed documents to not appear on PACER for several hours or several days (if a case is filed on a late Friday afternoon or Saturday, or Sunday). Debtor's attorneys claim that almost any document filed on a late Friday afternoon will not be available for view on PACER until Monday morning. If this occurs, however, this does not mean that the case was filed on Monday. It means it was filed on Friday and appeared on PACER for viewing on Monday.

The Response states that Debtor has provided information that the documents were filed at 10:02 am to 10:03 am. Exhibit D, Dckt. No. 14. Therefore, the documents were filed at this time and it occurred before the 10:40 am sale date. Cal-Western was sent a fax that gave the case number of 2014-26695 and the fax was received at 10:19 a.m. Exhibits A and B, Dckt. No. 14.

Debtor argues that the fact that the Debtor received a case number means that the case is filed, and that Cal-Western's argument that no case was filed, even though Debtor received a case number, is invalid. Debtor states that the reasoning that a case has not been filed until it becomes available to view on PACER is illogical; in adopting this line of reasoning, then if the debtor were to have filed his bankruptcy on Friday afternoon and received a bankruptcy case number, the case would still would not have been filed until Monday morning when the documents were uploaded to PACER for viewing.

Debtor also questions Cal-Western's attempts, as an experienced foreclosure firm, in verifying the Debtor's case filing. Debtor argues that Cal-Western should have known that all documents filed are not immediately ready for viewing on PACER, and that Cal-Western already had in its possession a fax transmittal from Debtor, showing the first three pages of Debtor's petition.

LEGAL STANDARD

A request for an order of contempt by the United States Trustee or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283-85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to wilful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (an Congressionally created injunction) pursuant to its inherent power as a federal court. *Steinberg v. Johnston*, 595

F.3d 937, 940, (9th Cir. 2011), fn. 3.

Attorneys' fees may only be recovered for work involved in bringing about an end to the stay violation, not for pursuing an award of damages. *Sternberg v. Johnston*, *id.*, 947-48 (9th Cir. 2011) ("[P]roven injury is the injury resulting from the stay violation itself. Once the violation has ended, any fees the debtor incurs after that point in pursuit of a damage award would not be to compensate for 'actual damages' under § 362(k)(1)."), *cert. denied*, 2011 U.S. LEXIS 6502 (2011). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty on compliance on the nondebtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151-52 (9th Cir. 1996). A party which takes an action in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191-92 (9th Cir. 2003).

DISCUSSION

The court's inquiry begins with the court's file itself. The Petition filed in this case bears the following filing information, "Filed: 6/27/2014 10:03:14 AM." Petition, Dckt. 1. While Cal-Western Reconveyance did an immediate Pacer check, it apparently chose only to do so immediately, before the Pacer files had been updated to reflect a Petition having been filed with this court. Just as it taking time for a piece of paper to work its way from the front counter into a physical file, an electronically filed pleading takes time (through more quickly than the old physical file days) to get to the electronic file. It is the filing with the clerk, not the "placing in the file" which is the commencement of the bankruptcy case. See *United States v. Henary Bros. P'Ship (in re Henry Bros. P'ship)*, 214 B.R. 192, (B.A.P. 8th Cir. 1997); Fed. R. Bankr. P. 5005.

Though not cited by the Parties, this court has a Local Bankruptcy Rule expressly authorizing the electronic filing of documents. Local Bankruptcy Rule 5005-1 provides in pertinent part,

> "Documents Submitted in Electronic Form. Documents submitted in electronic form shall be deemed filed as of the date and time stated on the Notice of Electronic Filing issued by the Clerk."

L.B.R. 5005-1(f)(2), "Time of Filing." The filing stamp for the Petition, the Notice of Electronic Filing," is 10:03:14 on June 27, 2014.

The Bankruptcy Code expressly states that "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." 11 U.S.C. § 301(a). The commencement of the voluntary bankruptcy case constitutes the order for relief under that chapter. 11 U.S.C. § 301(b).

That an act taken in violation of the automatic stay is void, not merely voidable, is well-established law in the Ninth Circuit.

> In fact, the automatic stay provision is so central to the functioning of the bankruptcy system that this circuit regards judgments obtained in violation of the provision as void rather than merely voidable on the motion of the debtor. See [*In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992)]. Courts regularly void state court default judgments against debtors when the judgments are obtained in violation of the automatic stay provision, even where the debtor filed for bankruptcy in the midst of the state court proceedings. See, e.g., *In re Fillion*, 181 F.3d 859, 861 (7th Cir. 1999); *In re Graves*, 33 F.3d 242, 247 (3d Cir. 1994).

FN.1. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001).

As earlier stated, the Ninth Circuit addressed the significance of the automatic stay to bankruptcy proceedings. *Schwartz v. United States of America (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992), (Emphasis in original),

> Our decision today clarifies this area of the law by making clear that violations of the automatic stay are void, not voidable. See *In re Williams,* 124 Bankr. 311, 316-18 (Bankr. C.D. Cal. 1991) (recognizing that the Ninth Circuit adheres to the rule that violations of the automatic stay are void and criticizing the BAP decision in this case). . .
>
> > The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. *It stops all collection efforts, all harassment, and all foreclosure actions.* It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (emphasis added).

Creditors who wish to take action against a debtor or property which is subject to the automatic stay "[h]ave the burden of obtaining relief from the automatic stay." FN.2.

FN.2. *Id.* at 572.

The Ninth Circuit revisited this issue in *40235 Washington Street Corporation v. Lusardi (In re Lusardi)*, 329 F.3d 1076 (9th Cir. 2003), addressing a county tax sale of real property which occurred after a bankruptcy case was filed, with neither the county nor the purchaser having any knowledge of the bankruptcy case. The Ninth Circuit concluded that because the tax sale occurred while the bankruptcy case was pending, the sale was void, and that the debtor, not the purchaser, was the owner of the real property. This ruling finding that the sale was void was issued more than 12 years after the sale had

occurred and notwithstanding the county not having refunded the purchase money paid by the buyer at the tax sale.

The automatic stay is just that, automatic, with no obligation on a debtor to affirmatively enforce the stay. When a creditor has notice of a bankruptcy case, it is the creditor's burden to determine the extent of the automatic stay and seek such relief as is appropriate. COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 362.02; *Carter v. Buskirk (In re Carter)*, 691 F.2d 390 (8th Cir. 1982); *Hillis Motors v. Hawaii Automobile Dealers' Association (In re Hillis Motors)*, 997 F.2d 581, 586 (9th Cir. 1993) ("Where through an action an individual or entity would exercise control over property of the estate, that party must obtain advance relief from the automatic stay from the bankruptcy court. *Carroll v. Tri-Growth Centre City Ltd. (In re Carroll)*, 903 F.2d 1266, 1270-71 (9th Cir. 1990).")

Once the creditor learns or has notice of a bankruptcy case having been filed, any actions that it intentionally undertakes are deemed willful. FN.3. As the Ninth Circuit Court of Appeals explained:

> A "willful violation" does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was "willful" or whether compensation must be awarded.

FN.3. *In re Risner*, 317 B.R. 830, 835 (Bank. D. Idaho 2004); *see also Eskanos and Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002); *Thompson v. GMAC, LLC*, 566 F.3d 699, 702-3 (7th Cir. 2009); *Emp't. Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996) (holding that the knowing retention of estate property violates the automatic stay).

FN.4. *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989) (citing *INSLAW, Inc. v. United States (In re INSLAW, Inc.)*, 83 B.R. 89, 165 (Bankr. D.D.C. 1988)).

The fact that a creditor may have originally acted in good faith and reasonably believed that its conduct did not violate the automatic stay does not insulate the creditor from the court finding the continuing conduct in violation of the automatic stay was willful and subject that creditor to damages. FN.5.

FN.5. *In re Cordle*, 187 B.R. 1, 4 (N.D. Cal. 1995).

Bankruptcy Code § 362(a)(3) states that the automatic stay applies to, "any act to obtain *possession of property of the estate* or *of property from the estate* or to exercise control over property of the estate." (Emphasis added). As one of the fundamental principles girding the Bankruptcy Code, "the automatic stay requires a creditor to maintain the status *quo ante* and to remediate acts taken in ignorance of the stay." FN.6 "The operation of the automatic stay applies to property merely in the debtor's possession at the time of filing, and remains in effect until and unless the debtor abandons such

property or relief from the stay is sought." FN.7. The automatic stay imposes an affirmative duty to discontinue actions in violation of the stay. FN.8. A creditor cannot use the state court enforcement action as leverage in negotiations once the bankruptcy case has been commenced. FN.9. When property of the estate is held in violation of the automatic stay the onus is on the creditor to turn over the property, not for the debtor, debtor-in-possession, Chapter 7 trustee, or Chapter 11 trustee to chase the creditor and force correction of the continuing violation. FN.10. "The responsibility is placed on the creditor to address the continuing violation of the automatic stay because to place the burden on the debtor to undo the violation 'would subject the debtor to the financial pressures the automatic stay was designed to temporally abate.'" FN.11.

FN.6. *Franchise Tax Bd. v. Roberts* (*In re Roberts*), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994).

FN.7. *Turbowind, Inc. v. Post Street Management, Inc.* 42 B.R. 579, 585 (S.D. Cal. 1984).

FN.8. *Sternberg v. Johnson*, 595 F.3d 937, 944 (9th Cir. 2010); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002) (addressing the obligation to discontinue post-petition collection proceedings).

FN.9. *Eskanos & Alder*, 309 F.3d at 1215.

FN.10. *Taxel*, 98 F.3d at 1151.

FN.11. *Johnson v. Parker* (*In re Johnson*), 321 B.R. 262, 283 (D. Ariz. 2005) (citation omitted).

REQUEST FOR CONTINUANCE

Debtor files a responsive document to the continued hearing on this matter. Dckt. No. 50. The Debtor acknowledges that the hearing the motion was continued to this hearing date, so that the parties could attempt to settle the dispute.

The Response states that the parties have reached an agreement to settle the dispute. However, parties are waiting for the Chapter 7 Trustee to sign off on the stipulation agreement. This bankruptcy case was converted to one under Chapter 7 on July 24, 2014. The Chapter 7 Trustee assigned to the case is Geoffrey Richards, who indicated that he would sign off on the agreement after the 11 U.S.C. § 341 meeting of creditors.

The Chapter 7 341 meeting of creditors was set for September 2, 2014 but the debtor did not appear (the Response represents that Debtor had written the address down wrong and could not find the court location). The continued meeting of creditors has been set for September 16, 2014 at 1:00 p.m. Therefore, the Debtor requests a short continuance of 2 weeks, so that the Chapter 7 Trustee can review the stipulation and make a determination as to whether the agreement is satisfactory to him. If the agreement is signed by the trustee, counsel for debtor will file the document with the court along with a proposed Order for the courts approval.

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 Determination of the Violation of the Automatic Stay filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is continued to XXXXX at XXXXX.

32. 09-30096-E-13 CAROL DOYLE
DPC-1 Eric Schwab

MOTION TO AUTHORIZE DISBURSEMENT OF FUNDS
8-19-14 [155]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors and parties requesting special notice on August 19, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The Motion to Authorize Disbursement of Funds is granted.

The Chapter 13 Trustee in this case, David Cusick, seeks an order allowing the Trustee to disburse certain funds being held, to unsecured claim holders in this case.

Procedural History

Debtor, Carol Jean Doyle, filed this bankruptcy case on May 20, 2009, and her Chapter 13 Plan was confirmed on October 2, 2009. The Plan called for payments to the Trustee in the amount of $100.00 per month for 24 months, with a proposed 100% dividend to unsecured claim holders, holding claims totaling

approximately $181,069.00. The Plan called for the final payment to come from the sale or refinance of Debtor's real property. All claims bar dates have since passed, and to date a total of $248,653.62 remains to be paid to unsecured claim holders who have filed claims.

On July 12, 2011, Debtor filed a Motion to Approve the Processing of Debtor's Settlement Funds by the Chapter 13 Trustee, which was ultimately denied, Dckt. Nos. 50 and 79. Debtor had filed an unlawful detainer action against the tenant of her property located at 611 Main Street in Susanville, California. Debtor ultimately received $65,000.00 in settlement of the action. Those funds were then forwarded to the Chapter 13 Trustee. Per a court order, the Chapter 13 Trustee was to hold those funds in an interest bearing account until further order of the court. Dckt. No. 80.

Debtor's motion stated that the funds held by the Trustee were needed to pay delinquent property taxes, repairs to the property to be able to market and sell it, and for day to day living expenses of the Debtor. A fair reading of that Motion is a statement by the Debtor that these Settlement Funds are to be used to pay creditors in this bankruptcy case (the expenditures sought by Debtor to be used solely to make repairs to a piece of real estate to be sold to generate monies to pay creditors.

Though Debtor stated under penalty of perjury in her declaration, Dckt. 53, that the monies would be used to make repairs on properties to be sold, she never made a further request for the monies to be released to make any specific repair relating to the property. In ruling on the motion (Dckt. 50) and issuing the order for the Chapter 13 Trustee to hold the funds pending further order, the court found,

> "In a supplemental declaration Carol Doyle testifies that she is the trustor, trustee, and beneficiary of the John and Carol Doyle Family Trust which she and her husband created in 1992. As trustee, she want to sell the properties in the trust to pay her creditors.
>
> The Trust documents, running 61 pages in length, are filed as Exhibit E in support of the motion. Dckt. 62. Section 3 of the Trust documents provide that the trust is revocable by the trustor. In responding to the Trustees objection, the Debtor states that these monies are trust monies and that she is the only active beneficiary of the trust.
> ...
> The Debtors confirmed plan in this case states that Final plan payment will be proceeds form sale or refinance of real property on or before May 25, 2011 . Dckt. 6. This plan was confirmed on October 2, 2009. In the meantime, since filing the case in May of 2009, the Debtor has been funding the plan with $100.00 a month.
>
> The court has reviewed the docket and does not find any motions for the Debtor to hire a real estate professional to achieve the May 25, 2011 sale promised in the plan. The court does not any motion for the court to approve any refinancing or borrowing to fund the plan by the promised May 25, 2011

> date.
> ...
> In her declaration in support of the modified plan the Debtor adds the qualifier to a sale or refinance that she must receive the $65,000.00 to make unstated repairs to the 611 Main Street Property. No such qualification was part of the original plan filed in this case which promised payment by May 25, 2011.
>
> When the settlor of a trust (the Debtor in this case) retains the power to revoke the trust, the assets of the trust are subject to the claims of creditors. Probate Code § 18200. Not only is the interest in the trust an asset of the estate, but the right to revoke the trust and place the assets directly in the Estate. *Askanase v. LivingWell, Inc.*, 45 F.3d 103,106 (51h Cir. 1995); see also In re Ross, 162 B.R. 863 (Bankr. Idaho 1993); *In re Vogel*, 16 B.R. 670 (Bankr. S.D. Fla. 1981) (properly of debtor held in trust becomes properly of the estate pursuant to 11 U.S.C. § 541(a)(1)).
>
> In the present case the Debtor and Estate are holding $65,000.00 cash. The Debtor is operating in her fiduciary capacity for the estate, as well as being the trustee of the trust for which she is the only beneficiary. The Debtor offers no explanation as to the specific purposes for which the money will be expended, how the unidentified repairs will make the property more marketable, or how much of the monies she intends to spend on her own household purposes. Further, the Debtor is in default under her existing contract with the creditors (the confirmed Chapter 13 Plan). She offers no explanation as to why the confirmed Plan is in default and what she intends to do that cures that default.
>
> The Debtor has not show grounds for the court to order $65,000.00 to be turned over to her revocable trust for her to spend however she chooses. The Debtor can, as with any other property being administered by a trustee or fiduciary in bankruptcy (given the unqualified right to revoke and creditors the right to enforce claims against), seek to expend the monies for specific purposes. The Debtor can engage a real estate agent to market and sell the property. The Debtor can engage contractors to propose repairs, to which the real estate broker can opine as to whether the cost of the repairs results in a greater enhancement in the value of the property."

Civil Minutes, Dckt. 79.

On July 12, 2011, the Debtor also filed a Motion to Modify the Chapter 13 Plan, which was set for hearing on August 23, 2011. Dckt. No. 56. The Plan proposed to extend the term from 24 months to 36 months paying 100% to unsecured claim holders. Trustee objected to the Plan, stating that he could not calculate the feasibility of the plan since there was no specified amount

of funds to be paid in from the proposed sale of the property, and that there was no mention of the $65,000 being held by the Trustee. The motion was denied by the court. Dckt. No. 91. To date, no new plan or motion to confirm has been filed to date.

On May 1, 2012, Debtor filed a Motion to Approve the Short Sale, Dckt. No. 107. The Motion was to sell the property at issue in the unlawful detainer action. The Motion made no reference to the $65,000 settlement funds being held by the Trustee that were the product of that suit. The Motion to sell was granted by the court, Dckt. No. 115. The property was the majority of the non-exempt equity. Schedule A listed the property with a value of $400,000, and a debt of $166,967.00 against it. Dckt. No. 1.

Current Posture of the Case

Trustee asserts that the Plan is now overextended: Debtor is in month 63 of a 24 month plan that was confirmed on October 2, 2009. Debtor is $1,000 delinquent under the confirmed plan, as it calls for a 100% dividend to unsecured claim holders, to be funded by the sale of real property. Although Debtor made the $100.00 plan payments for 24 months (Month 24 was May of 2011), and well beyond, her last payment to the Trustee was made in November of 2013.

To date, the Trustee is holding $65,163.12 in the interest bearing account. Trustee argues that the reasons for turnover to the Debtor of the funds, Trustee asserts, is no longer valid. The Trustee's office has conducted an interest search, and found that the property was sold on May 23, 2012, for $65,000.00. Exhibit A, internet printout.

The Trustee requests court authorization to disburse the $65,163.12 in settlement funds being held in its interest bearing account to the unsecured claim holders in this case. The Trustee notes that the confirmed plan as a 100% dividend to unsecured claim holders, and to date a total of $248,653.62 remains to be paid to unsecured claim holders who have filed claims. Trustee states that there are insufficient funds on hand to pay 100% as proposed. The court notes that since the filing of the Trustee's Motion to Authorize the Disbursement of Funds, the court granted Debtors' Motion to Sell Property located at 7642 North Avenue, Tahoe Vista, California. Civil Minutes, Dckt. No. 160. The proceeds of that sale are being applied to the creditors holding the first and second mortgage loans on the property, and a secured claim held by the Placer County Tax Collector.

The court having already previously determined that the $65,000 in settlement funds from Debtor's unlawful detainer action should be held by the Trustee (and not to be turned over to the Debtor and her revocable trust, to be spent however Debtor chooses, Dckt. No. 80), and the Debtor's confirmed Chapter 13 Plan being insufficiently funded to pay all unsecured claim holders in Debtor's case (in which a 100% dividend was to be paid to unsecured claim holders), the court grants the Motion and authorizes the disbursement of $65,163.12 in unlawful detainer settlement funds being held by the Chapter 13 Trustee in a separate interest bearing account, to be distributed to the unsecured claim holders in this case.

At this juncture, the Debtor having demonstrated by her inaction that the $65,000.00 of monies do not need to be used to repair and maintain property

to be sold and the proceeds of such sale used to pay creditors, the $65,000.00 can be used directly under the Debtor's confirmed plan to pay creditors.

The Motion is granted and the Trustee is authorized to disburse the $65,000.00 Settlement monies, plus all interest paid thereon, to pay administrative expenses and creditor claims pursuant to the confirmed Chapter 13 Plan in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Authorize Disbursement of Funds filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the $65,163.12 in settlement funds, and all interest thereon, being held by the Chapter 13 Trustee in his interest bearing account shall be disbursed to for the payment of administrative expenses and claims through the Chapter 13 Plan confirmed in this case as unencumbered monies paid into the plan by the Debtor.

33. 13-34597-E-13 VAN PHAM **MOTION TO INCUR DEBT**
CA-1 Michael Croddy **9-2-14 [28]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 2, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Incur Debt is granted.

The motion seeks permission to incur debt by modifying Van Pham's ("Debtor") loan with Bank of America, N.A. securing property located at 9472 Timber River Way, Elk Grove, California. The modification decreases the Debtor's monthly payment to $1,602.49 from the current $1,961.17 monthly payment.

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 Motion is supported by the Declaration of Debtor Van Tuyet Pham. Dckt. No. 30. 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.

In accordance with Federal Rule of Bankruptcy Procedure 4001(c)(1)(B), the Debtor has filed a copy of the subject loan modification agreement with Bank of America, N.A., as Exhibit A, Dckt. No. 31, in support of the Motion. The agreement indicates that the current interest rate of 5.000% will change to 2.000% for the first 5 years of the modified loan. The length of the loan is extended by 2 years and 9 months, and the total modified monthly mortgage payments of $1,602.49 will be consist of principal and interest of $1,263.53, and an initial escrow amount of $338.05.

This post-petition financing is consistent with the Chapter 13 Plan in this case and Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 court authorizes Van Pham ("Debtor") to amend the terms of the loan with Bank of America, which is secured by the real property commonly known as 9472 Timber River Way, Elk Grove, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 31.