UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

September 22, 2015 at 3:00 p.m.

---

1. 15-24401-E-13 CINDY GRAHAM — MOTION TO MODIFY PLAN
SJS-2 Scott J. Sagaria — 8-11-15 [20]

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, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 11, 2015. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

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

Cindy Graham ("Debtor") filed the instant Motion to Confirm the Modified Plan on August 11, 2015. Dckt. 20.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on September 8, 2015. Dckt. 28. The Trustee objects on the following

grounds:

1. The Debtor is delinquent $225.00 under the proposed plan. The Debtor has paid the Trustee $1,030.00 when $1,255.00 have become due under the proposed plan.

2. The Debtor's amended Schedule J reflects an expense in the amount of $250.00 labeled as "homeowner's association or condominium dues." The proposed plan reclassifies the Debtor's real property from Class 1 ongoing to Class 3 surrender. Since the Debtor intends to surrender the property, the Trustee asserts that the expenses is not necessary.

DISCUSSION

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

The basis for the Trustee's objection is that the Debtor is $225.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

Additionally, given the reclassification of the real property from Class 1 to Class 3 indicates that the Debtor will not longer have homeowner's association or condominium dues. As such, that expense should be paid into the plan for the benefit of the estate and creditors. The proposed plan does not appear to increase any payments once the property is surrendered, if it has not been surrendered to date. Without the Debtor's Schedule J properly reflecting real and actual expenses, the court, Trustee, and any other party in interest cannot determine whether the Debtor is committing all of her disposable income as well raises concerns over whether the proposed Schedules and plan are a propre reflections of the Debtor's financial reality.

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.

2.	**10-27102-E-13 CYB-4**	**FILIBERTO/JENNIFER CASILLAS Candace Y. Brooks**	**MOTION FOR OMNIBUS RELIEF AND/OR MOTION FOR WAIVER OF 1328, 522 AND POST PETITION EDUCATION REQUIREMENTS 9-1-15 [98]**

Tentative Ruling: The Motion to Substitute 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, creditors, parties requesting special notice, and Office of the United States Trustee on September 1, 2015. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Substitute 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 Substitute is granted.

Joint Debtor, Filberto Casillas, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Jennifer Casillas. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on March 10, 2010. On December 9, 2010, the Debtor's Chapter 13 Plan was confirmed. Dckt. 64. On August 31, 2010, Debtor Jennifer Casillas passed away. The Joint Debtor asserts that he is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. The Suggestion of Death was filed on March 20, 2015. Dckt. 74. Joint Debtor is the husband of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that he will continue to prosecute this case in a timely and reasonable manner.

This is not the Debtor's first attempt at substituting in as the representative of the deceased debtor.

The Debtor seeks:

1. Order allowing further administration of a case under Fed. R. Bankr. P. 1016

2. Order allowing substitution as the representative for or successor to the deceased under Fed. R. Bankr. P. 1004.1 and 7025, incorporating Fed. R. Civ. P. 25.

3. Waiver of the requirement for joint debtor to complete deceased debtor's 11 U.S.C. § 1328 Certificate and Certificate of Chapter 13 Debtor regarding 11 U.S.C. § 522(1)

4. Waiver of the requirement for deceased debtor to complete Debtor's Post-Petition Educational requirement for entry of discharge pursuant to 11 U.S.C. § 727(a)(11) and 1328(q)

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion. Dckt. 104. The Trustee states that the funds surviving Debtor is entitled to from University of California due to deceased Debtor's retirement in the amount of $7,500.00 is expected to be received sometime in October 2015 based on the Debtor's declaration. The Trustee notes that these funds were not listed on Schedule B nor exempted on Schedule C. The Trustee states that if the schedules are amended, he does not foresee an issue. However, the Trustee does state that if the Debtor propose to retain these funds even if they are non-exempt, the Trustee is not certain it is appropriate to substitute the surviving debtor in for the deceased debtor.

The Trustee states that he does not believe that there were significant funds in the transfer of Debtor's business based on the review of the 2011 tax return.

DISCUSSION

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

dies. *Id*.

Local Bankr. R. 1016-1 requires that a Notice of Death of the debtor "shall be filed within sixty days of the death of a debtor by the counsel for the deceased debtor or the person who intends to be appointed as the representative for or successor to a deceased debtor." This Local Rule was adopted in 2015.

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

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

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

> excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

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

Local Bankruptcy Rule 5009-1(b) requires the filing with the court Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. Local Bankr. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

Delay in Providing Notice of Death

Here, the Notice of Death was not served until March 20, 2015. Dckt. 76. The deceased Debtor passed away on August 31, 2010, nearly five years prior to the instant Motion. The Plan in this case was confirmed based only on the income of the surviving Debtor. Amended Schedules I and J, Dckt. 56.

It is now disclosed that one of the two joint debtors died on August 31, 2010. This raises some concerns for the court. On September 20, 2010, almost a month after the co-Debtor died, a declaration through which the deceased Debtor "testified" was filed. Though the declaration is dated August 21, 2010, before the death, it was not filed until after the co-Debtor was dead and unable to so testify. Neither the Motion to Confirm the Amended Plan nor the declaration of the Debtor and deceased Debtor make any disclosure of the death.

The Amended Schedules I and J filed on September 20, 2015 filed almost a month after the co-Debtor's death also purport to have been signed by and state under penalty of perjury testimony by the deceased Debtor. The Amended Schedules I and J purport to have been dated and signed on August 25, 2015 by the deceased Debtor.

The court also notes that in addition to the inaccurate information filed under penalty of perjury in 2010, the surviving Debtor has also incorrectly testified under penalty of perjury that the deceased Debtor died on September 10, 2010. Declaration, Dckt. 76. This puts in serious question

any of the information provided by the surviving Debtor and whether the prosecution of this case has been in good faith.

While the court will not deny the present motion based on the inaccurate testimony under penalty of perjury provided in 2010 (a deceased person purporting to make statements under penalty of perjury) and in 2015, it is without prejudice to the Chapter 13 Trustee, U.S. Trustee, and any party in interest seeking appropriate relief – including the dismissal of this bankruptcy case.

Granting of Motion

Filberto Casillas has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Joint Debtor, Filberto Casillas, as the husband of the deceased party and is the successor's heir and lawful representative may continue to administer the case on behalf of the deceased debtor, Jennifer Casillas. The court grants the Motion to Substitute Party.

Debtor Jennifer Casillas died before being able to satisfy the 11 U.S.C. § 1328 requirement to certify that domestic support obligations have been paid, to the extent owed, or that no such obligations exist. However, there is no reason to waive the requirement that her personal representative provide such certification in this case. If such obligations existed, they are required to have been paid as a condition of the deceased Debtor obtaining a discharge.

Further, the Motion seeks a waiver of the certification that the deceased Debtor has not claimed an exemption in excess of the amounts permitted under 11 U.S.C. § 522(q). No grounds have been shown as to why the personal representative of the deceased Debtor cannot, and should not, provide such certifications as a condition of a discharge being obtained for the deceased Debtor. Such is well within the ability of a personal representative of the Debtor. FN.1.

FN.1. Seeking the waiver of such basic of representations and one which a person competent to be a personal representative must have, especially in light of the false statements under penalty of perjury, raises further issues of whether this surviving Debtor is proceedings in good faith.

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 Substitute After Death 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 Filberto

Casillas is substituted as the successor-in-interest to Jennifer Casillas.

IT IS FURTHER ORDERED that this case shall continue to be administered as a Chapter 13 case for the deceased Debtor Jennifer Casillas pursuant to Federal Rule of Bankruptcy Procedure 1016.

IT IS FURTHER ORDERED that all other requested relief is denied, including the request to waive the certification requirements pursuant to 11 U.S.C. § 1328 and the 11 U.S.C. § 522(q) exemption, which certifications may be provided by the personal representative for the deceased Debtor appointed in this case.

3. 15-23902-E-13 JOHN/MELISSA RUS
CLH-2 Cindy Lee Hill

MOTION TO AVOID LIEN OR TO VALUE COLLATERAL OF NORTHERN CALIFORNIA COLLECTION SERVICES, INC.
8-20-15 [32]

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 Chapter 13 Trustee, Creditor, and Office of the United States Trustee on August 20, 2015. By the court's calculation, 33 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 Northern California Collection Services ("Creditor") is denied without prejudice.

John and Melissa Rus ("Debtor") filed the instant "Renewed Motion to Avoid the Fixing of a Lien Pursuant to 11 U.S.C. § 522(f)(1) or in the alternative to Value the Collateral of Secured Creditor" on Dckt. 32.

However, the Motion suffers from multiple defects.

First, the Motion, on its face, does not comply with Local Bankr. R. 9014-1(d)(1) which states, in relevant part, "[e]xcept as otherwise provided in these rules, every application, motion, contested matter or other request

for an order, shall be filed separately from any other request, except that relief in the alternative based on the same statute or rule may be filed in a single motion."

This Local Rule is consistent with and implements the Federal Rules of Bankruptcy Procedure. While Federal Rule of Civil Procedure 18 allows for multiple claims seeking relief to be included in one complaint, and that Rule is incorporated into the pleading for complaints by Federal Rule of Bankruptcy Procedure 7918, it is not incorporated into contested matter practice, being excluded from Federal Rule of Bankruptcy Procedure 9014(b).

Here, the Motion is pleaded in the alternative, but under different code sections, namely § 522(f) to avoid a lien and what possibly could be asserted one seeking to value a secured claim pursuant to § 506(a). This is improper.

With the Motion facially improper, it appears that the plan cannot be confirmed since it relies on the Debtor either avoiding the lien or valuing the lien. While in an Adversary Proceeding the plaintiff may plead multiple claims against a defendant as permitted by Federal Rule of Civil Procedure 18, that Rule is not incorporated into bankruptcy court contested matter practice by Federal Rule of Bankruptcy Procedure 9014. If Debtor wants to file a motion to avoid a lien under 11 U.S.C. § 522(f), then such a motion can be filed. If Debtor seeks to value a secured claim pursuant to 11 U.S.C. § 506(a), such a motion can be filed. But with the rapid pace of contested matter practice, in which the responding party may have only two weeks to file an opposition, including evidence, stitching together multiple theories and claims into one motion is not proper.

The court addressed this issues at the September 15, 2015 hearing on the Trustee's Objection to Confirmation.

Additionally, the Motion appears to seeks declaratory relief in its prayer. Under paragraph one of the prayer, the Debtor requests that:

> That the lien on the property described in paragraph five (5) of this motion arising from the abstract of judgment filed by Northern California Collection Services be ***declared*** void and the Debtor be ***declared*** to hold title of said property free and clear of the lien filed April 17, 2014.

Dckt. 32 (emphasis added).

Pursuant to Fed. R. Bankr. P. 7001 define what are "adversary proceedings." Fed. R. Bankr. P. 7001(9) states that an adversary proceeding includes "a proceeding to obtain a declaratory judgment relating to any of the foregoing." Here, the Debtor did not file an adversary proceeding, but instead is relying on the motion practice outlined in Fed. R. Bankr. P. 9014 and Local Bankr. R. 9014-1 to seek relief. Declaratory relief is not permitted nor proper when seeking relief under such motion practice.

Grounds Stated in the Motion

The Motion states that relief is sought pursuant to 11 U.S.C. § 522(f)(1)(B). This section provides that a lien may be "avoided" if it is a nonpossessory security interest in specified items.

> "(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is–
> ...
> (B) a nonpossessory, nonpurchase-money security interest in any--
>
> (I) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
>
> (iii) professionally prescribed health aids for the debtor or a dependent of the debtor."

11 U.S.C. § 522(f)(1)(B).

Debtor alleges that they have claim their residence, commonly known as 6300 Whitecliff Way, as exempt. Northern California Collection Service, either as an agent or assignee of Waldorf Schools, filed a collections action against Debtor.

Debtor further alleges that Norther California Collection Service asserts a judgment lien against the real property commonly known as 6300 Whitecliff Way. Debtor states that the value of the real property is approximately $144,000 and it is subject to a senior deed of trust securing a claim in the amount of $174,000.

Therefore, Debtor requests that the court,

A. Declare the abstract of judgment void and declare that Debtor holds title to the real property free and clear of the abstract of judgment lien, or, in the alternative,

B. Declare that the value of the collateral securing the judgment lien be found to be $0 and the claim treated as an unsecured claim.

The relief which may be sought pursuant to 11 U.S.C. § 522(f)(1)(B) relates to nonpossessory nonpurchase money security interests in personal property. Debtor seeks relief with respect to real property.

Further, Debtor requests that the court declare the judgment lien to be void. No basis is provided for the court determining that the judgment lien is void. 11 U.S.C. § 522(f)(1)(A) provides statutory basis for a bankruptcy judge to "avoid the fixing of [a judgment lien]...." Avoiding a bona fide, valid judgment lien is significantly different from the court determining that a lien is "void."

As to the alternative relief, if the court were to "declare" merely that the value of the collateral is $0.00, that does not (1) make any ruling as to the lien and (2) is not relief provided for under 11 U.S.C. § 522(f)(1)(B) [or

any other part of 11 U.S.C. § 522(f) or § 506(a)].

The failure of the Debtor and Debtor's counsel to properly plead under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules are grounds to deny the Motion.

Therefore, due to the Debtor improperly pleading multiple forms of relief as well as attempting to obtain declaratory judgment without initiating an adversary proceeding, the Motion is denied without prejudice.

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

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

4. 15-23902-E-13 JOHN/MELISSA RUS
DPC-1 Cindy Lee Hill

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
6-23-15 [20]

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 23, 2015. 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 the pending plan relies on the Motion to Avoid Lien of Waldorf School/Northern California Collection Services, Inc. The Motion to Avoid Lien is set for hearing on July 21, 2015 at 3:00 p.m.

On July 21, 2015, the court denied without prejudice the Motion to Avoid Lien.

JULY 21, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on September 15, 2015. Dckt. 28.

SEPTEMBER 15, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on September 22, 2015 to be heard in conjunction with the Debtor's Motion to Avoid Lien or to Value Collateral of Northern California Collection Services, Inc.

DISCUSSION

The Trustee's objections are well-taken. The Plan relies on the Motion to Avoid Lien which has been denied due to the Debtor failing to show that the lien impairs an exemption claimed by the Debtor.

On August 20, 2015, the Debtor filed an amended Schedule C which exempts the Debtor's real property in the amount of $1.00.00 Dckt. 35. The Debtor also filed a "Renewed Motion to Avoid the Fixing of a Lien Pursuant to 11 U.S.C. 522(f)(1) or in the Alternative to Value the Collateral of Secured Creditor." Dckt. 32. The Motion, on its face, does not comply with Local Bankr. R. 9014-1(d)(1) which states, in relevant part, "[e]xcept as otherwise provided in these rules, every application, motion, contested matter or other request for an order, shall be filed separately from any other request, except that relief in the alternative based on the same statute or rule may be filed in a single motion."

Here, the Motion is pleaded in the alternative, but under different code sections, namely § 522(f) and § 506(a). This is improper.

With the Motion facially improper, it appears that the plan cannot be confirmed since it relies on the Debtor either avoiding the lien or valuing the lien. While in an Adversary Proceeding the plaintiff may plead multiple claims against a defendant as permitted by Federal Rule of Civil Procedure 18, that Rule is not incorporated into bankruptcy court contested matter practice by Federal Rule of Bankruptcy Procedure 9014. If Debtor wants to file a motion to avoid a lien under 11 U.S.C. § 522(f), then such a motion can be filed. If Debtor seeks to value a secured claim pursuant to 11 U.S.C. § 506(a), such a motion can be filed. But with the rapid pace of contested matter practice, in which the responding party may have only two weeks to file an opposition, including evidence, stitching together multiple theories and claims into one motion is not proper.

The court denied the Motion on September 22, 2015.

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

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

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

evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Objection to confirmation the Plan is sustained, without prejudice, and the proposed Chapter 13 Plan is not confirmed.

5.	**15-25102-E-13** **DPC-1**	**LARRY/ROSEMARY CALKINS** **C. Anthony Hughes**	**CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **8-5-15 [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, Debtor's Attorney on August 5, 2015. 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 P. Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. The Debtor failed to appear at the First Meeting of Creditors held on July 30, 2015. The Meeting of Creditors has been continued to August 27, 2015.

2. Debtor's plan may not be their best efforts. Debtor's Schedule I indicates a gross income for Debtor Larry Calkins of $3,831.71 per month. A review of Debtor's pay advices indicates that Debtor receives annual and quarterly bonus income, overtime income, and incentive income, which is not disclosed on Schedule I.

   Debtor's pay advice dated December 31, 2014 indicates total year to date income of $59,174.41, which amounts to $4,931.20 per month. The pay advice lists "incentive" of $911.75, "overtime" $1,246.33, "sales contest" $131.77, "Valshare annual" $400.00, and "Valshare quarterly" $8,048.28.

   Debtor's pay advice dated June 18, 2015 indicates total year to date income of $27,107.79, which amounts to approximately $4,928.00 per month. The pay advice lists "overtime" $1,425.53, and "Valshare quarterly" $3,664.17.

SEPTEMBER 1, 2015 HEARING

At the hearing, the court continued the hearing based on agreement of the parties. Dckt. 36.

DEBTORS' DECLARATION

On September 8, 2015, the Debtors filed a declaration in support of the proposed Motion. Dckt. 37.

While it appears that either part of the declaration was cut off due to scanning or the declaration contains grammatical errors, the court discerns that the Debtor state that they do not expect any further performance bonuses when the Debtor exceed the corporate goals given the current climate of the business.

The Debtor further states that Debtor Rosemary Calkins has been diagnosed with breast cancer and will be undergoing chemo treatment until December 2015. Debtor Larry Calkins states that he will continue working through the beginning of the treatment.

The Debtor states that they hare able to make all payments under the plan. The Debtor states that the primary source of income for the household is from the employment with valspartPro Corp. and Twin Rivers Unified School District.

DISCUSSION

The Trustee's objections are well-taken.

The basis for the Trustee's first objection was that the Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). The Debtor, however, appeared at the continued Meeting of Creditors on August 27, 2015. Therefore, the Trustee's second objection is overruled.

However, the Trustee's second objection remains concerning. The Trustee's second objection deals with whether the plan, as proposed, is the Debtor's best efforts. Reviewing the Debtor's Schedule I, Debtor Larry Calkins states that he makes a gross income of $3,831.71. However, like the Trustee, the court's review of the pay advices indicate that this may be a gross underestimation of Debtor Larry Calkins' actual gross income. From the review of just the two advices discussed by the Trustee, there appears to be additional income in the form of overtime, bonuses, and others that all boost the Debtor's income. With such discrepancies in gross income, the court concurs with the Trustee that it does not appear that the plan is the Debtor's best efforts, when it appears that the Debtor is under-reporting their gross income by $1,096.29.

The Debtor's declaration does not provide much supplemental information to address the Trustee's and the court's concerns over the under-reporting. The Debtor appears to only address the objection in paragraph 4 of the declaration, stating:

> We do not expect any further performance bonuses when we exceed the corporate goals given the present climate in our business.

Dckt. 37. This is the only line in the supplemental declaration that addresses the "bonuses" when it appears that there are upwards of three different bonuses or incentives that the Debtor receives. Once again, the court is concerned that the information provided by the Debtor is not a full and accurate picture of the Debtor's financial reality.

Therefore, the objection is sustained

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

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

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

> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

6. 14-30007-E-13 MITCHELL WHITE
DPC-2 Michael O'Dowd Hays

OBJECTION TO CLAIM OF WHEELS FINANCIAL GROUP, LLC, CLAIM NUMBER 3
7-27-15 [36]

Final Ruling: No appearance at the September 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, Creditor, and Office of the United States Trustee on July 27, 2015. By the court's calculation, 57 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim Number 3-1 of Wheels Financial Group, LLC is sustained and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of Wheels Financial Group, LLC ("Creditor"), Proof of Claim No. 3-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $6,754.16. Objector asserts that the Claim has not been timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is February 11, 2015. Notice of Bankruptcy Filing and Deadlines, Dckt. 11.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual

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

The deadline for filing a Proof of Claim in this matter was February 11, 2015. The Creditor's Proof of Claim was filed April 21, 2015. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

Creditor has not filed a response to the instant Objection.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Wheels Financial Group, LLC, Creditor filed in this case by David Cusick, Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 3-1 of Wheels Financial Group, LLC is sustained and the claim is disallowed in its entirety.

7. 15-22909-E-13 JENNIFER RIANDA **MOTION TO CONFIRM PLAN**
LBG-1 Lucas B. Garcia **8-6-15 [50]**

Final Ruling: No appearance at the September 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 6, 2015. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 28, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so

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

8. 15-20810-E-13 VASILIY/YELENA KUMANSKIY
15-2056
WELLS FARGO CARD SERVICES V. KUMANSKIY ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-13-15 [1]

Plaintiff's Atty: Austin P. Nagel
Defendant's Atty: Mitchell L. Abdallah

Adv. Filed: 3/13/15
Answer: 4/16/15

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud

Notes:

Continued from 9/9/15

9. 15-20810-E-13 VASILIY/YELENA KUMANSKIY MOTION TO CONFIRM PLAN
MLA-3 Mitchell L. Abdallah 8-6-15 [70]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 1, 2015. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

Vasiliy Kumanskiy and Yelena Kumanskiy ("Debtor") filed the instant Motion to Confirm the Amended Plan on August 6, 2015. Dckt. 70

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on September 1, 2015. Dckt. 75. The Trustee asserts 11 U.S.C. § 1325(b) grounds for rejecting this plan. The Trustee objects to Debtor's Additional Provisions in the proposed plan, which states:

> Debtors will provide to Chapter 13 Trustee copies of all future annual tax returns, when filed, during the term of the Chapter 13 Plan.
>
> Commencing with the 2015 tax year, Debtors will turn over all future annual tax refunds in excess of $2,000.00 received during the term of the Chapter 13 plan to Chapter 13 Trustee,

> Chapter 13 Trustee, within a reasonable period of time, will review such refunds and characterize the refund for either plan payments or retention by Debtors.

Dckt. 73, p. 6. Trustee notes that this same issue arose in Trustee's Objection to Confirmation and the Civil Minute Order by this court relating to the First Amended Plan, where this court stated:

> Additionally, the failure of the Debtors to provide for future tax refunds raises concerns if the information provided in the schedules as well as Form 22C is an accurate reflection of the Debtors financial reality. Without the plan and schedules reflecting the tax refund income, the court cannot confirm the plan.

Dckt. 38, 58.

DEBTOR'S REPLY

> Debtor offers to amend the Additional Provision to state:
>
> Debtors will provide to Chapter 13 Trustee copies of all future annual tax returns, when filed, during the term of the Chapter 13 Plan. Debtors will remit a copy of each tax return within 30 days from filing the tax return.
>
> Commencing with the 2015 tax return, Debtors will turn over all future annual tax refunds in excess of $2,000.00 received during the term of the Chapter 13 plan to Chapter 13 Trustee. Debtors will remit the excess refund within 30 days from the date of receipt of the refund.

Dckt. 78.

DISCUSSION

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

Trustee's objection concerns Debtor's failure to explain the reasons behind withholding $2,000.00 from post-petition tax refunds, rather than contributing the full amount of each refund to creditors as disposable income. 11 U.S.C. § 1325(b)(1), provides:

> [i]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan–-(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Debtor's proposed plan only provides 2.97% dividend for Class 7 general unsecured creditors. Dckt. 73. This is for a plan which requires only a $133.25 monthly plan payment by Debtor. *Id.* Debtor reports on Schedule I having gross monthly wage income of $7,999.07.Dckt. 66 at 7. Debtor's deductions include a mandatory ($318) and voluntary ($200) retirement contributions. Additional monthly withholding of $12.07for CERS Pension Low, $156.64 for CERS Pension High, $219.14 for 457 Plan FT, and $160.49 for a medical HSA is made by Debtor. In addition to the $160 withholding for the HSA, Debtor also lists $160 of expenses on Schedule J. *Id.* at 11.

On Schedule J Debtor lists two dependant minor children and a father. No income information is provided for the father, though listed as a dependant. On Schedule J Debtor's expenses include: $1,100.00 for food and housekeeping supplies, $200.00 for clothing and laundry, $400 for transportation, $600 for charitable contributions, and $1,111.48 for mortgage on other property. Net income from rental or business of $1,350.00 is listed on Schedule I. No other expenses for business or rental (such as maintenance or repairs) are disclosed on Schedule I (which requires that a separate statement of gross income and all expenses be provided as part of Schedule I).

The Debtor's expenses do not appear credible or reasonable. Some key information is not provided (such as the gross income and expenses for the rental property or business net income stated on Schedule I). Debtor lists a substantial monthly expense for charitable contributions, but does not provide any evidence of a history of such contributions or that such contributions are currently being made by Debtor.

From the information provided, the information on Schedules I and J appear to be a carefully crafted statement to support a preconceived minimal monthly plan payment amount. This evidences bad faith in the prosecution of this bankruptcy case and this bankruptcy plan.

Debtor seeks to withhold $2,000.00 from post-petition income tax refunds with no explanation for how the $2,000.00 will be used for expenses under the plan. Further, this court has previously noted that, without further explanation, the court cannot confirm a plan when there is not either a justification for withholding tax return. Dckt. 38, 58. Thus, this court may not approve the plan because Debtor's post-petition tax refund is projected disposable income that is not going toward payments to general unsecured creditors. 11 U.S.C. 1325(b)(1)(B).

Based on the fact that the Debtor appears to want to withhold partial tax returns without any explanation or argument as to why the Debtor, as a fiduciary of the Chapter 13 estate, is entitled to a maximum of $2,000.00 in any tax returns. The Debtor's response misses the mark over the Trustee's objection. It is not the time for remitting the tax return funds but instead why the Debtor is entitled to any of the tax refund.

Without this information, the plan is not confirmable.

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.

10. 13-34917-E-13 AARON CATUBIG **MOTION TO MODIFY PLAN**
SJS-3 Scott J. Sagaria **8-17-15 [58]**

Final Ruling: No appearance at the September 15, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 17, 2015. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The 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 17, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so

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

11. 14-21319-E-13 MARK/SARAH ANN HANSEN — OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS
DPC-3 Bonnie Baker — 8-25-15 [158]

Final Ruling: No appearance at the September 15, 2015 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 and Debtor's Attorney on August 26, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *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 Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The objection to claimed exemptions is sustained and the exemptions are disallowed in their entirety.

David Cusick, the Chapter 13 Trustee, filed the instant Objection to Exemptions on August 25, 2015. Dckt. 158.

The Trustee begins by stating that Mark and Sarah Ann Hansen ("Debtor") previously claimed a 100% exemption with a value "unknown" in "Altec personal injury suit filed by Debtor Mark Hansen in anticipation of cross complaint by defendant in the Lance Hansen Personal Injury case" under California Code of Civil Procedure § 703.140(b)(11)(D) and (E). The Trustee had objected to these claims and the court ordered that the Debtor had until August 24, 2015 to claim amended exemptions.

The Trustee notes that the Debtor now claims exemptions in the amounts of $24,060.00, $15,939.60, and 100% under California Code of Civil Procedure § 703.140(b)(11)(D) and (E) and § 703.140(b)(5), with values of "unknown," blank, and "unknown." The 100% and one of the unknown values are interlineated. Dckt. 163.

The Trustee objects to the claim of exemption as to claim of 100% exemption. The Trustee bases the objection on the fact that the Debtor has not provided a basis for a good faith claiming of all of the undisclosed amount of the asset being exempt in the case. The Debtor's claim of exemption is not clear. While the Debtor is presumably continuing to claim the lawsuit, the Trustee argues that interlineating part of the claim, it is not clear who is claiming the exemption, where no date or initials appear on the page with the interlineation although both Debtor names appear on the cover sheet.

Furthermore, the Trustee argues that the Debtor has not proven they are entitled to California Code of Civil Procedure § 703.140(b)(11)(D) and (E) exemptions. Specifically, the Trustee asserts that the Debtor has not proven that the law suit is for: (1) a loss of future earning of the debtor or a dependent; (2) the extent that the compensation for these earnings is reasonably necessary for the debtor or a dependent; and (3) on accounts of personal bodily injury of the debtor or a dependent.

TRUSTEE'S STATUS REPORT

The Trustee filed a status report on September 9, 2015. Dckt. 176. The Trustee states that the Debtor has filed an Amended Schedule B and C on August 28, 2015 and August 30, 2015. Dckt. 163 and 170.

The Trustee states that the Amended Schedule B filed on August 28, 2015 adds the asset of "Accounts receivable due from Terry Hansen work projects. Total due $340,000.00. Litigation currently proceeding on one work project in the amount of $168,000.00."

However, the Amended Schedule B filed on August 30, 2015 changes the value of this asset to $257,602.00 without any explanation as to why it is no longer $340,000.00 after only two days had past.

The Amended Schedule C appears to be essentially the same as the Schedule C filed on August 24, 2105 (Dckt. 156) with the only change being the addition of the Debtor's initial and date.

The Trustee states that his objections still have not been addressed.

DEBTOR'S FOURTH AMENDED SCHEDULE C

On September 11, 2015, the Debtor filed a fourth Amended Schedule C, with the only amendment appearing to be the separation of California Code of Civil Procedure § 703.140(b)(11)(D) and (E) into separate rows. Dckt. 178. The amount claimed exempt under each of the sections is as follows:

California Code of Civil Procedure § 703.140(b)(11)(D) - $24,060.00
California Code of Civil Procedure § 703.140(b)(11)(E) - 100%
California Code of Civil Procedure § 703.140(b)(5) - $15,939.60

DISCUSSION

In relevant part, California Code of Civil Procedure § 703.140(11)(D) and (E) state:

(11) The debtor's right to receive, or property that is

traceable to, any of the following:

> (D) A payment, not to exceed twenty-four thousand sixty dollars ($24,060), on account of personal bodily injury of the debtor or an individual of whom the debtor is a dependent.
>
> (E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

The Trustee has objected to the unlimited exemption claimed in this asset. The basis for the exemption is California Code of Civil Procedure § 703.140(b)(11)(D) and (E). Amended Schedule C, Dckt. 178. For the "personal injury" damages, the maximum amount which may be exempt is $24,060, not 100% of some unknown amount as sought by Debtor in Amended Schedule C.

This is not the Trustee's first objection as to these exemptions and the Debtor's failure to provide explanation as to how and why these exemptions apply to the lawsuit. Dckt. 149.

There are few cases interpreting this statute and what constitutes "bodily injury." The bankruptcy court in *In re Ciotta*, 222 B.R. 626, 631 (Bankr. C.D. Cal. 1998) concluded that the person asserting the exemption must have suffered a physical injury, not mental injury or anguish (such as pain and suffering), upon which the damages are based. Debtor offers no basis for claiming the exemption.

As recently determined by the Hon. Christopher M. Klein in *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal. 2015), the burden of providing the basis for an exemption is that of the debtor, not the party objecting. The exemption claimed arises under California law and California places the burden of proof on the Debtor in this contested matter. *Id.* at *7-*11. The presumption for the exemption created by the filing of Schedule C is rebutted by the filing of the objection to exemption, placing the burden on the debtor to prove the objection. *Id.* at *15, and *33-*36.

Additionally, no basis is apparent for a good faith claiming of all of the undisclosed amount of the asset being exempt in this case. Fed. R. Bank. P. 9011. The court can imagine (and will not profess to "know the pain") of witnessing the injury of one's child. However, as addressed the first time the court addressed the Trustee's objection to the claim of exemption, the Debtor has failed to provide any specifics or justification as to why, under the California Code of Civil Procedure, the Debtor is entitled to claim these amounts.

Instead of taking to heart the court's prior opportunity to amend the Schedules and to provide competent evidence as to why the Debtor is entitled to the exemption, the Debtor has merely responded with additional amendments to Schedule C without any explanation as to how the exemption applies. Specifically, the fact that the Debtor responded to the Trustee's objection by merely clarifying the categories in Schedule C rather than actually address the underlying issue of whether the Debtor is entitled to the exemption further

emphasizes that the Debtor does not have a good faith basis in claiming the exemption. The Debtor has not offered any opposition to the Objection to Exemptions.

The court sustains the Objection to Claim of Exemption.

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 Exemptions filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Exemptions is sustained and the Debtor's exemption pursuant to California Code of Civil Procedure § 703.140b)(11)(D), (E) for "100%" claimed in the asset described as "Altec personal injury law suit filed by debtor Mark Hansen in anticipation of cross complaint by defendant in the Lance Hansen Personal Injury case" is disallowed in its entirety.

12. 13-33721-E-13 MICHAEL/SHAUNIE BRIGGS CONTINUED MOTION TO MODIFY PLAN
PGM-2 Peter G. Macaluso 6-17-15 [39]

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 June 17, 2015. By the court's calculation, 41 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.

Michael and Shaunie Briggs ("Debtor") filed the instant Motion to Modify Plan on June 17, 2015. Dckt. 39. Debtor states that the Modified Plan will increase payments to $10,640.00 in order to account for the claim of George Berrettoni, which Debtor had previously been contesting. Debtor further states that they are seeking a loan modification or restructure of the loan with the aforementioned creditor, which could result in a lower monthly plan payment.

TRUSTEE'S RESPONSE

David P. Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on July 14, 2015. Dckt. 48. The Trustee requests the Debtor to explain how an increase to the plan payment, if it is necessary, can be afforded. The Trustee asserts that the claim of George Berrettoni is $100,000.00 higher than Debtors had estimated. While Debtor can afford their current monthly payment of $7,500.00, the Berrettoni claim makes the case

overextended, and calculates to complete in 75 months. Further, if the Debtors cannot obtain a loan modification or restructure, it is not clear how the Debtors will afford the increased plan payment of $10,640.00.

DEBTOR'S REPLY

The Debtor filed a reply on July 20, 2015. Dckt. 51. The Debtor requests a continuance of sixty days in order to address the concerns arising from the higher than anticipated claim.

JULY 28, 2015 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on September 22, 2015, in light of the recent claim filed by George Berrettoni coming in at a higher than anticipated and the Trustee and Debtor both requesting more information. The court ordered that the Debtor shall file any supplemental papers on or before September 1, 2015. Any replies or responses shall be filed on or before September 15, 2015.

DEBTOR'S SUPPLEMENTAL DECLARATION

The Debtor filed a supplemental declaration on September 3, 2015. Dckt. 56. The Debtor states the following:

1. Debtor are hopeful that they will be able to refinance the 820 Railroad Avenue loan because the beneficiaries of the trust that holds the loan are allegedly willing to work with the Debtor as soon as the executor hands over the estate.

2. The Debtor are actively working to implement other income streams, which the Debtor estimate will increase their disposable income by the required $3,140.00:

    a. Debtor Shaunie Briggs "could get a regular job, catering, chef, health consultation, art director, event coordinator etc..."

    b. Debtor Michael Briggs' job is "going very well, his company is ahead of projections and it is very likely he will be able to obtain extra capital and/or more weekly pay the even that it becomes necessary next June."

3. Debtor claim they can begin to sell Debtor Shaunie Briggs' artwork in a gallery in downtown Winters, [Debtor] have maintained a working relationship with mailing list of over 6,000 clients. In the past, [Debtor Shaunie Briggs'] metal work has been in high demand and will sell when she is able to create new pieces.

DISCUSSION

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

The Debtor's supplemental declaration appears to merely speak of "hypothetical" means in which the Debtor believes the necessary increased plan

payments given Mr. Berrettoni's claim and the pending loan modification. Nothing in the Debtor's supplemental declaration is there factual and actual information indicating that the Debtor can, in fact, afford the plan without the loan modification and the increased claim. Instead, the Debtor merely outlines options that the Debtor "could" take. This is not evidence that the Debtor is able to comply with the terms of the plan or to make plan payments as required by 11 U.S.C. § 1325(a)(6). The Debtor is merely speculating means in which the Debtor may be able to make the proposed plan viable. However, the possibility of a viable and feasible plan does not make the proposed plan actually confirmable under the Code.

Therefore, because the Debtor does not provide evidence that they are able to make plan payments in light of no loan modification being authorized to date and the larger-than-expected claim of Mr. Berrettoni, 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

13. 15-25722-E-13 JENNIFER JENSEN
DPC-1 Scott J. Sagaria

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-26-15 [21]

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 26, 2015. 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, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. Debtor failed to appear at the First Meeting of Creditors on August 20, 2015. The Meeting Has been continued to September 17, 2015, at 11:00 a.m.

2. Debtor's Schedule I lists the sole income of $5,611.00 coming from Jeffrey Jensen, Debtor's father. However, there is no declaration from Debtor's father indicating his willingness and ability to help fund the Chapter 13 Plan.

3. The Internal Revenue Service ("IRS") has a priority claim for $50,471.54. Debtor's Plan provides for this claim in Class 5 for $1.00.

4. Debtor failed to the prior four years of tax returns with the IRS: specifically, her 2012 tax return.

Debtor has not filed an opposition.

DISCUSSION

The Trustee's objections are well-taken. The basis for Trustee's first objection was that the Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Trustee's second objection was that Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Trustee asserts that Debtor failed to provide a declaration for Debtor's father that asserts the father's ability and willingness to fund the Plan with payments for $5,611.00. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable. Therefore, the objection is sustained.

Trustee's third objection was that Debtor failed to adequately provide for the IRS's secured claim. The IRS filed a Proof of Claim 3 which asserts a claim of $50,471.54 in this case. The Debtor's Schedule D does not account for the IRS's claim; the IRS is listed under Schedule E for $1 for "Noticing Purposes Only." Dckt. 1, p. 15, 17.

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).

Here, the Debtor does not provide for the payment in full of the Internal Revenue Service priority claim, as required by 11 U.S.C. § 1322(a)(2) and (4). The Internal Revenue Service filed a Proof of Claim on August 20, 2015. Proof of Claim No. 3. The Internal Revenue Service claims a priority debt of $50,471.54 out of its $55,747.94 unsecured claim. However, the Debtor's proposed plan does not provide for the priority amount. Therefore, the Debtor's plan does not comply with 11 U.S.C. §§ 1322 and 1325.

Trustee's fourth objection was that Debtor failed to timely provide the Trustee with business documents including her 2012 tax return. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). This document is required 7 days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the required document, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

On these four grounds, 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 David Cusick as 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.

14. 07-27123-E-13 DOREEN GASTELUM
PGM-6 Peter G. Macaluso

EVIDENTIARY HEARING SCHEDULING CONFERENCE RE: MOTION TO MODIFY ORDER FOR EVIDENTIARY HEARING
6-12-15 [186]

Debtor's Atty: Peter G. Macaluso
Creditor's Atty: Marc Koenigsberg

Notes:

Evidentiary hearing scheduled for 10/7/15 removed from calendar.

The court to conduct an evidentiary hearing scheduling conference to determine if the Motion for Contempt should be dismissed (if it has not already been dismissed), the scheduling conference continued, or the matter set for an evidentiary hearing.

15. 15-24024-E-13 TAMI ERTLE — MOTION TO CONFIRM PLAN
NSV-2 Nima S. Vokshori — 7-28-15 [43]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 29, 2015. By the court's calculation, 55 days' notice was provided. 42 days' notice is required.

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

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

Tami Mirene Ertle ("Debtor") filed a Chapter 13 plan on May 27, 2015. Dckt. 10. David Cusick, as Chapter 13 Trustee, objected to the May 27, 2015 plan; this court sustained Trustee's objection on August 13, 2015. Dckt. 23, 53. Debtor filed an Amended Plan and accompanying Motion to Confirm on July 28, 2015. Dckt. 45.

TRUSTEE'S OPPOSITION

Trustee filed an opposition to instant Motion on September 8, 2015. Dckt. 57. Trustee asserts two grounds to reject this plan. First, that Debtor failed to state with particularity the grounds for confirming the July 28, 2015 First Amended Plan. Second, that the July 28, 2015 First Amended Plan provides inconsistent dividends to Class 7 general, unsecured claims: the plan proposes a 3% dividend, but Debtor's declaration provides 0% dividend. Trustee does not oppose this motion otherwise.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor filed a supplemental Declaration on September 9, 2015. Dckt. 60. Debtor adds two points and corrects one clerical error. First, Debtor declares that Caliber Home Loans was originally listed as a Class 1 creditor on the original plan, but has been listed as a Class 2 creditor on the First Amended Plan. Dckt. 60, ¶ 3.

Second, Debtor filed her first amended plan subsequent to the full reconveyance of the second mortgage, previously held by HSBC Consumer Lending. Dckt. 49, 60 ¶ 4. Finally, Debtor corrects the clerical error in the original Declaration, and declares that she plans to pay a 3% dividend on general unsecured claims, not 0% as originally declared. Dckt. 60 ¶ 5.

DISCUSSION

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

Trustee's objection is that Debtor has failed to explain the factual bases supporting confirmation. That has been cured with Debtor's Supplemental Declaration which provides the missing assertions of fact needed. Further, Debtor's Supplemental Declaration cured the inconsistent dividend cited to for Class 7 general unsecured claims. The declaration clarifies the 3% dividend to be provided in the First Amended Plan. Dckt. 45, 60. Thus, the defects raised by Trustee have been corrected.

However, the court does want to emphasize that Debtor and Debtor's counsel should be more cognizant of the requirements of Fed. R. Bankr. P. 9013. As the Trustee noted, the Motion barely, if at all, actually meets the "state with particularity" standard as required by Rule 9013. While the Debtor has been able to "save" the instant Motion and plan through a supplemental declaration, the Debtor nor Debtor's attorney should rely on the court's leniency in the future for any motions. The Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules are readily available to the parties and are equally enforced for all parties.

The amended Plan complies with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 28, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order, Debtor will 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.

No further or additional relief is granted.

16. 15-25732-E-13 PAUL/JULIANNE CLEM — **OBJECTION TO CONFIRMATION OF PLAN BY CITIMORTGAGE, INC.**
Mikalah R. Liviakis — **8-27-15 [35]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 27, 2015. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

CitiMortgage, Inc. ("Creditor") opposes confirmation of the Plan on the

basis that the Debtor's plan improperly classifies the Creditor's claim as a Class 2C claimant and does not provide for the full amount of the claim.

While the Creditor's objection seems to object to the valuation of the real property that secures the Creditor's second deed of trust, the court reads the objection to be, in light of the court denying the Debtor's Motion to Value, the Creditor's claim is not fully provided for and that the proposed plan misclassified the Creditor's claim in light of the motion to value having been denied and no new motion being filed.

The Creditor's objections are well-taken.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Creditor. However, the Debtor has failed to file a Motion to Value the Collateral after the court previously denied the Motion for failing to name the actual creditor. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Creditor, implicitly, alleges that the plan is not feasible, *See* 11 U.S.C. § 1325(a)(6), and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of the creditor's matured obligation, which is secured by the Debtor's residence.

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.

Here, the Debtor provides for the Creditor, just based on a valuation in which the court did not grant. Therefore, the proposed plan does not comply

with 11 U.S.C. § 1325(a)(5).

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

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

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

17. 15-25732-E-13 PAUL/JULIANNE CLEM
DPC-1 Mikalah R. Liviakis
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-26-15 [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 August 26, 2015. 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, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. The Debtor's plan relies on a Motion to Value Collateral of Citimortgage. The Debtor's prior Motion was denied on August 11, 2015. Dckt. 25.

The Trustee's objection is well-taken.

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Citimortgage. However, the Debtor has failed to file a Motion to Value the Collateral after the court previously denied the Motion for

failing to name the actual creditor. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

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 of the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

18. 10-53637-E-13 G./KATHLEEN ULBERG MOTION TO MODIFY PLAN
JGD-12 John G. Downing 8-19-15 [243]

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 18, 2015. 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.

G. Wendell and Kathleen Ulberg ("Debtor") filed the instant Motion to Confirm the Modified Plan on August 19, 2015. Dckt. 243.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on September 8, 2015. Dckt. 249. The Trustee objects on the following grounds:

1. The Debtor may not have provided sufficient notice. The Debtor's papers appear on the docket dated August 19, 2015 which is only 34 days compared to the required 35 days pursuant to Local Bankr. R. 3015-1(d)(2).

2. The proposed plan does not authorize the payment approved by

the court for the Debtor's Motion to Approve Settlement Agreement with Pacific Crest Partners. Dckt. 173. The Trustee has paid the creditor $73,574.64. Additionally, Proof of Claim No. 4, Internal Revenue Service, which claimed $690.51 as priority is not provided for in the modified plan. This claim was provided for by Minor Modification of the Debtor's plan. Dckt. 151. The Trustee has paid $690.51 to creditor.

3. The Debtor's plan does not accurately reflect the plan term and payments. The proposed plan specifies a term of 44 months but September 2015 is the 57th month of the case. The Debtor's Additional Provision states that the Debtor has make a total of $104,710.00 to date and these payments are deemed approved to complete required payments under the plan. The Debtor has paid a total of $104,710.00 to the Trustee with the last payment of $700.00 posted August 27, 2014 which was month 44 of the plan. The Trustee has disbursed the full amount.

4. The Debtor's declaration is identical to the Debtor's prior declaration. Compare Dckt. 186 and 245. The declaration refers in item 4 to the fourth modified plan and states priority claims are to be paid in full.

5. The plan proposes a no less than 8% dividend to unsecured claims in Section 2.15. The Trustee has disbursed 24% to unsecured claims.

DISCUSSION

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

The Trustee's objections are well-taken.

First, the Trustee's objection over notice is overruled. A review of the proof of service shows that the Motion and accompanying documents were served on August 18, 2015. While the docket shows August 19, 2015 as the date, this may be due to clerical delay at the court, especially since the time stamp of the docketing is at 7:46 a.m. The court basis the notice calculation on the statement, under penalty of perjury, in the Proof of Service.

However, to the rest of the objections, it appears that the Debtor has not properly and fully contemplated the plan and the current status of the case. Instead, it appears that the Debtor and Debtor's counsel "threw together" a plan, not providing for the priority claim of the Internal Revenue Service, incorrectly stating the months remaining, incorrectly stating how much has been paid into the plan to date, and inaccurately reflects the amount provided to unsecured.

While it is possible that most of these corrections can be down in the order confirming, looking at the amount and scope of the errors in the plan and the Debtor's declaration, the amount of corrections that would need to be made, in total, would be too significant to be classified as a mere scrivener's error. It appears that this plan was, facially, not the Debtor's best efforts, in light of the glaring issues in the plan, specifically, providing a plan which technically would have ended August of 2014, the 44th month of the plan.

The court does not merely rubber stamp plans. The Debtor and Debtor's counsel has to be aware and thorough in the preparation of plans in order to accurately, factually, and truthfully reflect the Debtor's financial reality as well as be an accurate depiction of the case to date. This is not the case in the instant proposed plan.

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

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

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

19. 09-44339-E-13 GLEN PADAYACHEE — CONTINUED MOTION FOR CONTEMPT
PLC-16 Peter L. Cianchetta — 7-28-15 [213]

Final Ruling: No appearance at the September 22, 2015 hearing is required.

The court has by order continued the matter to October 20, 2015 at 3:00 p.m. (Dckt. 227).

20. 15-22139-E-13 NANCY/DANIEL BALAGUY MOTION TO CONFIRM PLAN
RS-2 Richard L. Sturdevant 8-5-15 [69]

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 (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 5, 2015. 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.

Nancy Balaguy and Daniel Balaguy ("Debtor") filed a petition on March 18, 2015. Dckt. 1. The Debtor filed an original Plan on April 2, 2015. Dckt. 16. Bank of America, David Cusick as Chapter 13 Trustee, and Schools Financial Credit Union all filed objections to confirmation of the April 2, 2015 Plan. Dckt. 37, 40, 44. This court overruled Bank of America's objection, but sustained Trustee's and Schools Financial Credit Union's objections. Dckt. 62, 63, 64. Debtor filed the instant Motion to Confirm the Amended Plan on August 5, 2015. Dckt. 69.

TRUSTEE'S OBJECTION

Trustee filed an objection on September 4, 2015. Dckt. 74. Trustee objects on two grounds. First, that the Franchise Tax Board's Lien was improperly classified as Class 1. Second, that the Plan fails to provide for a priority claim of the Placer County Department of Child Support Services.

SCHOOLS FINANCIAL CREDIT UNION OBJECTION

Schools Financial Credit Union ("Creditor") filed an objection on September 8, 2015. Dckt. 77. Creditor objects on three grounds. First, that the plan does not allocate all of Debtor's disposable income to payments for unsecured claims. Second, that Creditor's secured claim is not provided for. Finally, that Debtor's August 5, 2015 First Amended Plan was not filed in good faith.

Specifically, as to the first objection, Creditor argues that proposed plan does not comply with 11 U.S.C. § 1325(b)(1)(B). The Creditor asserts that the Debtors improperly calculated their disposable income on Form 22C and that there is sufficient monies to pay unsecured claimants 100%. The Creditor provides analysis, much like the Creditor's previous objection, that the Debtor excludes income, such as vehicle reimbursements, and inflates expenses, such as involuntary deduction and taxes.

As to the second objection, the Creditor objects to the plan because it is not adequately protected under the plan, given the 2.99% interest rate proposed. The Creditor asserts that 6% interest rate is appropriate pursuant to *Till*. The Creditor asserts that the repayment period for the loan should not be extended more than 12 months because of the mileage of the vehicle and that it is not being maintained properly.

As to the third objection, the Creditor argues that the Debtor's is not proposing the case in good faith because the Debtor has failed to list all income and expenses accurately, do not list the refund from the prior Chapter 13 Trustee, and failed to list payments made within 90 days preceding the filing of the case. This, in totem, the Creditor argues signifies that this was filed in bad faith.

DISCUSSION

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

Trustee's Objections

Trustee's objections are well-taken. Trustee's first objection is to the treatment of the secured claim for the Franchise Tax Board. 11 U.S.C. § 1325(a)(5) gives the debtor three options to provide for secured claimants:

(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).

There is no evidence that Debtor plans to surrender property to the Franchise Tax Board, nor is there evidence that Debtor and the Franchise Tax Board have come to an agreement. Thus, Debtor must provide for payment in full of the

Franchise Tax Board's entire claim, including interest. Here, Debtor has provided for 0% interest, which does not entirely compensate the Franchise Tax Board's secured claim, filed in Proof of Claim 14. This objection is grounds to deny confirmation.

Trustee's second objection focuses on Debtor's failure to include a secured claimant in the August 5, 2015 First Amended Plan. Trustee notes that the Placer County Department of Child Support Services has a claim for $305.28, as reflected in its filed Proof of Claim 8.

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).

Here, the Debtor's plan does not provide for the payment of full of the Placer County Department of Child Support Services priority claim as required by § 1322(a)(2) and (4). Therefore, the objection is sustained.

Creditor's Objections

The Creditor's objections are well-taken. The crux of all the Creditor's objections revolves around the accuracy and truthfulness of the information submitted by the Debtors and whether all income and expenses are listed correctly and fully. These failures compound, raising serious concerns over whether the instant case has been filed in good faith and whether the information provided is, in fact, the Debtors' financial reality.

A review of the Creditor's proposed Form 22C amendments to properly calculate the Debtors' disposable income for plan payments highlights that there is a potential for substantial differences in what the plan payments should be. Under the Creditor's calculation, the Debtors have sufficient income to pay 100% to Class 7 claimants. However, the proposed plan only provides for a minimum of a 15% dividend to Class 7 claimants. This 85% differential arises from whether the Debtors have fully reported their income and whether the expenses, whether it be the number of dependents or other expenses, are accurate or inflated.

The Debtors have failed to respond to the instant objections. There are appears to be fundamental concerns over whether the instant case has been filed in good faith and whether, under the penalty of perjury, the Debtors have truthfully disclosed their finances.

This is not Debtors first attempt at a Chapter 13 case. With the assistance of the same counsel as in this case, Debtors filed their first case on August 22, 2014 ("First Chapter 13 Case"). Bankr. E.D. Cal. No. 14-28542. The First Chapter 13 case was dismissed five months later on March 2, 2015. The case was filed due to Debtors' failure to confirm a Chapter 13 Plan.

In reviewing the filings in the First Chapter 13 Case, the court notes that Debtors stated under penalty of perjury that their monthly gross wage income was $10,389.54. 14-28542, Dckt. 12 at 21. After deductions from wages for taxes, retirement, insurance, domestic support obligation payment, and

unition dues, Debtors stated that their monthly income was $7,064.48. *Id.* at 22.

On Schedule J in the First Chapter 13 Case Debtors computed their monthly expenses to be $3,662.85, leaving $3,401.623 in Monthly Net Income. *Id.* at 24. The last Chapter 13 Plan proposed by Debtors *(Id.* at 41) required monthly payments of $3,834.60; which is $434 more a month than the Net Monthly Income stated by Debtors under penalty of perjury on Schedule J.

Debtors commenced the current Chapter 13 case on March 18, 2015, a mere sixteen days after dismissal of the First Chapter 13 Case for the inability to confirm a plan. In the current Case, Debtor's again state their monthly gross wage income to be $10,489.55. Schedule I, Dckt. 15 at 21. Again, after deductions, Debtors stated under penalty of perjury that their monthly income is $7,064.48.

On Schedule J Debtors state that their monthly expenses have been reduced to $3,234.00 a month; yielding a Monthly Net Income of $3,830.48. Expenses have dropped because a $428.85 car payment is removed from the budget.

The First Amended Chapter 13 Plan which Debtors are now trying to confirm (Dckt. 68) requires that Debtors' monthly plan payment jump to $4,240.48. This is $410 more a month than Debtors state under penalty of perjury is their Monthly Net Income. In the declaration stated in support of the present Motion, Debtors offer no testimony under penalty of perjury as to why their prior income, expense, and Monthly Net Income statements under penalty of perjury were inaccurate. As in the First Chapter 13 Case, the testimony relating to finances and funding the plan consists of,

> "6. I gave my pay stubs to my attorney, Mark Alonso, and went over my budget (income and expenses) with him and/or his staff attorney Richard Sturdevant. I am trying to pay the largest Plan payment that I can afford and still meet basic living expenses."

Declaration, ¶ 6; Dckt. 71. No testimony is provided by the attorney as to how the attorney computed the correct Monthly Net Income and the projected disposable income with which the plan would be funded.

The Internal Revenue Service has filed a proof of claim for $63,659.20. Amended Proof of Claim No. 1. The Internal Revenue Service claim is asserted to be comprised of,

A. Priority Claims.....$13,252.40

B. General Unsecured Claim.....$50,406.80

C. Income Taxes For the:

1. 2009 Tax Year

2. 2012 Tax Year

3. 2013 Tax Year

The California Franchise Tax Board has filed a proof of claim for $10,837.83. Proof of Claim No. 14. The Franchise Tax Board Claim is for:

A. Secured Claim.....$7,860.33

B. Priority Claim.....$2,686.39

C. General Unsecured.....$ 291.10

D. Income Taxes For the

1. 2009 Tax Year

2. 2013 Tax Year

Through the Chapter 13 Plan Debtors also seek to cure a $12,852.56 arrearage on the claim secured by their residence. Proof of Claim No. 9 filed by Bank of America, N.A. In the First Chapter 13 Case Bank of America, N.A. filed Proof of Claim No. 8 which stated an arrearage of $9,929.05. Since Debtor began their bankruptcy cases, the arrearage on this claim has increased $2,923.51, which is more than the amount of the $2,538.99 monthly contractual payment listed for payment through the First Amended Chapter 13 Plan.

As in the prior case, Debtors have purported to provide for higher monthly Chapter 13 Plan payments than projected disposable income they should have considering the current financial information provided in Schedules I and J, and the additional testimony provided in support of the confirmation motion.

Debtors having not prosecuted this case, nor proposed this Amended Chapter 13 Plan in good faith. The financial information provided is not credible, and conflicts with the prior statements of Debtors under penalty of perjury. This is a pattern which has bridged from the First Chapter 13 Case to this case, which makes it appear that such misstatements are part of an intentional scheme to mislead the court, Chapter 13 Trustee, creditors, and other parties in interest. This lack of good faith constitutes further grounds for not confirming this Plan.

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.

21. 14-27045-E-13 HARINDER SINGH
PGM-1 David M. Alden

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH SACRAMENTO SIKH SOCIETY BRADSHAW TEMPLE
8-12-15 [90]

Final Ruling: No appearance at the September 22, 2051 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 12, 2015. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion for Approval of Compromise is continued to 3:00 p.m. on October 6, 2015. Any replies or responses shall be served and filed on or before September 29, 2015.

Harinder Singh, the Chapter 13 Debtor, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Sikh Society Bradshaw Temple ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those connected with the Adversary Proceeding No. 14-08837 which dealt with causes of action for false pretenses, false representation, and actual fraud.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 93):

A. Movant shall pay Settlor $30,000.00 on or before July 2, 2015

and a second payment of $30,000.00 on or before December 25, 2015, and the mutual release and other covenants contained in this Agreement, the parties:

1. Release, acquit, and forever discharge the other and the others agents, employees, officers, directors, shareholder, investors, spouses, partners, members, managers, heirs, executors, administrators, and assigns, and each of them, from any and all claims, actions, causes of action and demands that ere brought, that could have been brought, or that are in any way related to the allegations in the pending Adversary Proceedings.

2. Agree never to commence or prosecute, or cause to be commenced or prosecuted, against the other party that any action or proceeding "taste" directly or indirectly on any released claims.

B. Upon receipt of the total payment of $60,000.00, the Settlor shall cause the pending Adversary Proceeding to be dismissed. The dismissal shall not constitute and many not be used as an admission of res judicata as to the discharge ability of the subject underlying debt, should Movant file a Chapter 7 or other new bankruptcy case 90 days or less after either or both settlement payments.

C. In addition to and at the same time as the dismissal of the pending Adversary Proceeding, the Settlor shall deliver to Movant a Notice and Acknowledgment of Full Satisfaction of Judgment, on California standard Judicial Council Form, as to Movant as well as to Movant's father, Hakam Singh, and Movant's wife, Anita Singh, for purposes of releasing the abstract and judgment lien on the real property and residence located at 9012 Sand Field Court, Sacramento, California.

SETTLOR'S NON-OPPOSITION

The Settlor filed a non-opposition to the instant Motion on August 17, 2015. Dckt. 95.

DEBTOR'S DECLARATION

The Debtor filed a declaration on September 19, 2015. Dckt. 106. The Declaration states that the Debtor was a defendant in a state court case that resulted in an adverse ruling to Debtor and co-defendants and in favor or Settlor. The compensatory damages awarded were paid by one of the co-defendants, leaving Debtor and the remaining co-defendants liable for each of the punitive damage awards.

The Debtor states that he is willing to pay the two, lump sum payments of $30,000.00 to the Settlor since it would be half of what the Debtor would need to pay if he was required to pay the full punitive damage amount.

The Debtor states that he is a one-third owner of the residence in which the judgment lien is attached. The remaining thirds are owned by Hakam and Anita Singh, the Debtor's father and estranged wife.

The Debtor states that timely funding of the first installment under the terms of the settlement was made possible by the contribution of his father and father's estranged wife in the amount of $22,944.08 into Debtor's savings account on June 1, 2015 for the purpose of paying the first installment fee to SEttlor. The Debtor states he made the difference from current earning to make the full $30,000.00 installment payment on July 16, 2015.

The Debtor states that he has since been advised that he should have waited for the compromise to be approve before making the payment. The Debtor alleges that he did not mean to cause any harm and was concentrated on making the first installment to actually avoid harm.

The Debtor states that if the court would grant his previously filed application to dismiss the case, assuming the court approves the compromise, the Debtor and the other owners of the residence may be able to refinance the house and use any exempt equity to fund the second installment to the Settlor. If the court is unwilling to grant the dismissal, the Debtor states that he will have his bankruptcy counsel propose an amended plan to pay the second installment through the plan.

HAKAM AND ANITA SINGH'S DECLARATION

On September 19, 2015, Hakam and Anita Singh filed a declaration. Dckt. 107. The Declaration states that they provided $22,944.08 to the Debtor for the purpose of funding the first installment payment. Hakam and Anita Singh state that the instant declaration was filed to "reassure" the court that the money was to pay the first installment and that they do not expect repayment of th e $22,944.08.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

In light of the Debtor and Hakam and Anita Singh filing declarations three days prior to the hearing, the court continues the hearing to 3:00 p.m. on October 6, 2015 to allow the Trustee, the U.S. Trustee, and other parties in

interest the opportunity to review these filings. Any replies or responses to the late-filed declarations shall be filed and served on or before September 29, 2015.

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 Compromise filed by Harinder Singh, Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Compromise is continued to 3:00 p.m. on October 6, 2015. Any replies or responses shall be filed and served on or before September 29, 2015.

22. 15-25445-E-13 DPC-1 | **GUADALUPE GONZALEZ Julius M. Engel** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 8-26-15 [28]**

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 26, 2015. 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, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. Debtor failed to appear and the First Meeting of Creditors held on August 20, 2015. The Meeting has been continued to September 17, 2015 at 11:00 a.m.

2. Debtor failed to provide Trustee with a copy of her most recent pre-petition tax year return. Trustee Has no written statement alleging the documentation doesn't exist.

3. Debtor's plan relies on a Motion to Value Collateral of

Consumer Portfolio, which is set for hearing on September 1, 2015. If the motion fails, Debtor cannot afford to make payments or comply with the plan.

4. Debtor listed a Rent to Own on Schedule D as a furniture lease, but failed to list this on her plan under § 3.02. It is not clear if Debtor intends to return the furniture or when the payment on the lease will stop. It is also unclear whether Debtor seeks to reject or continue the lease.

Debtor failed to respond to this motion.

DISCUSSION

The Trustee's objections are well-taken.

Trustee's first objection was that the Debtor did not appear at the meeting of creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Trustee's second objection was that the Debtor has failed to timely provide the Trustee with the required tax return or written statement that no such documentation exists. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). This document is required 7 days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the tax return, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

Trustee's third objection was that Debtor's plan relies on a Motion to Value Collateral of Consumer Portfolio, which was set for hearing September 1, 2015. However, Debtor and Debtor's counsel improperly set the motion for hearing on a Motion for Relief calendar at 1:30 p.m. on September 1, 2015. On September 15, 2015, the Debtor filed a Motion to Value Collateral of Consumer Portfolio Services, which is set for hearing on October 20, 2015. Dckt. 32. Therefore, because there is a pending Motion to Value, the Trustee's third objection is overruled.

Trustee's final objection was that Debtor failed to provide for a lease. Section 1325(a)(1) requires that "the plan complies with the provisions of this chapter and with the other applicable provisions of this title." Bankr. Rule 6006(a) requires that "[a] proceeding to assume, reject, or assign an...unexpired lease, other than as part of a plan, is governed by Rule 9014." Here, Debtor did not provide for the lease in the plan; a review of the court's docket shows no motion to assume the lease. Therefore, Trustee's objection is sustained.

While the Debtor has filed a properly set Motion to Value Collateral of Consumer Portfolio Services, the Trustee's remaining objections are sustained. Therefore, 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 David Cusick, as 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.

23. 11-30546-E-13 WILLIAM/DENISE NISSEN
LC-7 Lorraine W. Crozier

MOTION TO APPROVE LOAN MODIFICATION
8-20-15 [118]

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, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 20, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by William and Denise Nissen ("Debtor") seeks court approval for Debtor to incur post-petition credit from Ocwen Loan Servicing, LLC.

The Debtor states that the court previously denied the Debtor's first Motion to Approve Loan Modification because the Debtor failed to provide credible evidence that Ocwen Loan Servicing, LLC is the creditor or had authority to modify the underlying loan. Dckt. 62.

The Debtor states that they have received the declaration of Gina Feezer, a senior loan analyst employed by Ocwen Financial Corporation, whose indirect subsidiary is Ocwen Loan Servicing, LLC. Dckt. 121, Exhibit E. The

declaration states that the mortgage is part of the Fannie Mae portfolio and that under the Fannie Mae Servicing Guide, Ocwen Loan Servicing, LLC has "possession of the note when representing the interest of Fannie Mae in a bankruptcy proceeding."

However, in this same declaration, Ms. Feezer states that at the time of the first Motion to Approve Loan Modification, One West Bank, FSB was the servicer. As such, and under the servicing guide, the note was transferred to One West Bank, FSB. Ms. Feezer states that on September 1, 2013, the servicing rights were transferred to Ocwen. Since the bankruptcy case was still pending, One West Bank, FSB also transferred possession of the Note to Ocwen. Ms. Feezer states that Ocwen is the current holder in due course and in physical possession of the note.

The Debtor states that the mortgage has been treated as a class 1 claim pending court authorization of the modification. The Debtor states that once the court authorizes the modification, the Debtor will submit an order which removes the obligation to Class 4 of the plan and allows Debtor to make the payment directly to Ocwen.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on September 4, 2015. Dckt. 123. The Trustee states that he is uncertain wether the current Motion properly addresses the courts prior concerns about naming the correct creditor. The Trustee notes that the Trustee has disbursed $13,336.10 in mortgage payments to Ocwen.

The Trustee is not opposed to the transaction.

DISCUSSION

The court remains concerned over whether Ocwen is, in fact, the creditor in interest who has the authority to modify the loan.

The exhibits and declaration of Ms. Feezer just further highlights the confusion in the Fannie Mae Servicing Guide. Ms. Feezer's declaration appears to suggest that Ocwen is both the servicer of a loan held by Fannie Mae but also the holder of the underlying note which was transferred to it by One West Bank, FSB. However, none of the exhibits provided by the Debtor show any such transfer or a copy of the current Deed of Trust and Note denoting who the actual lender is. The Feezer declaration offers conflicting that via the Servicing Guide it is the holder of the Note but also because it was directly transferred from One West to Ocwen.

The Declaration provided by Gina Feezer raises significant doubts as to whether an entity identified as Ocwen Loan Servicing, LLC actually exists. Ms. Feezer states that she is a "senior loan analysis" who is "employed by Ocwen Financial Corporation," which has an "indirect subsidiary [named] Ocwen Loan Servicing, LLC." Ms. Feezer provides no testimony as to what is this "indirect subsidiary" relationship.

More significantly, while Ms. Feezer provides her legal conclusion that she is "authorized" to provide testimony as to the books and records of the "indirect subsidiary" of the company which employs her. She also fails to

provide any testimony why Ocwen Loan Servicing, LLC has no managing members or employees who can provide accurate, credible, competent testimony concerning the operation of Ocwen Loan Servicing, LLC. Her lack of testimony is pregnant with admissions that Ocwen Loan Servicing, LLC may well not exist as a bona fide, viable, entity.

Further, Ms. Feezer testifies that at best, she has no personal knowledge of any facts concerning Ocwen Loan Servicing, LLC, but is merely stating what she has read from some records which she believes (for an unstated reason) are those of Ocwen Loan Servicing, LLC. She does not provide any information about how such records are maintained, under whose control and supervision the records are made and maintained, or why she has access to any such records. She again merely provides a legal conclusion that as an employee of Ocwen Financial Corporation, the records of an indirect subsidiary (for which she is not an managing member, employee, or representative) are maintained in the ordinary course of business. FN.1

FN.1. Ms. Feezer's testimony would be akin to an employee of Bank of America Corporation testifying about the records of BAC Loans Servicing, LP concerning the loans originated and maintained by Countrywide Loan Servicing, LP. A shareholder of an entity, which has an interest in an entity that has an interest in an entity that has records is not made a competent, credible witness concerning the business, operations, and records of the indirect subsidiary.

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

The Motion makes summary reference to the claim of Owen Loan Servicing, LLC being provided for in Class 4 of the proposed plan. Dckt. 46. The Declaration of William Nissen, one of the Debtors, (Dckt. 48) authenticates the Loan Modification Agreement which is filed as Exhibit A (Dckt. 49) in support of the Motion. The Declaration does not provide evidence that Ocwen Loan Servicing, LLC is a creditor of the Debtors.

The Loan Modification Agreement identifies Ocwen Loan Servicing, LLC as the entity offering the loan modification and does not indicate that it is the actual creditor to enter into a contract to modify the Loan. The Loan Modification Agreement does not state that it is a contract or agreement between Ocwen Loan Servicing, LLC and the Debtors, but only uses the non-specific language, "Ocwen Loan Servicing, LLC ('Ocwen') is offering you this Loan Modification Agreement...."

Interestingly, Ocwen Loan Servicing, LLC is not listed as the party to sign this Loan Modification Agreement. The signature block for the other party to the Loan Modification Agreement provides that it is signed by "Mortgage Electronic Registration Systems, Inc. ["MERS"] – Nominee for Service." This is problematic for several reasons.

First, there is no defined term in the Loan Modification Agreement for

"Servicer" or "Service." From the four corners of this Loan Modification Agreement there is no way to tell for whom MERS is the "Nominee." However, it appears that it is Fannie Mae who nominated MERS. Second, there is not way to tell what rights and powers a "Nominee" would have to alter the terms of the promissory Note for which the Debtors are obligors.

Second, MERS involvement in the consumer residential loan market transactions has been that of a "placeholder" as the "nominee" of the lender who is the actual creditor. In 2011, the Ninth Circuit Court of Appeals addressed this note-deed of trust issue in *Cervantes v. Countrywide Home Loans, Inc. et. al.*, 656 F.3d 1034, (9th Cir. 2011). The creation of MERS by lenders was to facilitate multiple transfers of promissory notes as part of securitized loan portfolio trading is at the root of many of these timing and document of transfer issues. The purpose of creating MERS was to avoid the recording of assignments of deeds of trust while promissory notes were transferred from investment portfolio to investment portfolio. Only when the ultimate buyer would have to foreclose would MERS then stop acting as the "nominee" for the original lender and its assigns. FN.1.

FN.1. For a discussion of MERS, *see Cervantes v. Countrywide Home Loans*, 656 F.3d at 1038-1040.

In this case, Proof of Claim No. 10 was filed for OneWest Bank, FSB. The claim is for $252,871.45 and is asserted to be secured by the Debtors' property at 8609 El Sobrante Way, Orangevale, California. The person filing the proof of claim for OneWest Bank, FSB, is identified as "Ryan M. Davies, Claimant's Counsel." Payments on the claim are to be sent to "OneWest Bank, FSB 00 Cashiering Dept., 6900 Beatrice Drive, Kalamazoo, MI."

The Loan Modification Agreement does not specifically identify the Note that is being modified, but does state that the principal balance is $246,092.03. It appears that this the same debt as the one upon which Proof of Claim No. 10 is based.

The Deed of Trust attached to Proof of Claim No. 10 identifies MERS as the beneficiary under the Deed of Trust, as the "Nominee" for "Lender [Quicken Loans, Inc.] and Lender's successors and assigns." The powers granted MERS under the Deed of Trust are stated to be,

> "Borrower understands and agrees that **MERS holds only legal title to the interests granted by Borrower** in this Security Instrument, but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) **has the right to exercise any or all of those interests [in the Security Instrument]**, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Deed of Trust Attached to Proof of Claim No. 10, page 3 of 15 of Deed of Trust (emphasis added). This is consistent with language in other deeds of trust for which MERS is the nominee, which is carefully circumscribed to be limited only to interests under the deed of trust and not that MERS is granted a power of attorney, an interest in the note secured by the deed of trust, or the ability

to alter or defease the "Lender, successors, or assigns" of its rights and interests in the note secured by the deed of trust.

This grant of authority to the nominee is only with respect to the Security Agreement, the deed of trust. No rights, powers, or authorities are granted to alter the note. It is well established, as discussed in *Cervantes* and applicable state law. See *Adler v. Sargent*, 109 Cal. 42, 49-50 (Cal. 1895) *Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932). While the deed of trust or security interest cannot have an existence separate from the obligation, it is not the obligation (note).

A second modification document is proved as part of Exhibit D which is titled "Modification Due on Transfer Rider." This document is to be signed by the Debtors and Ocwen Loan Servicing, LLC. This document is "deemed to amend and supplement the Loan Modification Agreement...." This additional modification is to add a due on sale clause to the Deed of Trust. For this document, Ocwen Loan Servicing, LLC is given the defined term "Lender" to identify it in the document.

A third modification document is included as part of Exhibit D. This document is titled "1-4 Family Modification Agreement Rider Assignment of Rents and is to be executed by Owen Loan Servicing, LLC and the Debtors. The document does not include Ocwen Loan Servicing, LLC as a party or have it agree to any terms of the modification. It is to be incorporated into the Loan Modification Agreement (which is executed by MERS as "Nominee."

On October 15, 2013, a Transfer of Claim was filed for Proof of Claim No. 10. Dckt. 37. The Transferee is identified as Ocwen Loan Servicing, LLC and the Transferor is identified as OneWest Bank, FSB. The person signing the Transfer document is "Nancy Lee, Esq.," who is identified as the Transferee's Agent. This document directs that payments on the claim are to be sent to Attn: Payment Processing, 3451 Hammond Avenue, Waterloo, IA 50702. No documents, such as an assignment of the Note, assignment of the claim, copy of note endorsed in blank and certification that it is in the possession of the Transferee is attached to the this document.

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

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

interests determined, and the relief they seek issued.

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

However, the legal position Ocwen appears to be taking, based on the representations in Ms. Feezer's declaration is that Ocwen does not even need a power of attorney or any authority because it is the holder of the underlying note.

The Ninth Circuit Court of Appeals recently addressed the requirement for third-parties to correctly identify the creditor, or original creditor, when obtaining payment of consumer debt. *Tourgeman v. Collins Financial Services, Inc.*, et al., 12-56783 (9th Cir. 2014), filed June 25, 2014. In that case the Ninth Circuit panel concluded that the misidentification of the original creditor (notwithstanding correctly identifying the current creditor) stated a cause of action under the Federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 et seq.). As this court has addressed in Landry v. Bank of America, N.A., 493 B.R. 541 (Bankr. E.D. Cal. 2013) and *Luchini v. JPMorgan Chase Bank, N.A.*, 2014 Bankr. LEXIS 2510 (Bankr,. E.D. Cal. 2014), in California all creditors (original, assignees, collectors, third-party servicers) are covered by Rosenthal Fair Debt Collection Practices Act, which incorporates may provisions of the Fair Debt Collection Practices Act. This just highlights the need for creditors, and their servicers, to deal honestly and truthfully with consumer debtors. This include correctly identifying the other party with whom the consumer debtor is contracting (and other party who is actually bound by the contract).

GRANTING OF MOTION

Notwithstanding all of the facial deficiencies, Debtor seeks to have the loan modification approved. The court recognizes that consumers, such as Debtor, are placed in an unequal negotiating position with entities such as Ocwen Financial Corporation and Ocwen Loan Servicing, LLC (which has refused to comply with Rule 2004 subpoenas in other unrelated cases and accurately and truthfully identify the actual creditor) who may fail to provide accurate information. Debtor may well have been told "sign this or lose your home." FN.2.

FN.2. Interestingly, on the court's September 22, 2015 calendar was a motion to hold Ocwen Loan Servicing, LLC in contempt for violating the confirmation order, the terms of the completed Chapter 13 plan and the discharge injunction. As has occurred in other recent cases, no response was made by Ocwen Loan Servicing, LLC to this very serious motion. *In re Robert and Kathleen Ash*, Motion for Contempt (DCN: PLC-1); 09-32061. A lack of response this and other contempt motions is not consistent with the expected conduct of a bona fide entity which actually exists and is engaging in good faith business practices. Other loan servicers, debt collectors, debt buyers, and financial institutions which faced with such motions have quickly responded and addressed the issues.

The court grants the Motion, leaving it to Debtor and Debtor's counsel

to determine if they are satisfied that they are actually modifying the contract with the creditor. They can decide that information provided by an employee of an entity that has some indirect subsidiary is sufficient to base the loan modification.

Though granting this Motion, the court makes it clear that in doing so it is based in large part of the personal testimony of Gina Feezer. The court, Debtor, and bankruptcy estate have justifiably relied upon the statements of fact provided by Ms. Feezer, individually and in her capacity as an employee of Ocwen Financial Corporation and in providing the testimony purportedly for Ocwen Loan Servicing.

In granting this Motion, the court recognizes that it may be that whomever the creditor actually is may not want to do these types of modifications and is trying to goad the court into denying the motion – taking the creditor off the hook. The lesser of two evils is to grant the Motion, expressly basing it on the representations made by Ms. Feezer, Ocwen Financial Corporation by its employee, and Ocwen Loan Servicing, LLC.

Though relying on this testimony, the court shall issue a separate order to appear for (1) senior management of Ocwen Financial Corporation, (2) managing member of Ocwen Loan Servicing, LLC, and (3) Gina Feezer to provide the court with credible, properly authenticated evidence as to the existence of Ocwen Loan Servicing, LLC; why Ocwen Loan Servicing, LLC has no managing member or employee which could provide the declaration; all of Ms. Feezer's conduct by which she has personal knowledge to provide the testimony concerning the books and records of Ocwen Loan Servicing, LLC; and identifying all of the other declarations or other testimony she has provided in state or federal court relating to the books, records, notes, or loans purported to be owned or serviced by Ocwen Loan Servicing, LLC.

The court grants the Motion.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and William and Denise Nissen, the Debtors, are authorized to enter into the Loan Modification described in Exhibit D (Dckt. 121) with whatever entity is the other party to the Note.
>
> The court has granted this Motion expressly relying the testimony of Gina Feezer, personally and as an employee of Ocwen Financial Corporation, Ocwen Financial Corporation, and Ocwen Loan Servicing, LLC.

24. 11-48055-E-13 CURTIS HEIGHER
PLC-7 Peter L. Cianchetta

CONTINUED OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE AND/OR MOTION FOR COMPENSATION BY THE LAW OFFICE OF CIANCHETTA AND ASSOCIATES, DEBTOR'S ATTORNEY
2-9-15 [100]

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

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on February 9, 2015. By the court's calculation, 78 days' notice was provided. 28 days' notice is required.

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

The Parties having failed to document the reported Stipulation, the court shall conduct an evidentiary hearing on the Objection to Notice of Mortgage Payment Change at 9:00 a.m. on xxxxxx, 2015.

Curtis Heigher ("Debtor") filed the instant Objection to Notice of Mortgage Payment Change and Request for Attorney's Fees on February 9, 2015. Dckt. 100.

The Debtor states that the confirmed Chapter 13 plan calls for payments to Wells Fargo Bank, N.A. ("Creditor"), who holds the first deed of trust on the Debtor's residence, of $1,454.00. Creditor's Proof of Claim No. 7 called for ongoing mortgage payments of $1,358.02 through February 15, 2012 and $1,364.99 thereafter. The claim also included arrears of about $9,980.76.

The Creditor filed a Notice of Payment Change on October 13, 2014. The Debtor filed an Objection to the Notice of Mortgage Payment. Dckt. 84. The court sustained the objection and ordered that:

> [t]he stated changes in the required escrow payments in excess of $1,531.67 ($1,117.43 Minimum Payment and $414.24 Escrow Payment) are disallowed. This disallowance is without prejudice to Wells Fargo Bank, N.A., or its successor from providing notice of such future, prospective changes allowed or required under the Note and Deed of Trust upon which Proof of Claim No. 7-1 in this case is based, however, such changes shall not be based on any amounts, asserted defaults, or expenses which predate the date of this order.

December 12, 2014 Order, Dckt. 96.

The Creditor filed a Notice of Mortgage Payment Change on January 9, 2015. The Notice states that the current monthly payment includes a minimum payment of $1,436.69 and states that the escrow payment should be $569.17 total per month ($495.39 plus $73.78 for shortage). The attached escrow analysis to the Notice begins with an actual positive balance of $386.83 in November 2014, with an actual payment in November 2014 into escrow of $402.21. For December 2014, there was an actual payment into escrow of $0.85 and in January 2015 an actual payment into escrow of $3,278.67. In January 2015, the actual balance in escrow was $1,096.23.

The Debtor states in the Objection:

> "[a]n analysis of the required escrow payments from February 2015 through January 2014 require payments of $408.99 (6,004.11 - 1,096.23 = $4,907.88 [/] 12 = $4,08.99)."

Dckt. 100.

The Debtor argues that no explanation is offered as to the increase in the minimum payment for $1,117.34 to $1,436.69. The Debtor argues that the Creditor has not provided the new index the Creditor is using to determine the variable late and the Debtor is unable to calculate the current payment due without it.

The Debtor asserts that the current minimum monthly payment maximum is $1,201.21 and Escrow $408.99 for a total payment of $1,610.22. The Debtor notes that there is a post-petition deficiency caused by the Chapter 13 Trustee under paying the monthly ongoing mortgage payment and is addressing the same with an amended Chapter 13 plan.

ORDER CONTINUING HEARING

On March 31, 2015, the court continued the hearing to 1:30 p.m. on April 28, 2015, pursuant to a stipulation filed by the parties. Dckt. 108.

TRUSTEE'S RESPONSE

The Trustee responds that based on the court's December 12, 2014 Order, the Trustee adjusted the monthly payment to Creditor to $1,531.67 (the $1,117.43 minimum principal and interest payment and a $414.24 escrow payment).

The Trustee further notes that Debtor asserts that there has been a post-petition under payment of Creditor's claim totaling $17,656.01 based on the Trustee having make the $1,117.43 monthly payments since March 2012.

In the Response, Trustee provides the following summary of payments made to Creditor through the Chapter 13 Plan:

a. The confirmed Chapter 13 Plan provides for a monthly payment to Creditor of $1,454.00 (inclusive of taxes and insurance). Dckt. 5.

b. In February 2012, the Trustee adjusted the payment to $1,366.15 based on written correspondence from Creditor. See Exhibit 1, Letter, Dckt. 114, p.5. This correspondence from Creditor states:

i. New Mortgage Payment Effective 02/2012.....$1,366.15

c. In May 2012, the Trustee adjusted the payment to $1,117.43 based on a letter dated March 16. 2012, from Creditor. Exhibit 2, *Id.* at 6. This correspondence states:

i. In accordance with the modification agreement, the interest rate will increase to 4.375% with the payment due on May 15, 2012, "with a monthly payment amount of $1,117.43." *Id.*

ii. If further states, "If Wells Fargo pays the taxes and/or insurance, please refer to the monthly billing statement for the total payment amount with escrow." *Id.*

d. The Trustee states that it was not sent a monthly billing statement by Creditor setting forth any escrow amounts to be paid in addition to the stated amount of $1,117.43.

e. The Trustee did not directly notify the Debtor of the payment change.

f. For November 2014, Creditor sent a notice of mortgage payment change, increasing the monthly payment to $1,859.23, increasing the escrow amount from $402.21 to $422.54. Exhibit 3, *Id.* at 9-14. The notice, *Id.* at p. 13, states that as of November 2014, Creditor computed an escrow under funding of $2,889.84.

[Using the $402.21 "current escrow amount" shown on page 12 of this Exhibit, the under funding represents approximately 7 months of escrow payments.]

g. Debtor objected to the Notice of Mortgage Payment Change, and while the objection was pending the Trustee reduced the payments to the prior $1,117.43 amount. The Trustee notified Debtor's counsel of this adjustment by correspondence dated November 18, 2014. Exhibit 4 (email), *Id.* at 15.

h. Starting with January 2015, the Trustee continued to make the monthly payments of $1,117.43 to Creditor based on the court's December 12, 2014 Order (Dckt. 96). This notice was given in writing to Debtor and Debtor's counsel, which included the court's December 12, 2014 Order. *Id.* at 16-19.

i. The court's December 12, 2014 Order determined that the correct monthly payment for principal, interest, and escrow was $1,531.67 ($1,117.43 principal and interest, and $414.24 for escrow payment) effective with the November 2014 payment and going forward.

j. The Trustee reports that, as of filing the Response, $42,876.58 had been disbursed to Creditor by the Trustee for post-petition mortgage payments. (First disbursement was June 29, 2012). The Trustee has also disbursed $9,980.76 for payment on the pre-petition arrearage on Creditor's claim.

k. The Trustee is uncertain of the Debtor's methodology in computing there being a $17,656.10 escrow shortage.

STIPULATION

On April 24, 2015, the parties filed a stipulation requesting that the hearing be continued to 1:30 p.m. on June 2, 2015 and that the deadline to respond to the Objection be extended to May 19, 2015. Dckt. 116.

The court continued the hearing to 1:30 p.m. on June 2, 2015. The court further ordered that any response to the instant Objection be filed and served on or before May 19, 2015.

TRUSTEE'S SUPPLEMENTAL RESPONSE

The Trustee's Supplemental Response advises the court that no other parties have filed any further pleadings.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on May 19, 2015. The evidence in opposition to the Objection to Notice of Mortgage Payment Change identified by Creditor is Proof of Claim No. 7 it has filed in this case. Creditor has filed 20 pages of Exhibits in opposition to the Objection, but has failed to provide testimony or other basis for some of these documents to be authenticated. Fed. R. Evid. 901, *et seq*.

The salient points advanced by Creditor in this Opposition to Objection to Notice of Mortgage Payment Change are:

A. On October 13, 2014, Creditor issued a Notice of Mortgage Payment Change which reflected a total payment amount of $1,859.23. This Notice was filed with the court.

1. The Certificate of Service for the October 13, 2014 Notice states that is was served on the Debtor, Debtor's counsel, and the Trustee. *Id.* at 9.

B. The court determined that the correct payment amount for the Notice of Mortgage Payment Change beginning in November 2014 was $1,531.67. Order, Dckt. 96.

C. On January 9, 2015, Creditor issued another Notice of Mortgage Payment Change (two months after issuing the October 13, 2014 Notice), increasing the total payment amount to $2,005.86. The monthly escrow payment was increased $422.54 to $569.17 – which by the court's calculation is a 34.7% increase after two months.

1. The Notice does not explain how the escrow amount has increased 34.7%.

D. The January 9, 2015 Notice was filed with the court. Exhibit 3, *Id.* at 11-15. With respect to the Escrow, this Notice states that as of November 2014, there was a positive $386.63 escrow balance. From that starting month, Creditor states,

1. In November 2014 $2,485.46 was advanced for County property taxes. No other escrow advances are shown.

2. An escrow payment in the amount of $3,278.67 was made in January 2015, which resulted in there being a $1,096.23 positive escrow balance.

3. As of May 2015, Creditor projects that there should be an escrow balance of $414.24, assuming that the April 2015 property taxes were paid from escrow. [From this Notice, it does not appear that the taxes have been paid and there remains $1,096.23 in escrow.]

E. On March 15, 2015, Creditor filed yet another Notice of Mortgage payment change with the court. Exhibit 4, *Id.* at 16-20. This Notice states that the payment of principal and interest has increased to $1,866.11 (due to an increase in the interest rate to 6.5% from 5.625%.

1. The amount of the loan, as determined in the Loan Modification Agreement was $306,493.14, as of April 14, 2009. The loan is amortized over 30 years. As a rough approximation (and recognizing that in the first 5 years of the loan most of the payments go to interest) the court estimates that repaying of $281,000.00 (estimate

principal balance), amortized over 26 years of the loan, would be $1,914.96.

2. If the court uses the $414.24 as the correct escrow monthly payment amount as stated by Creditor in January 2015, then the current monthly payment would appear to be approximately $2,330.00.

   a. Creditor computes a higher escrow amount because the property taxes total $5,944.66, which when divided by 12 equals $495.39 a month.

   b. Creditor also identifies $885.32 in escrow payments which have come due since the court's December 2014 order that have to be cured.

JUNE 2, 2015 HEARING

At the hearing, the parties advised the court that this dispute has been resolved that they will have it documented. The resolution may include an attempt by the Trustee to recover disbursements made to creditors holding general unsecured claims. The arrearages to be cured arising from the December 2014 determination of this court of the correct payment amount and arrearage, and not for possible prior arrearage.

Based on the representations of the parties, the court continued the hearing to 3:00 p.m. on August 18, 2015. Dckt. 128.

AUGUST 18, 2015 HEARING

At the hearing, counsel for the Creditor reports that the matter has been resolved by a Stipulation. The execution of the Stipulation had fallen through the cracks. The court continued the hearing to 3:00 p.m. on September 22, 2015.

DISCUSSION

Since the hearing, no supplemental papers have been filed in connection with this Objection nor any other motion.

While resolution of this dispute appears to have eluded the Debtor and Creditor, it appears deceptively simple to the court. The following information is required:

A. The payments made to Creditor since the November 2014 payment change as determined by the court.

B. The accurate amount of expenses to be funded through escrow from November 2014 going forward.

C. The principal balance as of November 1, 2014, the amount of interest accruing since the October 2014 payment, and the application of payments to principal and interest since November 1, 2014.

D. The escrow shortfall since November 1, 2014.

E. Computation of remaining principal balance as of July 1, 2015 through the end of the loan.

F. Computation of the current escrow payment.

G. Computation of a cure for shortfalls, if any, in escrow payments since November 2014.

H. Short term cure of shortfall in escrow payments through the Chapter 13 Plan or by specially authorized payments outside of plan.

The court cannot reconcile Debtor's contention that the principal and interest payments should be $1,201.23 with the estimated principal balance based on principal payments made during the first four years of a thirty year loan and an interest rate of 6.5%. Using the Microsoft Excel loan calculator, a thirty year loan, with 6.5% interest for a $306,000 principal will have monthly payments of will have monthly principal and interest payments of $1,934.

Though the court previously addressed the issues as discussed above, the parties have not been able to reduce any purported settlement to writing and conclude this matter.

Clearly, continuing this Contested Matter will not bring about a resolution, but result in only further delay. Therefore, the court will set the matter for evidentiary hearing.

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

B. On or before ----------, 2015,Curtis Heigher ("Movant") shall file and serve on ---------- ("Respondent") a list of witnesses which Debtor will present as their witnesses for their case in chief (excluding rebuttal witnesses).

C. On or before Wells Fargo Bank, N.A., xxxxxx 2015, Respondent, shall file and serve on the Movant, a list of witnesses which Creditors will present as their witnesses for their case in chief (excluding rebuttal witnesses).

D. Movant, shall lodge with the court and serve their Testimony Statements and Exhibits on or before xxxxxx, 2015.

E. Respondent, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 2015.

F. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 2015.

G. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before —----------, 2015.

H. The Evidentiary Hearing shall be conducted at 9:00 a.m. on ----------, 2015.

25. 15-25460-E-13 DENNIS JACOPETTI
Richard L. Jare

OBJECTION TO CONFIRMATION OF PLAN BY BANK OF NEW YORK MELLON
8-18-15 [41]

Final Ruling: No appearance at the September 22, 2015 hearing is required.

The case having previously been dismissed, 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 having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is dismissed as moot, the case having been dismissed.

26. 15-25460-E-13 DENNIS JACOPETTI **OBJECTION TO CONFIRMATION OF**
DPC-1 Richard L. Jare **PLAN BY DAVID P. CUSICK**
8-26-15 [45]

Final Ruling: No appearance at the September 22, 2015 hearing is required.

The case having previously been dismissed, 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 having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is dismissed as moot, the case having been dismissed.

27. 09-32061-E-13 ROBERT/KATHLEEN ASH MOTION FOR CONTEMPT
PLC-1 Peter L. Cianchetta 8-20-15 [130]

Tentative Ruling: The Motion for Contempt 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, Creditor, parties requesting special notice, and Office of the United States Trustee on August 19, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Contempt is granted, with an evidentiary hearing on the issue of damages to be conducted at xxxxx on xxxxx, 2015.

Robert and Kathleen Ash ("Debtor") filed the instant Motion for Civil Contempt as to Ocwen Loan Servicing LLC on August 20, 2015. Dckt. 130. The Debtor requests to the court to find Ocwen Loan Servicing, LLC ("Creditor") in civil contempt under 11 U.S.C. § 105 and Fed. R. Bankr. P. 3002.1, 9014 and 9020 for violations of the discharge injunction.

The Debtor filed the instant bankruptcy case on June 13, 2009. On April 12, 2010, the Debtor's plan was confirmed. On July 15, 2015, the Chapter 13 Trustee filed a Notice of final Cure Payment. Dckt. 109.

On August 4, 2014, Creditor filed a Response to Notice of Final Cure indicating that the arrears were paid and the next payment dues was for July 1, 2014. Dckt. 112.

The Debtor states that since the final payment made by the Trustee, the Debtor has made all payments to Creditor, as required by the loan, except for

one due to the confusion caused by the demands of Creditor and payments were made, but Creditor has returned them demanding back payments that were cured in the Chapter 13 plan.

The Debtor states that they made a Qualified Written Request and was provided a full accounting was provided on July 13, 2015. Dckt. 133, Exhibit 14. The Debtor alleges that the accounting reveals that post-petition payments were applied to amounts claimed during the cure of the bankruptcy case.

The Debtor argues that attempts to collect payments cured by the Chapter 13 Plan, as found to have been paid in full as of August 4, 2014 based on the Creditor's response to the Trustee's Notice of Final Cure Mortgage Payment are in violation of the discharge.

Debtor asserts that he made all necessary payment to Creditor and any delinquency is based on the return of payments . Dckt. 133, Exhibit 16.

The Debtor alleges is that since the response to the Notice of Final Cure of Mortgage Payment, Creditor has told Debtor that they are more than $15,000.00 in arrears and that they must pay the entire amount. The Debtor further alleges that the Creditor threatened to filed foreclosure on August 20, 2015 and the Debtor has received phone calls to collect the arrears.

The Debtor argues that they have also suffered emotional stress.

Additionally, the Debtor argues that the Creditor violated Fed. R. Bankr. P. 3002.1 because Creditor did not file any notice of post petition fees and, therefore, should not be charging Debtor for Bankruptcy related fees.

The Debtor notes that the breach of the contract between Debtor and Creditor post petition is a matter for the state courts to resolve but the Debtor is seeking resolution as to the alleged violation of the discharge injunction and violation of Fed. R. Bankr. P. 3002.1 for the res judicata effect it may have on state court.

The Debtor is requesting that:

1. Creditor be found in civil contempt for violating the "automatic stay" and Rule 3002.1 and sanctioned

2. A further hearing to determine emotional damages

3. Pay the Debtor's reasonable attorneys' fees

APPLICABLE LAW

Civil Contempt

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposes under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

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

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

Federal Rule of Bankruptcy Procedure 3002.1

Pursuant to Fed. R. Bankr. P. 3002.1(c), a creditor holding a claim must do the following:

> (c) Notice of fees, expenses, and charges
>
> The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

Furthermore, if the holder of a claim fails to properly notice, the Rule provides the following:

> (I) Failure to notify
>
> If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
>
> > (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

> (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

VIOLATION OF ORDER CONFIRMING PLAN

As Debtor addresses in the Points and Authorities, 11 U.S.C. § 524(I) provides that the failure of a creditor to properly apply payments received through a bankruptcy plan shall also constitution a violation of the discharge injunction. Such a violation is addressed by holding the violating party in contempt, subjecting the violator to civil sanctions. *Espinosa v. United Student Aid Funds,* 553 F.3d 1193, 1205 (9th Cir. 2008); affrm. 440 U.S. 260 (2010). The Ninth Circuit cases addressing the bankruptcy court imposing the civil sanctions for violating the discharge injunction include: *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 10-52 (9th Cir. 2009); *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, (9th Cir. 2002). In *ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.)*, 450 F.3d 996, 1007 (9th Cir. 2006), the Ninth Circuit Court of Appeals states,

> "Section 524 of the bankruptcy code provides that discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any [discharged] debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A party who knowingly violates the discharge injunction can be held in contempt under section 105(a) of the bankruptcy code. See *In re Bennett*, 298 F.3d at 1069; *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002) (holding that civil contempt is an appropriate remedy for a willful violation of section 524's discharge injunction). In Bennett, we noted that the party seeking contempt sanctions has the burden of proving, by clear and convincing evidence, that the sanctions are justified. We cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Bennett*, 298 F.3d at 1069 (citing Hardy v. United States *(In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

As the Ninth Circuit Court of Appeals noted in Footnote 11 in *ZiLog*, "Of course, where the facts are not in dispute, no hearing need be held. See, e.g., Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191-92 (9th Cir.2003) (contempt sanctions upheld where creditor admitted having notice of the automatic bankruptcy stay, yet took no steps to remedy his violation of the stay)." *Id.* at 1008, FN.11.

DISCUSSION

The Motion was filed pursuant to Local Bankruptcy Rule 9014-1(f)(1) which provided at least twenty-eight days notice of this hearing, and for which any responding party is required to file written opposition and evidence at least fourteen days before the hearing. No Opposition was filed by Ocwen Loan Servicing, LLC. As stated above, the default of Ocwen Loan Servicing, LLC is

entered.

Here, Debtor has presented evidence that (1) Ocwen Loan Servicing, LLC knew of the bankruptcy case; (2) Ocwen Loan Servicing, LLC knew that its arrearage was provided for in the Chapter 13 Plan; (3) knew that the pre-petition arrearage was paid in full through the Chapter 13 Plan; (4) Ocwen Loan Servicing, LLC received notice that all of the arrearage had been cured through the Chapter 13 Plan payments; (5) Ocwen Loan Servicing, LLC confirmed in writing that all of the pre-petition arrearage had been cured (Dckt. 112, August 4, 2014); (6) Ocwen Loan Servicing, LLC has subsequently refused to accept current payments, demanding that double payments be made for the arrearage which was cured through the Chapter 13 Plan or the payments which were made through the Chapter 13 Plan; (7) Ocwen Loan Servicing, LLC has demanded payment of fees and charges incurred in connection with the bankruptcy case without complying with Federal Rule of Bankruptcy Procedure 3002.1; and (8) has knowingly misapplied post-petition payments to the pre-petition arrearage which was cured through the Chapter 13 Plan payments.

These actions were intentionally taken by Ocwen Loan Servicing, LLC and diverted the payments made by the Debtor to create the false appearance of a default. These actions were intentionally undertaken by Ocwen Loan Servicing, LLC to incorrectly and falsely assert that Debtor was in default under the loan. These actions were intentionally taken with full knowledge that the arrearage had been cured, Debtor had obtained a discharge, and that such conduct (as a matter of federal law) was a violation of the confirmed plan and discharge injunction.

The evidence further shows that Ocwen Loan Servicing, LLC demanded payments of money which it was not due, and which were not then owed, by Debtor under the Note and Deed of Trust which secured the Note upon which the claim in the bankruptcy case is based.

Further, Ocwen Loan Servicing, LLC has violated the provisions of Federal Rule of Bankruptcy Procedure 3002.1 and has improperly, intentionally made demands for the payment by Debtor of costs and expenses purportedly relating to the bankruptcy case without complying with the notice requirements of Rule 3002.1(c), which requires informing the Debtor of post-petition costs and expenses.

The court finding that Ocwen Loan Servicing, LLC has engaged in conduct for which contempt is a proper remedy for violation of the confirmed Chapter 13 Plan, confirmation order, and discharge in this case; failed to comply with the requirements of Federal Rule of Bankruptcy Procedure 3002.1(c); and had demanded payments of monies not due and owing at the time of demand under the terms of the Note and Deed of Trust from Debtor, the court sets this matter for an evidentiary hearing on the civil compensatory and corrective sanctions which should be properly ordered by the court.

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

B. On or before xxxxxxxxxx, 2015, Robert and Kathleen Ash, Debtors, shall file supplemental pleadings and evidence in

support of the amount of compensatory and corrective sanctions and damages to be awarded, and legal points and authorities for the correct determination of the damages and sanctions, and the contractual or statutory basis for any of the damages requested (including attorneys' fees).

C. On or before xxxxxxxxx, 2015, Ocwen Loan Servicing, LLC shall filed and serve any responsive pleadings to the Debtor's supplemental pleadings and evidence, to the extent that a party for whom a default has been entered, may respond as permitted by Federal Rule of Civil Procedure 55, and Federal Rules of Bankruptcy Procedure 7055 and 9014 at a post-default hearing to address the amount of damages to be awarded the prevailing party. SEE MOORE'S FEDERAL PRACTICE - CIVIL, VOL. 10 § 55.32.

D. On or before xxxxxxxxxx, 2015, Robert and Kathleen Ash shall file and serve Replies, if any, to Responses filed by Ocwen Loan Servicing, LLC.

E. Evidentiary Objections shall be lodged with the court and served on or before ----------, 2015.

F. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before ----------, 2015.

G. The Evidentiary Hearing shall be conducted at -------.m. on ----------, 2015.

28. 15-24065-E-13 MAURICE CARR **MOTION TO CONFIRM PLAN**
Pro Se **8-10-15 [38]**

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 (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 10, 2015. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

Maurice Taran Carr ("Debtor") filed a *pro se* petition and proposed Plan on May 19, 2015. Dckt. 1, 7. David Cusick, as Chapter 13 Trustee, filed an objection to Confirmation of the May 19, 2015 Plan on June 23, 2015. Dckt. 16. Debtor filed a First Amended Plan on July 6, 2015, representing a de facto withdrawal of the May 19, 2015 original Plan. Dckt. 26. Subsequently, this court sustained Trustee's objection and denied confirmation of the July 6, 2015 First Amended Plan. Dckt. 32. Debtor filed a Second Amended Plan and accompanying Motion to Confirm on August 10, 2015. Dckt. 40.

TRUSTEE'S OPPOSITION

Trustee filed opposition to the Second Amended Plan on September 8, 2015. Dckt. 44. Trustee opposes confirmation on the following grounds:

1. Debtor has not provided a tax transcript or copy of the Federal Income Tax Return for the most recent pre-petition tax year;

Trustee asserts the same objection was made in Trustee's June 23, 2015 objection to the First Amended Plan.

2. Trustee asserts Debtor is $199.00 delinquent in plan payments under the May 19, 2015 Plan.

3. Insufficient service was provided to the County of Sacramento, who is listed as a creditor in Debtor's August 10, 2015 Second Amended Plan, Debtor's master Address List, and Debtor's Schedule E. Dckt. 1, 3, 40.

4. Trustee asserts Debtor may not be able to make plan payments because Debtor's Schedule I and J show an income of $55.00, while the plan proposes payments of $90.00 per month. Dckt. 42.

5. Trustee asserts Debtor has placed County of Sacramento and Southgate Mobile Estates as Class 1 creditors, when they should be Class 2 under the August 10, 2015 Second Amended Plan.

DISCUSSION

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

Trustee's objections are well-taken.

First, the Debtor failed to timely provide the Trustee with tax returns or written statement that no such documentation exists. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). This document is required 7 days before the date set for the first meeting, 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting the tax returns or proof that filing is not required, the court and the Trustee are unable to determine if the plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The basis for Trustee's second objection is that the Debtor is $199.00 delinquent in plan payments, which represents multiple months of the $90.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each month beginning the month after the order for relief under Chapter 13. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

Trustee's third objection notes Debtor's failure to provide service to a listed creditor, County of Sacramento. Fed. R. Bankr, P. 7005 and 9013(a) require service on all parties to a motion. County of Sacramento was listed by Debtor as a Creditor with a Class 2 secured claim, and thus must be served. Dckt. 1, 3, 40. Thus, Debtor has not complied with the other applicable provisions of Title 11. 11 U.S.C. 1325(a)(1).

Trustee's fourth objection asserts that the Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Specifically, Debtor has listed $55.00 as monthly income, but plans to make plan payments of $90.00 per month. Schedules I and J, Dckt. 40, 42. Without an accurate picture of the Debtor's financial reality, the court cannot

determine whether the plan is confirmable. Therefore, the objection is sustained.

Finally, Trustee's fifth objection is essentially to Debtor's failure to provide for the arrearages of County of Sacramento and Southgate Mobile Estates. While a review of the court's docket shows neither creditor has filed a proof of claim, the August 10, 2015 Second Amended Plan does list both creditors under Class 1, yet does not propose to cure either arrearage. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). The August 10, 2015 Second Amended Plan fails to provide for the full payment of arrearages, so the plan cannot be confirmed.

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.

29. 12-40367-E-13 ADRIANA ECHANDIA **MOTION TO APPROVE LOAN**
EGS-1 Candace Y. Brooks **MODIFICATION**
8-21-15 [46]

Final Ruling: No appearance at the September 22, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 21, 2015. By the court's calculation, 32 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 Bayview Loan Servicing, LLC, servicing agent for the Bank of New York Mellon fka the Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trustee 2005-14, Mortgage Pass Through Certificates, Series 2005-14 ("Creditor") seeks court approval for Adriana Echandia ("Debtor") to incur post-petition credit. FN.1. Creditor, whose claim the plan provides for in Class 4, has agreed to a loan modification. The modification will provide the following:

1. New principal balance of $349,754.85 which includes all amounts and arrearages past due (excluding unpaid late charges) less any amounts paid to the servicer but not previously credited to Debtor's loan.

2. The new mortgage payment will be $2,198.84 at 2.00% interest, commencing on June 1, 2015, and continuing thereafter for six years at which time the payment will increase to $1,783.35 with an adjusted escrow and interest rate that shall increase to 3.00%. From year 7 through 20, the payment will be $1,899.72 with an adjusted escrow and increased interest rate at 3.875%.

There will be a balloon payment of $43,803.18 due on March 1, 2035.

FN.1. The Creditor provides evidence that it has the authority to enter into loan modifications through a limited power of attorney. Dckt. 49, Exhibit D.

The Debtor filed a “joinder” on August 21, 2015, which seems to be a stand alone motion to approve the same modification.

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

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on September 8, 2015.

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 Bayview Loan Servicing, LLC, servicing agent for the Bank of New York Mellon fka the Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trustee 2005-14, Mortgage Pass Through Certificates, Series 2005-14 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 Adriana Echandia ("Debtor") to amend the terms of the loan with Bayview Loan Servicing, LLC, servicing agent for the Bank of New York Mellon fka the Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trustee 2005-14, Mortgage Pass Through Certificates, Series 2005-14, which is secured by the real property commonly known as 299 Ainger Circle, Sacramento, California, on such terms as stated in the Modification Agreement filed as Exhibit E in support of the Motion, Dckt. 49.

30. 15-24584-E-13 ALEKSANDR TYSHKEVICH
Pro Se

MOTION TO CONFIRM PLAN
7-9-15 [27]

Final Ruling: No appearance at the September 22, 2015 hearing is required.

The case having previously been dismissed, 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 having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

31. 11-22287-E-13 LAWRENCE MORGAN — CONTINUED MOTION FOR CONTEMPT
PLC-8 Peter L. Cianchetta — 4-6-15 [143]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors on April 6, 2015. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion for Contempt is dismissed without prejudice for lack of prosecution as stipulated by the parties.

Lawrence Killpack Morgan, Jr. ("Debtor") filed the instant Motion to Show Cause for Contempt Against Specialized Loan Servicing LLC and Etrade Bank for Violation of the Discharge Injunction Pursuant to 11 U.S.C. § 542(a)(2) on April 6, 2015. Dckt. 143.

The hearing on the instant Motion has been continued four times since its filing in order to offer the parties the opportunity to settle the underlying issues. Dckt. 151, 153, 155, and 161,

On September 9, 2015, Specialized Loan Servicing, LLC filed a status

report. Dckt. 164. The Status Report states that the parties have met and conferred and are settling the claims raised in the Motion. The Report states that the parties are in the process of finalizing a settlement agreement memorializing their resolution of the Motion and anticipate the matter will be dismissed within the next few weeks.

There are some serious concerns that the court has with respect to the present proceedings and the prosecution, or lack of prosecution of this Motion. Etrade Bank has failed to appear in response to the Motion. Only Specialized Loan Servicing, LLC has appeared.

Second, this Motion, raising the very serious issue that Etrade Bank and Specialized Loan Servicing, LLC have violated the discharge injunction. If Debtor is so aggrieved, the court would expect this Motion, or any settlement thereof, to be diligently prosecuted. This Motion was filed on April 6, 2015. Now, 168 days later, the Motion is not being prosecuted and no settlement has been presented to the court.

Conversely, for Specialized Loan Servicing, LLC and Etrade Bank, if facing a Motion which raised a serious issue of whether the discharge injunction was violated, a settlement would be promptly implemented. If Specialized Loan Servicing, LLC believed that there was no such violation, a defense would be diligently prosecuted.

For all parties, the Contested Matter would not languish for 168 days with vague statements that the matter had been settled, without there being any settlement presented to the court.

On August 11, 2015, Debtor and Specialized Loan Servicing, LLC (Etrade Bank not appearing in this Contested Matter) made, subject to the certifications and warranties of Federal Rule of Bankruptcy Procedure 9011, the following representations to the court:

> "1. The parties request that the hearing on the Motion be continued for a final period of approximately 30 days to allow the parties to finalize a settlement agreement pursuant to discussions between the Parties.
>
> 2. The parties, having reviewed the Judge's self-calendar as of August 4,2015, hereby agree to have the Motion continued to September 22, 2015 at 3:00 p.m. The Motion will be heard before the Honorable Ronald H. Sargis in Courtroom 33, Dept. E, at the United States Bankruptcy Court located at 501 I Street Sacramento, CA, 95814.
>
> 3. The Stipulation and its Order approving shall in itself serve as proper notice of the continued hearing set forth above.
>
> 4. Respondent's opposition to the Motion shall be filed and served on or before September 8, 2015.
>
> 5. Debtor's reply to any opposition shall be filed and served on or before September 15,2015."

Stipulation, Dckt. 157. The above Stipulation is signed by both the Debtor and Specialized Loan Servicing, LLC. The court entered its order in reliance on the statements, representations, certifications, and warranties by the parties in the Stipulation.

No opposition has been filed by the required September 8, 2015 date. No Stipulation resolving this Motion has been filed.

The Debtor and Specialized Loan Servicing, LLC are not diligently prosecuting this Contested Matter. After 168 days and the Debtor and Specialized Loan Servicing, LLC setting the standard for the "final continuance," they merely request that this matter be further continued. Further, Etrade Bank is missing from this Contested Matter, choosing not to appear and defend itself from the affirmative claims asserted against it.

The Parties having failed to comply with the deadlines set in the prior stipulation, the Motion is dismissed without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Contempt 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 dismissed without prejudice.

32. 13-24993-E-13 DENNIS/SANDRA CUVA
DPC-3 Peter G. Macaluso

OBJECTION TO CLAIM OF DAVID CHRISTENSON AND CLAIRE CHRISTENSON, CLAIM NUMBER 8
7-27-15 [137]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on July 27, 2015. By the court's calculation, 57 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Amended Proof of Claim Number 8-1 is sustained.

David Cusick, the Chapter 13 Trustee, filed the instant Objection to Claim of David and Claire Christenson ("Creditor"), Proof of Claim No. 8-1 ("Claim"), Official Registry of Claims in this case.

The Trustee objects to the amended claim filed on June 17, 2015, in the amount of $4,370.44. Specifically, the Trustee objects to the claim as: (1) the amount of the amended claim is improper and (2) the Trustee is uncertain the Debtor has the authority to amend a proof of claim under Fed. R. Bankr. P. 4003 or withdraw a proof of claim under Fed. R. Bankr. P. 3006.

The Trustee states that, after a Motion to Value, the Debtor's attorney filed a Proof of Claim 8-1 on February 19, 2014 on behalf of the Creditor as $145,000.00 unsecured. The Debtor's attorney filed an amended Proof of Claim No. 8-1 on June 17, 2015 reducing the claim from $145,000.00 to $4,370.44, which is the exact amount the Trustee paid to Creditor.

The Trustee filed a Motion to Dismiss on May 21, 2015 stating that, due to the confirmed plan at the time, unsecured creditors were to be paid 100% of their claim, which would have resulted in the plan term extending beyond 60 months. In response, the Debtor's attorney filed an amended Proof of Claim 8-1 in the amount of $4,370.44, which is the exact amount the Trustee disbursed to the Creditor through June 30, 2015.

The Debtor filed a second modified plan on June 18, 2015 which included the Creditor's claim in Class 2C of the plan in the amount of $4,370.44 to be reduced to $0.00 based on the value of the collateral.

The Trustee argues that the Debtor has failed to provide any reason for amending the claim. The Trustee asserts that it appears that the Debtor has the impression that the claim was discharged in the Debtor's prior Chapter 7 case and that the creditor is not entitled to an allowed unsecured claim. The Trustee asserts that this is contrary to case law. *See In re Gounder*, 266 B.R. 879 (Bankr. E.D. Cal. 2001). The Trustee argues that since the Debtor has received a Chapter 7 discharge, and the current Chapter 13 case having been filed within four years of the filing of the prior Chapter 7, the Debtor is not entitled to a discharge in this case. The Debtor's personal liability for the debt was extinguished in the Chapter 7, however, there remains the in rem debt or obligation attached to the estate. The Trustee argues that the Creditor is entitled to an unsecured claim, and that the amount should be the full amount of $145,000.00

Furthermore, the Trustee objects stating that pursuant to Fed. R. Bankr. P. 3004 and 3006, the Debtor may not have had the authority to amend the Proof of Claim No. 8-1 without court approval.

DEBTOR'S OPPOSITION

The Debtor filed an opposition to the instant Objection on September 8, 2015. Dckt. 149. The Debtor requests that the matter be continued two weeks or a briefing schedule. The Debtor's counsel requests the continuance "[d]ue to the recent substitution of cases from Mr. Hughes' office and a Trial that started this week, [Debtor's counsel] have [sic] been unable to properly research the Trustee's points and request additional time."

APPLICABLE LAW

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

2006).

Fed. R. Bankr. P. 3004 provides an alternative for when a creditor does not timely file a proof of claim. Specifically, the Rule states:

> If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.

Furthermore, Fed. R. Bankr. P. 3006 contemplates the withdrawal of a proof claim, providing the following:

> A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.

DISCUSSION

Background

In this case, Debtor filed on February 14, 2014, a proof of claim for Creditor. Proof of Claim No. 8. The Claim is secured by a lien consisting of second deed of trust secured by real property commonly known as 11865 Trish Court, Nevada City, California. This claim is filed in the amount of $145,000 as an unsecured claim, no dollar amount is listed for the secured claim. The Proof of Claim is signed by counsel for Debtor under penalty of perjury. The Proof of Claim also states that the amount of pre-petition arrearage is $145,000. Though the proof of claim states that the claim is secured by the Trish Court property, no dollar amount is shown for the value of the property. A copy of the deed of trust is attached to this Proof of Claim.

On February 19, 2014, Debtor filed the First Amended Proof of Claim No. 8. This is signed under penalty of perjury by Debtor’s counsel. On this First Amended Proof of Claim Debtor now states that there is no arrearage when the claim was filed.

On June 17, 2015, Debtor filed a Second Amended Proof of Claim No. 9. On this Second Amended Proof of Claim signed under penalty of perjury by Debtor’s counsel, it is asserted that Creditor has a general unsecured claim in the amount of $4,370.44. The “basis for claim” is stated to be “third deed

of trust" on the Trish Court property. No explanation is provided for how this claim has morphed from a secured claim for an unsecured amount of $145,000 with a $145,000 arrearage; to a $145,000 claim with no arrearage; to a $4,370.44 unsecured claim.

Debtor has filed two prior bankruptcy cases, in each represented by their current counsel. The First Prior Case was a Chapter 13 case filed on January 1, 2011. Bankr. E.D. Cal. 11-20431. That case was dismissed on July 14, 2011. That case was dismissed for several grounds, including Debtor not be eligible for relief under Chapter 13, failure to provide documents, and defaulting in the plan payments. *Id.*; Motion to Dismiss, Dckt. 61; and Order to Dismiss, Dckt. 74.

Instant Case and Proposed Plan

Debtor then filed a second Chapter 13 case on August 1, 2011. Bankr. E.D. Cal. 11-38896. After the court issued a conditional order to dismiss the second bankruptcy case after Debtor was unable to confirm a plan, Debtor elected to convert the second bankruptcy case to one under Chapter 7 on June 21, 2012. *Id.*, Dckt. 113. Debtor received a discharge in the second case, with the discharge entered on October 9, 2012.

The Second Modified Chapter 13 Plan filed by Debtor which has been confirmed was filed due to Debtor's prior confirmed plan being in default because it under funded the claims as filed. Motion to Dismiss, Dckt. 115. The Second Modified Plan does not propose to cure the arrearage due on the Wells Fargo Bank, N.A. claim secured by the Trish Court property, but only make adequate protection payments while Debtor proceeds in good faith to try and obtain a loan modification. The Additional Provisions for this treatment appear to be standard "Enzminger Additional Provisions" commonly used by consumer attorneys in this court. The court notes that these "adequate protection" payments have been provided for since Debtor commenced this case in April 2013. This indicates that in the twenty-nine months since this case was filed, Debtor has not been able to obtain a loan modification (and the creditor has not sought to enforce its rights to foreclose on the property).

In Class 2 of the Second Modified Plan Debtor lists Creditor has having a judgment lien secured claim, which is to be valued at $0.00. It further states the amount "claimed by creditor" to be $4,370.44. This appears to be a misstatement, as the $4,370.44 is the amount stated by Debtor for Creditor. Further, stating that it is a judgement lien is inconsistent with the proofs of claim filed by Debtor under penalty of perjury stating that the lien was pursuant to a deed of trust (with a copy of the deed of trust attached to Proof of Claim No. 8 filed on February 14, 2013).

Effect of 11 U.S.C. § 506(a) Valuation and Classification of Claim

The Trustee's Objection raises the issue of whether a debtor may amend a proof of claim which it filed for a creditor. There is a more fundamental issue in this case. The Debtor has stated under penalty of perjury that Creditor has a deed of trust securing the claim. Thus, this is a secured claim. On May 21, 2013, Debtor filed a Motion to Value the Secured Claim of Creditor. Dckt. 15. On June 18, 2013, the court filed its order valuing the secured claim of Creditor at $0.00. Dckt. 35. That order was not appealed and is final.

The Chapter 13 plans in this District expressly provide that with respect to the amount of a secured claim to be provided for in a plan,

> 2.04. The proof of claim, not this plan or the schedules, shall determine the amount and classification of a claim unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of the claim.

Chapter 13 Plan Section 2, ¶ 2.04; Dckt. 125. The amount of the secured claim in this case for Creditor is $0.00.

When a creditor has a lien and the court determines the portion of the secured claim which is secured pursuant to 11 U.S.C. § 506(a) and what portion is unsecured, that ruling controls - not the repeated filings of proofs of claim by the creditor or debtor. When a creditor has a secured claim, which is this case was acknowledged under penalty of perjury by Debtor to be $145,000.00, and the court then bifurcates it pursuant to 11 U.S.C. § 506(a), then the portion of the debt which exceeds the amount of collateral is an unsecured claim (even if it were a non-recourse debt). Rather than paying the full amount as a secured claim, Debtor is electing by bifurcating the claim pursuant to 11 U.S.C. § 506(a) to have a portion of it provided for as a general unsecured claim in the bankruptcy plan. This is a substantial benefit to a debtor, and something that a debtor voluntarily elects to do.

The plain language of 11 U.S.C. § 506 clearly provides for this result. First, only an "allowed claim of a creditor secured by a lien on property in which the estate has an interest" is subject to valuation under that section. 11 U.S.C. § 506(a), as relevant to the secured claim at issue.

Next, the court determines that the portion of the allowed secured claim for which there is value in the collateral is a secured claim, 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 [secured] claim." It is by operation of law that Congress has provided for a creditor with an otherwise non-recourse secured claim to have an unsecured claim which must be provided for (even if a 0.00% dividend) in the bankruptcy plan. *See In re Gounder*, 266 B.R. 879, 881 (Bankr. E.D. Cal. 2001) *aff'd sub nom. Gounder v. Real Time Solutions, Inc.*, No. CIV.A. S-01-1707-WBS, 2001 WL 1688479 (E.D. Cal. Dec. 19, 2001) ("The debtor cannot object to the unsecured claim on the ground that the debt was a nonrecourse debt. While the creditor may have had no recourse against the debtor, section 506(a) gives the creditor recourse against the estate. This is the price of separating the claim from its security.")

Here, Debtor's efforts (by having Debtor's counsel file multiple proofs of claim under penalty of perjury stating different claim values than that presented to the court when the claim was bifurcated) to overrule, vacate, modify, or ignore the consequences of electing to value an allowed secured claim pursuant to 11 U.S.C. § 506(a) are without merit.

There appears to be no bona fide, good faith dispute that the amount of the secured claim was $145,000.00. See Declaration of Debtor stating under penalty of perjury that secured claim is $41,000.00, Dckt. 17; Original Chapter 13 Plan (subject to Fed. R. Bankr. P. 9011) stating that Creditor has

a Class 2 secured claim in the amount of $145,000.00, Dckt. 5; Motion to Value (subject to Fed. R. Bankr. P. 9011) stating that Creditor had a $145,000.00 claim secured by a second deed of trust, Dckt. 15; First Amended Chapter 13 Plan (subject to Fed. R. Bankr. P. 9011) stating that Creditor has a Class 2 secured claim in the amount of $145,000.00 Dckt. 51; First Modified Chapter 13 Plan (subject to Fed. R. Bankr. P. 9011) stating that Creditor has a Class 2 secured claim in the amount of $145,000.00, Dckt. 80; and Schedule D stating under penalty of perjury that Creditor has a secured claim in the amount of $145,000.00, Dckt. 1 at 23.

The court sustains the Trustee's Objection to Amended Proof of Claim No. 9-3 filed on June 17, 2015. FN.1.

FN.1. The only response from Debtor is to request a two week continuance due to counsel having taken on such a substantial amount of new Chapter 13 work from the law offices of C. Anthony Hughes, counsel for Debtor has been unable to research the Chapter 13 Trustee's points. The court denies the request for a continuance for several reasons. First, the court has already entered an order bifurcating the allowed secured claim of $145,000 as set forth in the original proof of claim. There is no serious dispute, based upon the multiple statements by and for Debtor under penalty of perjury and subject to Rule 9011 that the allowed secured claim is $145,000, that when the court bifurcated the claim the unsecured portion of the allowed claim was $145,000.

Second, counsel is making this request for a continuance due to a crushing case load in a number of cases. As this court has addressed with counsel, events are demonstrating that his desire to take over more than 800 active Chapter 13 cases from Mr. Hughes exceeds the ability of counsel's office. Of the 186 orders lodged with just Department E of this court to substitute in Mr. Macaluso for Mr. Hughes, for which no client consents were provided, in only 22 of the cases has a client consent been provided. Over 86% of those consumer debtors do not have a substitution of counsel authorized by the court.

While Debtor's counsel may desire to "capture all the business" from Mr. Hughes' decision to get out of the Chapter 13 business, that does not mean that counsel can take all that business. While the court encourages consumer debtors to find knowledgeable, experienced, thoughtful, concerned attorneys such as Debtor's counsel in this case, that does not mean that the court believes that Debtor's counsel is the only attorney who could take on a portion of the more than 800 active cases.

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

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

IT IS ORDERED that the objection to Amended Proof of Claim Number 8-1 filed on June 17, 2015, is sustained. The court sustaining the Objection to the Amended Proof of Claim is without prejudice to the rights arising from the court's prior order of this court (Dckt. 34) determining that the secured portion of the claim of Dave Christenson is $0.00 and the balance of the allowed secured claim is a general unsecured claim to be provided for through any plan in this bankruptcy case.

33. 13-24993-E-13 DENNIS/SANDRA CUVA — **OBJECTION TO CLAIM OF ELROY**
DPC-4 Peter G. Macaluso — **BRAATZ AND MARY BRAATZ, CLAIM NUMBER 9**
7-27-15 [142]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on July 27, 2015. By the court's calculation, 57 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Amended Proof of Claim Number 9-3 is sustained.

David Cusick, the Chapter 13 Trustee, filed the instant Objection to Claim of Elroy and Mary Braatz ("Creditor"), Proof of Claim No. 9-3 ("Claim"), Official Registry of Claims in this case.

The Trustee states that, after a Motion to Value, the Debtor's attorney filed a Proof of Claim 9-1 on February 19, 2014 on behalf of the Creditor as $41,000.00 unsecured. The Debtor's attorney also filed Claim 9-1 on July 17, 2015 amending the claim filed February 19, 2014 to $1.00 secured. The Debtor's attorney filed an amended Proof of Claim No. 9-2 on June 17, 2015 reducing the claim from $41,000.00 to $1,235.78, which is the exact amount the Trustee paid to Creditor.

The Trustee filed a Motion to Dismiss on May 21, 2015 stating that, due to the confirmed plan at the time, unsecured creditors were to be paid 100% of their claim, which would have resulted in the plan term extending beyond 60 months.

The Debtor filed a second modified plan on June 18, 2015 which included the Creditor's claim in Class 2C of the plan in the amount of $1,235.78 to be reduced to $0.00 based on the value of the collateral.

The Trustee argues that the Debtor has failed to provide any reason for amending the claim. The Trustee asserts that it appears that the Debtor has the impression that the claim was discharged in the Debtor's prior Chapter 7 case and that the creditor is not entitled to an allowed unsecured claim. The Trustee asserts that this is contrary to case law. *See In re Gounder*, 266 B.R. 879 (2001). The Trustee argues that since the Debtor has received a Chapter 7 discharge, and the current Chapter 13 case having been filed within four years of the filing of the prior Chapter 7, the Debtor is not entitled to a discharge in this case. The Debtor's personal liability for the debt was extinguished in the Chapter 7, however, their remains the in rem debt or obligation attached to the estate. The Trustee argues that the Creditor is entitled to an unsecured claim, and that the amount should be the full amount of $145,000.00

Furthermore, the Trustee objects stating that pursuant to Fed. R. Bankr. P. 3004 and 3006, the Debtor may not have had the authority to amend the Proof of Claim No. 8-1 without court approval.

DEBTOR'S OPPOSITION

The Debtor filed an opposition to the instant Objection on September 8, 2015. Dckt. 151. The Debtor requests that the matter be continued two weeks or a briefing schedule. The Debtor's counsel requests the continuance "[d]ue to the recent substitution of cases from Mr. Hughes's office and a Trial that started this week, [Debtor's counsel] have been unable to properly research the Trustee's points and request additional time."

MARY BRAATZ'S RESPONSE

Mary Braatz filed a response on September 8, 2015. Dckt. 153. Ms. Braatz states that she will be at the hearing and will be give any needed statement.

APPLICABLE LAW

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

Fed. R. Bankr. P. 3004 provides for the alternative of when a creditor does not timely file a proof of claim. Specifically, the Rule states:

> If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.

Furthermore, Fed. R. Bankr. P. 3006 contemplates the withdrawal of a proof claim, providing the following:

> A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.

DISCUSSION

Background

In this case, Debtor filed on February 14, 2014, a proof of claim for Creditor. Proof of Claim No. 9. The Claim is secured by a lien consisting of third deed of trust secured by real property commonly known as 11865 Trish Court, Nevada City, California. This claim is filed in the amount of $41,000 as an unsecured claim, no dollar amount is listed for the secured claim. The

Proof of Claim is signed by counsel for Debtor under penalty of perjury. The Proof of Claim also states that the amount of pre-petition arrearage is $41,000. Though the proof of claim states that the claim is secured by the Trish Court property, no dollar amount is shown for the value of the property.

On February 19, 2014, Debtor filed the First Amended Proof of Claim No. 9. This is signed under penalty of perjury by Debtor's counsel. On this First Amended Proof of Claim Debtor now states that there is no arrearage when the claim was filed.

On June 17, 2015, Debtor filed a Second Amended Proof of Claim No. 9. In this proof of claim Debtor's counsel states under penalty of perjury that the claim is a secured claim in the amount of $1.00. Again, no value is listed for the property which secures the claim. No amount for an unsecured claim is listed, and no basis is stated for $40,999 of the previously stated (under penalty of perjury) unsecured claim has evaporated.

Subsequent on June 17, 2015, Debtor filed a Third Amended Proof of Claim No. 9. On this Third Amended Proof of Claim signed under penalty of perjury by Debtor's counsel, it is asserted that Creditor has a general unsecured claim in the amount of $1,235.78. The "basis for claim" is stated to be "third deed of trust" on an unidentified property. No explanation is provided for how this claim has morphed from a secured claim for an unsecured amount of $41,000 with a $41,000 arrearage; to a $41,000 claim with no arrearage; to a $1.00 secured claim; and then to a $1,235.78 unsecured claim.

Later on June 17, 2015, Debtor filed yet another claim for this Creditor. The Fourth Amended Proof of Claim, signed by Debtor's counsel under penalty of perjury, states that it is an unsecured claim in the amount of $1,235.78. Further, the basis of the claim continues to be a "third deed of trust," but this amended claim references the Trish Court property as the collateral.

Debtor has filed two prior bankruptcy cases, in each represented by their current counsel. The First Prior Case was a Chapter 13 case filed on January 1, 2011. Bankr. E.D. Cal. 11-20431. That case was dismissed on July 14, 2011. That case was dismissed for several grounds, including Debtor not be eligible for relief under Chapter 13, failure to provide documents, and defaulting in the plan payments. *Id.*; Motion to Dismiss, Dckt. 61; and Order to Dismiss, Dckt. 74.

Debtor then filed a second Chapter 13 case on August 1, 2011. Bankr. E.D. Cal. 11-38896. After the court issued a conditional order to dismiss the second bankruptcy case after Debtor was unable to confirm a plan, Debtor elected to convert the second bankruptcy case to one under Chapter 7 on June 21, 2012. *Id.*, Dckt. 113. Debtor received a discharge in the second case, with the discharge entered on October 9, 2012.

Instant Case and Proposed Plan

The Second Modified Chapter 13 Plan filed by Debtor which has been confirmed was filed due to Debtor's prior confirmed plan being in default because it under funded the claims as filed. Motion to Dismiss, Dckt. 115. The Second Modified Plan does not propose to cure the arrearage due on the Wells Fargo Bank, N.A. claim secured by the Trish Court property, but only make

adequate protection payments while Debtor proceeds in good faith to try and obtain a loan modification. The Additional Provisions for this treatment appear to be standard "Enzminger Additional Provisions" commonly used by consumer attorneys in this court. The court notes that these "adequate protection" payments have been provided for since Debtor commenced this case in April 2013. This indicates that in the twenty-nine months since this case was filed, Debtor has not been able to obtain a loan modification (and the creditor has not sought to enforce its rights to foreclose on the property).

In Class 2 of the Second Modified Plan Debtor lists Creditor has having a judgment lien secured claim, which is to be valued at $0.00. It further states the amount "claimed by creditor" to be $1,235.78. This appears to be a misstatement, as the $1,235.78 is the amount stated by Debtor for Creditor. Further, stating that it is a judgement lien is inconsistent with the proofs of claim filed by Debtor under penalty of perjury stating that the lien was pursuant to a deed of trust (with a copy of the deed of trust attached to Proof of Claim No. 9 filed on February 14, 2013).

Effect of 11 U.S.C. § 506(a) Valuation and Classification of Claim

The Trustee's Objection raises the issue of whether a debtor may amend a proof of claim which it filed for a creditor. There is a more fundamental issue in this case. The Debtor has stated under penalty of perjury that Creditor has a deed of trust securing the claim. Thus, this is a secured claim. On July 5, 2013, Debtor filed a Motion to Value the Secured Claim of Creditor. Dckt. 40. On August 8, 2013, the court filed its order valuing the secured claim of Creditor at $0.00. Dckt. 54. That order was not appealed and is final.

The Chapter 13 plans in this District expressly provide that with respect to the amount of a secured claim to be provided for in a plan,

> 2.04. The proof of claim, not this plan or the schedules, shall determine the amount and classification of a claim unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of the claim.

Chapter 13 Plan Section 2, ¶ 2.04; Dckt. 125. The amount of the secured claim in this case for Creditor is $0.00.

When a creditor has a lien and the court determines the portion of the secured claim which is secured pursuant to 11 U.S.C. § 506(a) and what portion is unsecured, that ruling controls - not the repeated filings of proofs of claim by the creditor or debtor. When a creditor has a secured claim, which is this case was acknowledged under penalty of perjury by Debtor to be $41,000.00, and the court then bifurcates it pursuant to 11 U.S.C. § 506(a), then the portion of the debt which exceeds the amount of collateral is an unsecured claim (even if it were a non-recourse debt). Rather than paying the full amount as a secured claim, Debtor is electing by bifurcating the claim pursuant to 11 U.S.C. § 506(a) to have a portion of it provided for as a general unsecured claim in the bankruptcy plan. This is a substantial benefit to a debtor, and something that a debtor voluntarily elects to do.

The plain language of 11 U.S.C. § 506 clearly provides for this result.

First, only an "allowed claim of a creditor secured by a lien on property in which the estate has an interest" is subject to valuation under that section. 11 U.S.C. § 506(a), as relevant to the secured claim at issue.

Next, the court determines that the portion of the allowed secured claim for which there is value in the collateral is a secured claim, 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 [secured] claim." It is by operation of law that Congress has provided for a creditor with an otherwise non-recourse secured claim to have an unsecured claim which must be provided for (even if a 0.00% dividend) in the bankruptcy plan. *See In re Gounder*, 266 B.R. 879, 881 (Bankr. E.D. Cal. 2001) *aff'd sub nom. Gounder v. Real Time Solutions, Inc.*, No. CIV.A. S-01-1707-WBS, 2001 WL 1688479 (E.D. Cal. Dec. 19, 2001) ("The debtor cannot object to the unsecured claim on the ground that the debt was a nonrecourse debt. While the creditor may have had no recourse against the debtor, section 506(a) gives the creditor recourse against the estate. This is the price of separating the claim from its security.")

Here, Debtor's efforts (by having Debtor's counsel file multiple proofs of claim under penalty of perjury stating different claim values then that presented to the court when the claim was bifurcated) to overrule, vacate, modify, or ignore the consequences of electing to value an allowed secured claim pursuant to 11 U.S.C. § 506(a) are without merit.

There appears to be no bona fide, good faith dispute that the amount of the secured claim was $41,000.00. See Declaration of Debtor stating under penalty of perjury that secured claim is $41,000.00, Dckt. 43; Original Chapter 13 Plan (subject to Fed. R. Bankr. P. 9011) stating that Creditor has a Class 2 secured claim in the amount of $41,000.00, Dckt. 5; Motion to Value (subject to Fed. R. Bankr. P. 9011) stating that Creditor had a $41,000.00 claim secured by a third deed of trust, Dckt. 40; First Amended Chapter 13 Plan (subject to Fed. R. Bankr. P. 9011) stating that Creditor has a Class 2 secured claim in the amount of $41,000.00 Dckt. 51; First Modified Chapter 13 Plan (subject to Fed. R. Bankr. P. 9011) stating that Creditor has a Class 2 secured claim in the amount of $41,000.00, Dckt. 80; and Schedule D stating under penalty of perjury that Creditor has a secured claim in the amount of $41,000.00, Dckt. 1 at 23.

The court sustains the Trustee's Objection to Amended Proof of Claim No. 9-3 filed on June 17, 2015. FN.1.

FN.1. The only response from Debtor is to request a two week continuance due to counsel having taken on such a substantial amount of new Chapter 13 work from the law offices of C. Anthony Hughes, counsel for Debtor has been unable to research the Chapter 13 Trustee's points. The court denies the request for a continuance for several reasons. First, the court has already entered an order bifurcating the allowed secured claim of $41,000 as set forth in the original proof of claim. There is no serious dispute, based upon the multiple statements by and for Debtor under penalty of perjury and subject to Rule 9011 that the allowed secured claim is $41,000, that when the court bifurcated the claim the unsecured portion of the allowed secured claim was $41,000.

Second, counsel is making this request for a continuance due to a crushing case load in a number of cases. As this court has addressed with

counsel, events are demonstrating that his desire to take over more than 800 active Chapter 13 cases from Mr. Hughes exceeds the ability of counsel's office. Of the 186 orders lodged with just Department E of this court to substitute in Mr. Macaluso for Mr. Hughes, for which no client consents were provided, in only 22 of the cases has a client consent been provided. Over 86% of those consumer debtors do not have a substitution of counsel authorized by the court.

While Debtor's counsel may desire to "capture all the business" from Mr. Hughes' decision to get out of the Chapter 13 business, that does not mean that counsel can take all that business. While the court encourages consumer debtors to find knowledgeable, experienced, thoughtful, concerned attorneys such as Debtor's counsel in this case, that does not mean that the court believes that Debtor's counsel is the only attorney who could take on a portion of the more than 800 active cases.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of David and Claire Christenson, Creditor filed in this case by David Cusick, the Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Amended Proof of Claim Number 9-3 filed on June 17, 2015, is sustained. The court sustaining the Objection to the Amended Proof of Claim is without prejudice to the rights arising from the court's prior order of this court (Dckt. 54) determining that the secured portion of the claim of Elroy and Mary Braatz is $0.00 and the balance of the allowed secured claim is a general unsecured claim to be provided for through any plan in this bankruptcy case.

34. 15-22094-E-13 RL EMERY /AMY WARD — MOTION TO CONFIRM PLAN
MWB-2 Mark W. Briden — 8-3-15 [38]

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 (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 3, 2015. 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.

RL Emery Ward and Amy Jenine Ward ("Debtor") filed a petition and accompanying Plan on March 17, 2015. Dckt. 1, 5. Trustee filed an objection to confirmation of the plan, which this court sustained on June 17, 2015. Dckt. 32. Debtor filed a Motion to Confirm a First Amended Plan on August 3, 2015. Dckt. 38, 39.

TRUSTEE'S OBJECTION

Trustee filed an objection on September 8, 2015. Dckt. 48. Trustee objects on 1325(b) grounds, asserting the proposed plan is not Debtor's best efforts. First, Trustee asserts that Debtors have additional income that they are not allocating to paying unsecured creditors. Second, Trustee asserts Debtors are overwithholding for taxes, as Schedule I shows Debtor is withholding $823.00 per month while Debtor's 2014 Tax Return reveals a total tax of $2,941.00 with a $4,135.00 tax refund. Dckt. 43. Trustee requests that Debtor's Motion to Confirm be denied unless Debtor agrees to pay tax refunds

into the plan and furnish copies of their pay stubs every 6 months to Trustee.

DEBTOR'S REPLY

Debtor filed a reply on September 14, 2015. Dckt. 52. Debtor consents to turning over their income tax refund into the plan on an annual basis to increase the dividend to unsecured creditors. Debtor also agreed to furnish paystub copies to Trustee every six months.

DISCUSSION

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

Debtor has addressed one of the Trustee's objections. Trustee has requested that Debtor provide pay stubs every six months to verify and evaluate Debtor's disposable income. Debtor has consented to do so. Dckt. 52. Also, Trustee requires any post-petition tax refunds to be paid to unsecured creditors as projected disposable income. Again, Debtor has consented to submit the tax refunds collected during the applicable commitment period. 11 U.S.C. 1325(b)(1)(B); Dckt. 52.

However, the Trustee provides evidence that Debtor's gross income is $5,070.00 a month rather than the $3,897 stated under penalty of perjury on Schedule I. Debtor offers no evidence to rebut what the Trustee has presented. Rather, the attorney for Debtor is pushed forward to state that the plan will be modified to provide the tax returns and refunds into the plan. Debtor does not dispute that Debtor has an additional $1,173.00 a month to properly fund the Chapter 13 Plan.

The Motion is denied. The Trustee, U.S. Trustee, and other parties in interests may address as appropriate in separate proceedings the documented misstatement of income by Debtor 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 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 Debtor's Chapter 13 First Amended Plan filed on August 3, 2015 is not confirmed.

35. 13-32995-E-13 JANET VIOLA
LBG-4 Lucas B. Garcia

MOTION FOR COMPENSATION BY THE LAW OFFICE OF STEPHEN JOHNSON FOR LUCAS GARCIA, DEBTOR'S ATTORNEY(S)
8-13-15 [61]

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, creditors, parties requesting special notice, and Office of the United States Trustee on August 13, 2015. By the court's calculation, 40 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.

Lucas Garcia, the Attorney ("Applicant") for Janey Viola, the Chapter 13 Debtor ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. FN.1.

FN.1. While the Applicant does not explicitly state whether he is looking for compensation as interim fees or final fees, the first line of the Motion states "Pursuant to Bankruptcy Code Section 331...." In light of 11 U.S.C. § 331 being the section dealing with interim fees, the court will construe this Motion as

a request for interim fees. The Applicant should be more cognizant to "plead with particularity" in future motions.

The period for which the fees are requested is for the period July 3, 2013 through March 16, 2015. Applicant requests fees in the amount of $3,439.00 and costs in the amount of $382.71.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, file an amended opposition to the instant Motion on September 8, 2015. Dckt. 69. FN.2. The Trustee objects on the following grounds:

1. No retainer agreement has been filed with the court, no accounting for any retainer and supplement to any retainer has been provided, and no statement as to any funds paid to the Law Office of Stephen Johnson has been approved.

2. There may be duplicate Motion to Value fees based on the Applicant filing a Motion to Value, withdrawing the motion, then refiling it. The Applicant appears to have billed for both motion but the Applicant does not provide any explanation as to why. The Trustee asserts that the fees should be reduced by $102.50, the total of the second motion.

FN.2. The court notes that the Trustee originally filed an opposition on the same date but filed the amended opposition shortly after. The court construes the amended opposition as the controlling objection and does not consider the prior objection.

APPLICANT'S RESPONSE

The Applicant filed a response on September 14, 2015. Dckt. 71. The Applicant responds to the Trustee's objections as follows:

1. As to the retainer, the Applicant states that the statements in the additional provisions of the plan are for the utilization of options of a debtor supplementing their retainer as opposed to having it paid through the plan. However, in the present case, no retainer was paid up front by the Client, who only supplied the filing fee and a credit report. The retainer has never been supplemented. Due to the extraordinary financial situation of the client, the Applicant agreed to no retainer except the costs of the filing fee and credit check.

2. As to the possible duplicate of the Motion to Value, the Applicant states that there were discrepancies with the information provided by the Client so the motion was withdrawn and refilled. While the Applicant believes that the deficiencies were due to client disclosures to the office, the Applicant is not opposed to waive the duplicate charge.

TRUSTEE'S REPLY

The Trustee filed a reply on September 15, 2015. Dckt. 73. The Trustee states that the Applicant's response has resolved the Trustee's concern over the retainer agreement. As to the motions to value, the Trustee is satisfied with the reduction.

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.

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including data acquisition and input, meeting of creditors, motion to value, and motion for compensation. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Data Acquisition and Input: Applicant spent 12.5 hours in this category. Applicant assisted Client with legal guidance, proper analysis of Client’s financial situation and representation in the court as to which course of action is best for the Client.

Meeting to Creditors: Applicant spent 4 hours in this category. Applicant attended Meeting of Creditors and prepared all follow up materials.

Motion to Value: Applicant spent 2.1 hours in this category. Applicant drafting and filing the Motions to Value that were necessary for a confirmable plan.

Motion for Attorney’s Fees: Applicant spent 1.6 hours in this category. Applicant prepared and filed the instant Motion.

The fees requested 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:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
"Attorney"	9.8	$225.00	$2,205.00
"Paralegal/Case Manager"	9.1	$115.00	$1,046.50
"Legal Staff"	1.3	$65.00	$84.50
Total Fees For Period of Application			$3,336.00

FN.1. The court notes that based on the task billing provided by the Applicant, the actual, full requested amount of fees is $3,336.00 and not the $3,439.00 alleged by the Applicant.

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $382.71 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Credit Check Fee	**$40.00**	**$40.00**
Filing Fee	**$281.00**	**$281.00**
Postage		$20.51
Courtcall		$41.20
Total Costs Requested in Application		$382.71

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for most of the services provided. However, Applicant seeks to be allowed "professional fees" of $84 of legal staff, billed at $65 an hour. These charges are for:

A. "Client called wanting to schedule a consultation with

Attorney," 0.10;

B. "Legal Staff spoke with client on phone regarding status," 5 x 0.01;

C. "Client called back to confirm she received attorneys voice mail," 0.10;

D. "Legal Assitant [sic] fielded phone call and took message from client," 0.10;

E. "Legal Assitant [sic] spoke with client for milleage [sic] on vehicle," 0.10;

F. "Legal Assistant made changes to petition and printed out," 0.10;

G. "Legal Assistant created MTV-Strip document and sent to attorney to review, 0.20;

H. "emailed Janet for bank statements-received and scanned them to her file," 0.20;

I. "emailed Trustee 521's and sent a meeting reminder email to Janet," 0.20; and

J. "Office staff field client phone call," 0.10.

Time Log, Exhibit A; Dckt. 65. These 1.7 hours billed at $65 an hour total $110.50. These are clearly secretarial functions which any attorney should properly provide for clients as part of the attorney's hourly rate. The court doubts that counsel is paying clerical staff professional fees of $65 an hour for which he "must" be reimbursed.

The court disallows this $110.50 of the requested fees.

In reviewing the Time Log, the court is further concerned that counsel is attempting to bill clerical and secretarial work as $115.00 an hour paralegal work. In light of the modest fees, the court will not expend more time drilling down into the Time Log to determine what other clerical or secretarial services are being mis-billed.

In addition, the court also reduces the requested fees by the $102.50 as opposed by the Trustee.

The fees allowed by the court are $3,123.00 ($3,336.00 - $110.50 - $102.50)

First Interim Fees in the amount of $3,123.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved and authorized to be paid by the Trustee under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Costs and Expenses

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as on-line access to bankruptcy and state law and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include CourtCall for $41.20. No information has been provided to the court by Applicant that these cost items were extraordinary expenses than one would expect for Applicant providing professional services to Client to be changed in additional to the professional fees requested as compensation. The court disallows $41.20 of the requested costs.

Applicant seeks to be allowed $382.71 in costs. This includes a $281.00 filing fee and $40.00 credit check fee. But in the Reply to the Trustee's Opposition, Applicant states (or "admits"), " the client supplied only the costs of filing fee and a credit report...." Reply, p. 2:1-2; Dckt. 71.

The court disallows the $41.20 for the CourtCall expense. The court also disallows reimbursing Applicant for the $321.00 in filing fee and credit check fee expense which have already been paid for by the Debtor.

The court allows expenses of $20.51.

The First Costs in the amount of $20.51 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are approved. In light of the Applicant admitting that the Client paid both the filing fee and credit check fee, the Applicant is authorized to be paid by the Trustee from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan the remaining $20.51 in remaining approved costs.

The court is authorizing that Trustee under the confirmed plan pay 100% of the fees and costs allowed by the court.

Applicant is allowed, and the Trustee under the confirmed plan is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$3,123.00
Costs and Expenses	$20.51

pursuant to this Application as interim fees pursuant to 11 U.S.C. § 331 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Lucas Garcia ("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 Lucas Garcia is allowed the following fees and expenses as a professional of the Estate:

Lucas Garcia, Professional Employed by Chapter 13 Debtor

Fees in the amount of $ 3,123.
Expenses in the amount of $20.51

IT IS FURTHER ORDERED that the fees of $213.00 and costs of $41.20 are not allowed by the court.

The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee under the confirmed plan is authorized to pay the fees in the amount of $213.00 and costs in the amount of $362.20 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.