UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

September 30, 2014 at 3:00 p.m.

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

The court will call at the start of the calendar the following Matters: Items # 12, 14, 15, 37, 41, 54, 55, 59, 60, 62, and 63.

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

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

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

1. 13-22901-E-13 VICTOR/SANDRA GARCIA — MOTION TO MODIFY PLAN
PGM-6 Peter Macaluso — 8-19-14 [131]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on

August 19, 2014. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

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

Victor and Sandra Garcia ("Debtors") filed the instant Motion to Modify Chapter 13 Plan After Confirmation on August 19, 2014.

MOTION

Debtors move to modify their Chapter 13 plan. Debtors state that they are unable to complete the plan as originally confirmed because the child support obligations for Ciara Garcia has not ended because she did not graduate until June 2014 which meant that Debtors were still responsible fo the child support obligations. The child support obligations are a wage garnishment that could not be released until fulfilled by Department of Child Support Services. The modified plan proposes that the total amount of missed payments equaling $7,408.00 be forgiven and plan payments of $605.00 will begin August 2014 for 11 months, then increase to $1,176.00 for 33 months to complete the Plan within the maximum term allowed by law. The term of the plan remains at 60 months.

TRUSTEE'S OPPOSITION

The Trustee has filed opposition to this motion. The Trustee objects to the plan because the proposed plan payments listed in the modified plan and the motion do not match the listed payments in the Debtors' declaration. Specifically, the Trustee states that the modified plan lists plan payments as "$8,892.00 through 7/2014, $605.00 x 11 months starting 8/2014, $1,176.00 x 33." Dckt. 135.

However, the supporting motion state "The Debtors propose that the total amount of missed payments equaling $7,408.00 be forgiven and plan payments of $605.00 will begin August 2014 for 11 months, then increase to $1,176.00 for 33 months to complete the Plan within the maximum term allowed by law." Dckt. 131, pg. 2, lines 8-12. Then, the Debtors in their supporting declaration state: "We are asking the Court to modify our Plan so that we can begin remitting payments of $605.00 per month starting August 25, 2014 and then will increase to 1,176.00 if the second support obligation ends in June 2015 if not we will continue the payments of $605.00 and continue for the balance of the Plan." Dckt. 133, pg. 2, #4.

Additionally, the Trustee notes that according the Debtors' declaration, the proposed increase of plan payments is in anticipation of court order for child support ending in June of 2015.

DEBTOR'S RESPONSE

Debtors' Counsel, Peter Macaluso, filed a reply in response to the Trustee's objections. Specifically, Debtors' counsel points out Debtors' declaration in which the Debtors state:

> We are not sure when Daniel's obligation will end because there is no communication between Victor and the mother. We do not know that the child will graduate in June of 2015, because we do not know his academic status. According to Department Child Support Service, if the child does not graduate and the mother puts him back in school Victor will be responsible for another year. We will inform the Court if the obligation gets extended passed his due graduation date of June 2015 and if the support ever gets increased.

Dckt. 133, pg. 2, lines 26-28 - pg. 3, lines 1-5.

DISCUSSION

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

Here, the proposed plan is based on an event that may or may not happen – namely whether Debtor's child will graduate by June 2015. While the court does appreciate the nature of child support obligations, the "what-ifs" that surround the support obligations here leaves to much to chance. Debtors' counsel's response simply reiterates this concern by highlighting the contingent nature of the proposed plan after June 2015.

However, even with the contingent nature of the plan because of the child support obligation, the court finds that a modified plan can comply with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is be confirmed.

In order to ensure that the terms of the plan are enforced after the child support obligations are extinguished, the court order confirming the Plan includes the following additional plan modifications:

A. Debtor, through Debtor's Counsel, provide a written update under penalty of perjury every six-months, with the first report due on January 15, 2015, and then on the 15 day of June 2015, and each January 15 and June 15 thereafter during the term of the plan, stating the status of the child support obligation to the Chapter 13 Trustee and filed with the court.

B. When the child support obligation ends, which is currently estimated to be around June 2015, the Debtor shall file an ex parte motion, also signed to state the concurrence of the Chapter 13 Trustee, with the court within 30 days of the termination of the child support obligation to increase the plan payments to the $1,176.00 for the remaining to the term of the Plan. Debtor shall also transmit to the Chapter 13 Trustee a proposed order granting the ex parte motion and confirming the modification of the payment terms under the Plan.

C. The payments made by Debtor through July 2014 are $xxxxxx,

commencing August 2014, and each month thereafter the monthly play payment is $605.00, until increased to $1,176.00 commencing the first month when Debtor's child support garnishment obligation for Ciara Garcia has terminated.

The Trustee's objection concerning the conflicting amounts listed in the motion, plan, and declaration and the contingencies that trigger different payment amounts during the life of the plan are cured under the reporting requirements, ex parte amendment requirement, and statement of amount paid through July 2014, as agree and provided for amending the Modified Plan as stated by the parties at the hearing.

Therefore, the modified Plan, as amended at the hearing, does comply 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 Victor and Sandra Garcia, the Debtors, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtors' Modified Chapter 13 Plan filed on August 19, 2014, as amended to include the following terms stated in the order confirming,
>
> A. Debtors, through Debtors' Counsel, provide a written update under penalty of perjury every six-months, with the first report due on January 15, 2015, and then on the 15 day of June 2015, and each January 15 and June 15 thereafter during the term of the plan, stating the status of the child support obligation to the Chapter 13 Trustee and filed with the court.
>
> B. When the child support obligation ends, which is currently estimated to be around June 2015, Debtors shall file an ex parte motion, also signed to state the concurrence of the Chapter 13 Trustee, with the court within 30 days of the termination of the child support obligation to increase the plan payments to the $1,176.00 for the remaining to the term of the Plan. Debtor shall also transmit to the Chapter 13 Trustee a proposed order granting the ex parte motion and confirming the modification of the payment terms under the Plan.
>
> C. The payments made by Debtor through July 2014 total $xxxxxx, commencing August 2014, and each month thereafter the monthly play payment is $605.00, until increased to $1,176.00 commencing the first month

when Debtor's child support garnishment obligation for Ciara Garcia has terminated.

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.

2. 13-26601-E-13 CASSANDRA HUAPAYA — MOTION TO MODIFY PLAN
RJ-2 Richard L. Jare — 8-18-14 [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)(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, 2014. By the court's calculation, 43 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.

Cassandra Huapaya ("Debtor") filed the instant Motion to Modify Chapter 13 Plan After Confirmation on August 18, 2014.

MOTION

Debtor moves to modify her Chapter 13 Plan. Debtor filed the modified plan to address plan delinquency that arose because the Debtor had some traffic tickets to pay. According to the motion, the Debtor then received a child support garnishment because her child's father filed for welfare benefits. The Debtor notes that she recently lost three months of IHSS income and that she had to take time off from work because Debtor's son has a serious medical ailment. Additionally, the Debtor notes that she had to pay a $500.00 insurance deductible after her car was vandalized.

In support, the Debtor states that the Debtor has resumed payments by paying for July 2014. Debtor states that "[s]he will pay the trustee for August and September and those 2 payments are due prior to the anticipated hearing on this modification." Dckt. 70, pg. 2.

The proposed modified plan pays 0.0% to the unsecured creditors and proposes a payment of $610.00 per month. The Debtor states that she will amend Schedules I and J to show that the current disposable income is in fact $610.00.

TRUSTEE'S OBJECTION

The Trustee has filed opposition to this motion. The Trustee objects to the modified plan on four grounds.

First, the Trustee objects because it appears that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). The Debtor is delinquent $260.00 under the terms of the proposed modified plan. According to the proposed modified plan, payments of $6,160.00 have become due. The Debtor has paid a total of $5,900.00 to the Trustee with the last payment posted on September 2, 2014 in the amount of $250.00.

Second, the Trustee objects because Debtor has not filed Supplemental Schedules I and J in support of the proposed increased plan. Debtor's modified plan proposes a plan payment of $5,650.00 total paid in for the first 14 months, $510.00 for 2 months (August and September 2014), then $610.00 for the remaining 40 months. Debtor's plan payments under the confirmed plan are $510.00 for 54 months. The Trustee argues that the both the Debtor's motion and declaration make reference to the updated Schedules I and J but the Trustee has been unable to locate them within the court's docket. The Trustee additionally notes that he is uncertain Debtor will be able to afford an increased payment when she has been delinquent in the past with a lesser payment and is currently delinquent under the modified plan.

Third, the Trustee objects because Section 1.01 and 6.01 of Debtor's modified plan proposes a 56 month commitment period, while Section 1.03 proposes a commitment period of 40 months. The commitment period under the confirmed plan is 54 months.

Fourth, the Trustee objects because the modified plan proposes a

monthly dividend for Nationwide West, LLC in Class 2 of, "Prior to the September 30, 2014 anticipated hearing, the trustee will likely have disbursed the aggregate amount of $1,450. Beginning at the end of October 2014, the dividend resumes at $136.53." The Trustee has actually disbursed a total of $878.26 to this creditor ($613.65 principal and $264.61 interest), with the next disbursement date being September 30, 2014. Debtor's modified plan proposes a monthly dividend for Tidewater Finance Company of, "Prior to the September 30, 2014 anticipated hearing, the trustee will likely have disbursed the aggregate amount of $2,700.00. Beginning at the end of October 2014, the dividend resumes at $385.57." The Trustee has actually disbursed a total of $2,285.51 to this creditor ($1,578.29 principal and $702.22 interest), with the next disbursement date being September 30, 2014.

DISCUSSION

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

Here, the Debtor is delinquent as of September 15, 2014. While the Debtor does make the assertion that she will be making the delinquent payments prior to the hearing on the instant motion, Debtor has not filed any supplemental declaration or statement evidencing that Debtor is current on the plan payments. The Trustee's objection that the Debtor cannot make payments pursuant to 11 U.S.C. § 1325(a)(6) is persuasive.

The Debtor's plan is also premised on an amended Schedule I and J which have yet to be filed with the court. The court cannot determine the feasability of the proposed modified plan without seeing Debtor's updated budget.

The Trustee's third objection also raises additional concerns with the actual plan terms. The conflicting information in the proposed modified plan itself makes the court question the feasibility of the plan when the plan itself does not consistently state how long the plan term is.

As to the Trustee's fourth objection, it once again raises the issue of feasibility. If part of the foundation of the proposed modified plan is that the Class 2 creditors have been paid more through the plan, the fact that the Trustee was paid out significantly less to these creditors is problematic.

Because of the issues concerning feasibility, 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.

3.	14-23504-E-13 SJS-2	SHERMAN/MAXINE THOMPSON Scott J. Sagaria	MOTION TO AVOID LIEN OF NORTHSTAR CAPITAL ACQUISITION 8-25-14 [58]

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

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

Below is the court's tentative ruling.

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

Correct Notice **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Wells Fargo Bank, N.A., Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 25, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required. However, it does **not** appear that the lienholder, Northstar Capital Acquisition, has been served.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

In this Motion, Maxine Thompson ("Debtor") seeks an order avoiding the judicial lien of Northstar Capital Acquisition, Assignee of Wells Fargo Financial ("Creditor"). However, it does not appear that Creditor has been served with the instant motion. Dckt. 62. Debtor has served Wells Fargo Bank, N.A. instead. Parties whose rights may be affected by a motion must be properly served with notice that their rights could be affected. Fed. R. Bankr. P. 7004; Local Rule 9014-1. (Even with respect to Wells Fargo Bank, N.A., the service does not appear to comply with Fed. B. Bankr. P. 7004(h)m which requires service by certified mail on an officer of a federally insured financial institution). Since Creditor has not been served, the motion must be denied.

There is also an issue concerning the effect of the court valuing the secured claim pursuant to 11 U.S.C. § 522(f) when only one of the judgment

debtor owners of the property has filed bankruptcy. Sherman Thompson's bankruptcy case, as the co-debtor, was dismissed by order of the court on July 14, 2014.

A Minute Order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

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

ALTERNATIVE RULING

This Motion requests an order avoiding the judicial lien of Northstar Capital Acquisition, Assignee of Wells Fargo Financial ("Creditor") against property of Maxine Thompson ("Debtor") commonly known as 11 Parkshore Circle, Sacramento, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $3,395.48. An abstract of judgment was recorded with Sacramento County on August 22, 2011, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $321,486.00 as of the date of the petition. The unavoidable consensual liens total $515,173.99 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $15,413.84 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

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

IT IS ORDERED that the judgment lien of Northstar Capital Acquisition, Assignee of Wells Fargo Financial, California Superior Court for Sacramento County Case No. 34-2009-00033452-CL-CL-GDS, recorded on August 22, 2011, Book 20110822 and Page 1303 with the Sacramento County Recorder, against the real property commonly known as 11 Parkshore Circle, Sacramento, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

4. 11-48305-C-13 JOHN/DARLENE DOERR — CONTINUED MOTION TO CONFIRM PLAN
PGM-7 Peter Macaluso — 1-27-14 [183]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on January 24, 2014. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

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

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

SEPTEMBER 30, 2014 HEARING

No resolution has been provided to the court concerning a purported stipulation for which the court has continued the instant Motion to Confirm six times in order to allow the parties to reach a stipulation.

On August 5, 2014, Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change which states that the new mortgage payment is $767.33. The loan

document attached to the Notice is for an EquityLine Agreement dated February 6, 2007. This debt relates to Wells Fargo Bank, N.A. Proof of Claim No. 2. The deed of trust securing this claim was avoided by the Debtors in Adversary Proceeding No. 12-2153, with that lien preserved for the benefit of the estate. 11 U.S.C. § 551; Judgment, Adv. 12-2151, Dckt. 118. On September 5, 2014, Wells Fargo Bank, N.A. filed a subsequent Notice of Mortgage Payment Change for the same debt as the August 5th Notice, which states that the new mortgage payment is $767.34.

At the hearing, ----------

AUGUST 7, 2014 HEARING

No resolution had been provided to the court at the August 7, 2014 hearing. On July 3, 2014, Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change which states that the new mortgage payment is $742.59. The loan document attached to the Notice is for an EquityLine Agreement dated February 6, 2007. This debt relates to Wells Fargo Bank, N.A. Proof of Claim No. 2. The deed of trust securing this claim was avoided by the Debtors in Adversary Proceeding No. 12-2153, with that lien preserved for the benefit of the estate. 11 U.S.C. § 551; Judgment, Adv. 12-2151, Dckt. 118.

At the request of the parties, the court continued the hearing on this matter to September 30, 2014 to allow time for the parties to negotiate an amicable resolution. As of September 24, 2014, no resolution has been presented to the court.

PRIOR HEARINGS

At the June 19, 2014 hearing Wells Fargo Bank, N.A., the Debtors, and the Trustee appeared and requested a continuance. It was reported that the Debtors and Wells Fargo Bank, N.A. believe they have worked out a resolution which would be acceptable to the Trustee, creditors and the court, which would allow a plan to be confirmed in this case. The court continued the hearing.

At the March 11, 2014 hearing, the Debtors requested additional time to brief and present their arguments as to what it means for the avoided transfer of the Wells Fargo, N.A. deed of trust to be preserved for the benefit of the estate.

At the May 20, 2014 hearing, the Debtors requested one final continuance in an effort to work with creditors, resolve the dispute with Wells Fargo Bank, N.A., and propose a plan which provides the value from the avoided lien for creditors with general unsecured claims. The court continued the hearing to this date to permit Debtors additional time to brief their arguments. Civil Minutes, Dckt. No. 230.

Nothing further on this matter has been filed on the court docket.

REVIEW OF MOTION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, Creditor Wells Fargo Bank, N.A. ("Creditor") and the Chapter 13 Trustee have opposed confirmation of the plan.

CREDITOR'S OPPOSITION, filed 02/20/14 (Dckt. 197)

Creditor objects to Debtors' Motion to Confirm the Fifth Amended Plan on the following grounds:

On November 5, 2013, the Debtors prevailed in their adversary proceeding to avoid (11 U.S.C. § 544) the lien of Creditor in the amount of $222,593.65. Even though Debtors avoided Creditor's lien, Creditor still objects on the basis that the plan fails to satisfy the Chapter 7 liquidation analysis of 11 U.S.C. § 1325(a)(4), which requires that Debtors propose a plan that pays the unsecured claims of creditors at least the amount that they would be paid in a Chapter 7 liquidation. Specifically, Creditor asserts that based on Wells Fargo's appraisal, the Debtors' residence located at 815 Braddock Court, Davis, California, has a value of not less than $417,000.00, and is subject only to a lien secured by a first deed of trust in the amount of $221,320.62.

1. Based upon the appraised value of $417,000.00, and the fact that the Wells Fargo lien was avoided for the benefit of the Debtors' estate, there is equity available to the unsecured creditors of the Debtors' estate of $195,679.381, which Debtor did not provide for in their plan. The appraisal and sworn declaration of the appraiser, Bruch Elisher, was filed in support of the objection. Creditor also objects to Debtors' valuation of their residence in any amount less than $417,00, which was Creditors' appraised value of the property as of December 6, 2011, since property values have increased since that time.

   Creditor asserts that now that its lien has been avoided, the obligation of the Debtors is to pay more to unsecured creditors than they had proposed in their Fourth Amended Plan where they proposed to pay into the Plan $59,406. Currently, not only does the Debtors' Fifth Amended Plan not match what they had proposed before the avoidance of the Wells Fargo lien, but their Fifth Amended Plan proposes almost $10,000 less after avoiding the Wells Fargo lien of $222,593.65.

2. Creditor opposes Debtors' utilization of their homestead exemption and not accounting for the avoided lien. Creditor argues that 11 U.S.C. § 544 provides that any transfer avoided, is preserved for the benefit of the estate. Since the court avoided the Creditor's lien of $222,593.65, the lien is preserved for the benefit of the estate. Under the current plan, the Debtors' proposed Fifth Amended Plan proposes a distribution that is approximately $195,679.38 less than a current liquidation analysis in a Chapter 7 liquidation, therefore not meeting the best interests of creditors standard set forth in 11 U.S.C. § 1325(a)(4). FN.1.

FN.1. In addition to the statutory provisions of 11 U.S.C. § 551 for the automatic preservation of an avoided lien or transfer for the benefit of the estate, the judgment in the adversary proceeding expressly states, "IT IS ORDERED that judgement is for plaintiff and **the lien is avoided for the benefit of the estate.**" (Emphasis added) 12-02153 Dckt. 118.

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3. Creditor further objects on the basis that once the value of the Creditor's avoided lien has been properly scheduled for repayment to holders of unsecured claims, Debtors cannot feasibly complete their Plan as proposed.

4. Creditor also contends that the proceeding was filed in bad faith.

TRUSTEE'S OPPOSITION

Trustee opposes confirmation of the Plan on three grounds: (1.) that the plan fails to pay unsecured creditors what they are entitled to in the event of a Chapter 7 under 11 U.S.C. § 1325(a)(4); (2.) Debtor has not proven that they will be able to make the payments called for by the plan under 11 U.S.C. § 1325(a)(6); and that (3.) the plan is not proposed in good faith under 11 U.S.C. § 1325(a)(3).

Chapter 7 Liquidation

Debtors maintain that the effective plan date is December 6, 2011. Page 2, Motion to Confirm, Dckt. No. 183. Debtor takes this position, even though their plan, Dckt. No. 186, sets forth that the Plan will be effective upon confirmation. Debtors ignore the court's ruling on a prior but similar plan, that ruled "The plan is effective upon confirmation." Civil Minutes, Dckt. No. 176. Trustee argues that Debtors are ignoring 9th Circuit case law holding that post-petition appreciation in the property of the estate is required to insure the benefit of the estate. *Gebhart v. Gaughan (In re Gebhart), 621 F.3d 1206, 1210 (9th Cir. 2010); Alsberg v. Robertson (In re Alsberg), 68 F.3d 312, 314-15 (9th Cir. 1995); Hyman, 967 F.2d at 1321; Schwaber v. Reed (In re Reed), 940 F.2d 1317, 1323 (9th Cir. 1991); In re Chappell* (B.A.P. 9th Cir. 2010), 373 B.R. 73, 79.); *Viet Vu v. Kendall (In re Viet Vu)*, 245 B.R. 644, 647-48 (B.A.P. 9th Cir. 2000).

Debtor refers to lay opinion and an appraisal with no docket reference to the appraisal, and the appraisal is not filed with the moving papers. Trustee objects to the consideration of this appraisal when Trustee cannot view the appraisal. Trustee also notes that the Debtor previously maintained that the value of the property was $180,000.00 (Declaration of Debtors in Support of the Motion to Value, Dckt. No. 22 at 1,) where they attempt to assert a value of $380,000 in this motion, so the lay opinion should not appear very convincing.

Debtors refer to an unopposed claim of exemption of $175,000.00 under California Code of Civil Procedure § 704.070, but does not explain what affect 11 U.S.C. § 551 has on the claim of exemption. Debtors do not address of the court's prior order that the lien is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013.

Debtor has not proven that the plan pays unsecured creditors at least what they would receive in the event of a Chapter 7.

Ability to Make Payments

Trustee also asserts that Debtors have not proven that they will be able to make the payments called for by the plan under 11 U.S.C. § 1325(a)(6). Debtors' original plan, Dckt. No. 5, proposed $100,00 for 36 months and no less than 0% to holders of unsecured claims. The present plan proposes $150.00 for 9 months, $350.00 for 12 months, $754.00 for 39 months, and then a lump sum payment of $15,000 on or before the 60th month, with at least 14.5% to the holders of unsecured claims. Dckt. No. 186. Debtors do not give specific evidence of the ability to pay the lump sum, and instead, state,

> This lump sum will be from a combination of my husband's business as a private investigator, document server, which appears to be increasing this last few months, my regular cost of living increases at work, and/or a retirement loan, or a refinance of our real property. Page 2, Declaration of Debtors, Dckt. No. 185.

The court noted in its Civil Minutes in denying the last plan, on Dckt. No. 176, on page 3, that,

> The court is also skeptical of the plan relying on a lump sum payment to be drawn from a future refinance. Many unforseen factors and outside issues could impact the reliability of this projection. Debtors' reliance on refinance undermines the courts confidence in the feasibility of the plan.

Debtors have simply added additional factors, without specific evidence, to make it seem that Debtor will suddenly be able to make more than 15 extra monthly payments, as long as the court will let Debtors delay to the maximum time allowed by the law. Debtors have not provided sufficient evidence to show the ability to make the payments called for by the plan.

Plan Not Proposed in Good Faith

Debtors have proposed their 5th amended plan, and have ignored the rulings of the court as to the effective date of the plan, as to the preservation of an avoided transfer for the benefit of the estate, and as to the difficulty of proving the ability to pay a lump sum based on a refinance. Debtor continues to propose plans that do not comply with the court's prior rulings. Failure to propose a confirmable plan when Debtors are aware of the prior rulings appears to demonstrate bad faith under Factor #4 of In re Warren, 89 B.R. 87, 93 (9th Cir. 1987):

> (4) The accuracy of the plan's statements of the debts, expenses, and percentage of repayment of unsecured debt, and whether an inaccuracies are an attempt to mislead the court;

If Debtor is not going to propose a confirmable plan, and this Debtor has not demonstrated that they are willing to do so after five attempts, Trustee asks that the court consider denying confirmation without leave to amend.

DEBTORS' SUPPLEMENTAL REPLY TO WELLS FARGO BANK, N.A.'S OBJECTION

Debtor provides the following supplemental arguments in support of confirmation:

1. Debtors argue that their plan passes liquidation analysis. Debtors assert that they submitted "proper expert opinion" on the value of the subject real property at the time of filing being $380,000. (Exh. 1, Dckt.). According to Debtors, this leaves $127,007 in non-exempt equity that will be paid through the plan.

2. Debtors state they are seeking to value the security interest in the property located at 815 Braddock Court, Davis California. Debtors estimates a value of $127,007 will be assigned to that secured claim.

3. Debtors assert that their plan is not proposed in bad faith. The plan proposes to pay $7,812 from December 2013 through December 2013 ($754 x 30 months) plus a lump-sum payment of $92,051. Debtors concede that they must pay not less than $127,007 to unsecured creditors.

4. Debtors contemplate being able to afford a $92,051 lump-sum payment because of a recent approval of a refinance of the first deed of trust on their residence. Debtors assert that the "naturally inclining value" and the exemption held by debtor allows for the equity necessary to make the $95,000 payment.

WELLS'S FARGO MEMORANDUM IN SUPPORT OF OBJECTION

In support of its objection to confirmation, Wells Fargo Bank, N.A. provides the following:

1. Wells Fargo objects to the valuation of Debtors' residence in any amount less than $417,000, as this is the appraised value of the property as of December 6, 2011, based on the appraisal conducted for Wells Fargo and filed with the court on other occasions. Using this figure, Wells Fargo asserts that unsecured creditors need to be paid $162,320 for Debtors' plan to pass the Chapter 7 liquidation analysis.

2. Wells Fargo asserts that Debtors' plan is not feasible as it relies upon their refinance of their residence almost three years from now. The uncertainty of this lump-sum does not meet the confirmation requirement that Debtors will be "able to make all payments under the Plan and to comply with the Plan." 11 U.S.C. § 1325(a)(6).

STIPULATION

On April 24, 2014, Debtors' Counsel, Creditor's Counsel, and the Chapter 13 Trustee agreed to continue the hearing on this matter from May 6 2014 to May 20, 2014 to allow time for the parties to negotiate an amicable resolution. As of May 17, 2014, no resolution has been presented to the court.

DECLARATION OF JOHN DOERR IN SUPPORT OF CONFIRMATION

Debtor John Doerr provides the following in support of confirmation:

1. John Doerr declares that his credit score is 580 and his wife's credit score is 626. He admits he needs to raise his score to be approved for a refinance.

2. John Doerr has started his credit repair and believes that within six months the qualification for refinance will be possible.

DISCUSSION

Debtors' Chapter 13 Plan continues to be deficient in a myriad of ways. The court notes that Debtors represented that their opinion of the fair market value of the property was $180,000.00 on the first Motion to Value the Secured Claim of Creditor, PGM-1. The adversary case between Debtors and Creditor was filed by Debtors to obtain a declaratory judgment that Debtors are the owner of the fee simple interest in the subject property, and that Creditor has no secured interest in the property adverse to Debtors because Creditor did not properly record a lien on Debtors' property. Debtors alleged that Creditor did not record the deed of trust in the correct county, and thus the recording was not reflected in the chain of title for the property at issue. ¶ 31, Dckt. No. 1, Adv. No.: 12-02153. The court decided in favor of the Plaintiff and ordered that the lien of Creditor is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013. Debtors now apparently assert that the value of the property is $380,000.

The different figures cited by Debtors for the fair market value of their residence, coupled with an authenticated appraisal performed by a licensed appraiser (whose declaration is attached as Exhibit "B" in support of Creditor's opposition), which includes a Uniform Residential Appraisal Report that includes an analysis of comparable properties and adjustments for the current condition of the subject property, concluding that the value of the property is no less than $417,000.00 (Exhibit A, Dckt. No. 198), casts doubt over Debtors' less credible, less persuasive lay opinion that the value of the property is alternately $180,000 or $380,000.00.

As Creditor and Trustee pointed out, Debtors also claim an exemption of $175,000.00 on the property under California Code of Civil Procedure § 704.070, but still does not explain what affect 11 U.S.C. § 551 has on the claim of exemption. There is a prior court's order declaring that the Creditor's lien is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013. 11 U.S.C. § 551 provides that any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate with respect to the property of the estate. 11 U.S.C. § 551. The avoided lien does not seem to have been preserved for the benefit of the bankruptcy estate by the Debtors, as the Plan still seems to proposes a distribution that is less than a distribution under a Chapter 7 liquidation test, therefore not meeting the best interests of creditors standard set forth in 11 U.S.C. § 1325(a)(4).

It is also remains unclear whether Debtors can make the payments called for by the plan under 11 U.S.C. § 1325(a)(6). Debtors propose paying a lump sum of $92,000 on or before the 60th month of the plan. Debtors acquisition of this amount of money depends on improving their credit score, increased property value, and final approval of a refinance. There is no set date in the future when this will occur. The court cannot determine whether plan payments are feasible with this level of uncertainty. It would be different if Debtors had a date marked in the future when the refinance will be approved and presented the court with credible evidence of the equity thereafter available. As it stands, the court lacks such reliable evidence. This is not sufficient evidence of Debtors' ability to make and afford the plan payments.

The court also recognizes that this is Debtors' 5th Amended Plan, and that many mistakes committed in Debtors' previous plans have been repeated, and have not been properly corrected. Debtors have not incorporated the court's rulings in the drafting of their plan. Trustee has even alleged bad faith on Debtors' part.

Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren*, 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389-1390 (9th Cir. 1982)). Factors to consider include:

1) The amount of the proposed payments and the amounts of the debtor's surplus;

2) The debtor's employment history, ability to earn, and likelihood of future increases in income;

3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

5) The extent of preferential treatment between classes of creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

11) The burden which the plan's administration would place upon the trustee.

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))). Additionally, when considering Chapter 13 dismissal due to bad faith in its filing, bankruptcy courts consider: whether the debtor misrepresented facts in the petition or unfairly manipulated the Code; the debtor's history of filings and dismissals; and whether the debtor intended to defeat state court litigation; and —whether egregious behavior is present. *In re Ellsworth*, 455 B.R. 904, 917 (B.A.P. 9th Cir. 2011).

Debtors have struggled with including accurate statements of debts in their Chapter 13 Plan, a marker of bad faith under Factor 4 of *In re Warren*. It is not difficult to understand why Debtors' creditors and the Trustee would assert that Debtors have unfairly manipulated the Bankruptcy Code, and that Debtors have been prosecuting their case in bad faith. Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans.

This case was filed in December 6, 2011. No Chapter 13 Plan has yet been confirmed, after five attempts, over a span of over two years, to propose plans that have not complied with 11 U.S.C. §§ 1322 and 1325(a). Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans. Debtors have ignored court rulings on what needs to be addressed in order to achieve plan confirmation. This case is at serious risk of being dismissed for the Debtors' inability to effectuate a plan. A debtor's failure to timely file a Chapter 13 plan is cause for conversion or dismissal. 11 U.S.C. § 1307(c)(3)*; see In re Elkin*, 5 B.R. 21, 22 (Bankr. S.D. Cal. 1980). The Chapter 13 Trustee has filed previous Motions to Dismiss the Case for prejudicial delay to Debtor's creditors and now Debtors propose a plan based on a very contingent, large lump-sum payment of $92,000. The court is not confirming this plan as it does not meet confirmation requirements.

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.

5. 11-48305-C-13 JOHN/DARLENE DOERR
TSB-1 Peter Macaluso

CONTINUED MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
1-22-14 [179]

Tentative Ruling: The Motion to Dismiss Case 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 - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 22, 2014. 28 days' notice is required. That requirement was met.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. 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 and convert the case to one under Chapter 7.

SEPTEMBER 30, 2014 HEARING

No resolution has been provided to the court concerning a stipulation in connection with Debtor's Motion to Confirm in which the court has continued the instant motion and the Motion to Confirm six times in order to allow the parties to reach a stipulation. To date, nothing has been filed on the docket in connection with the instant Motion to Convert.

At the hearing, ----------

AUGUST 5, 2014 HEARING

At the hearing, the court continued the Motion to Convert to be heard in conjunction with Debtor's Motion to Confirm Plan.

PRIOR HEARINGS

The Chapter 13 Trustee moved to Dismiss Debtors' Bankruptcy Case because Debtor's Motion to Confirm was heard and denied on December 10, 2013. Trustee initially requested the case be dismissed unless Debtors file and serve an amended plan and motion to confirm an amended plan no later than February 5, 2014, or Debtors file a response no later than February 5, 2014 explaining the reason for the delay and why it was reasonable.

At the February 19, 2014 hearing, Debtors responded and stated that they filed, set, and served a Motion to Confirm for March 11, 2014. Debtors are current pursuant to the proposed plan and are prosecuting their case. The court determined that Debtors had provided an adequate response to Trustee's concerns and were sufficiently prosecuting their case, as an amended plan was filed January 27, 2014 with a Motion to Confirm. The court determined that cause did not exist to dismiss Debtors' case and the Motion to Dismiss was continued.

At the March 11, 2014 hearing, it was unclear whether Debtors could achieve confirmation of a feasible plan that complies with the provisions of 11 U.S.C. § 1322 and 1325(a).

At the May 20, 2014 hearing on this matter, the Debtors requested one final continuance in an effort to work with creditors, resolve the dispute with Wells Fargo Bank, N.A., and propose a plan which provides the value from the avoided lien for creditors with general unsecured claims. Dckt 232.

At the June 19, 2014 hearing Wells Fargo Bank, N.A., the Debtors, and the Trustee appeared and requested a continuance. It was reported that the Debtors and Wells Fargo Bank, N.A. believe they have worked out a resolution which would be acceptable to the Trustee, creditors and the court, which would allow a plan to be confirmed in this case.

Nothing further, however, has been filed on the court docket on this matter.

REVIEW OF THE MOTION

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter,

> whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1307(c)(1).

After having reaped the benefits of Chapter 13 and all of its protections, just dismissing the is case at this juncture may not be proper or in the best interests of all creditors. While Wells Fargo Bank, N.A. may well be anxious to have the case dismissed so that it can correct its lien recording error that led to the lien being avoided, such may not be in the best interests of the estate and creditors. While the Debtors may now be anxious to have this case dismissed, having exhausted 27 months of bankruptcy protection, and start a new case, such may not be in the best interests of creditors and the estate.

Further, when considering dismissals, the court should consider whether a dismissal with prejudice is warranted. Such a motion has not been filed, and in connection with this motion that issue is not before the court. But in light of what has transpired in this case and the large non-exempt equity in the property for creditors holding general unsecured claims, any request to dismiss should inform the court, creditors, Debtors, and other parties in interest the calculation for such relief not being requested as part of the motion to dismiss.

The court set the motion for further hearing to address the issue whether dismissal or conversion to Chapter 7 is in the best interests of creditors and the estate. However, neither the Chapter 13 Trustee nor Debtor filed supplemental documents with the court.

The court finds sufficient cause to dismiss Debtors' case for unreasonable delay that is causing prejudice to creditors. 11 U.S.C. § 1307(c).

This case was filed in December 6, 2011. No Chapter 13 Plan has yet been confirmed, after five attempts, over a span of over two years, to propose plans that have not complied with 11 U.S.C. §§ 1322 and 1325(a). Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans. Debtors have ignored court rulings on what needs to be addressed in order to achieve plan confirmation.

This case is at serious risk of being dismissed for the Debtors' inability to effectuate a plan. A debtor's failure to timely file a Chapter 13 plan is cause for conversion or dismissal. 11 U.S.C. § 1307(c)(3); *see In re Elkin*, 5 B.R. 21, 22 (Bankr. S.D. Cal. 1980). The Chapter 13 Trustee has filed previous Motions to Dismiss the Case for prejudicial delay to Debtor's creditors and now Debtors propose a plan based on a very contingent, large lump-sum payment of $92,000. The court is denying confirmation of the proposed fifth amended plan because it does not propose reliable terms of payment, which only compounds the continued prejudice facing creditors of Debtors.

Dismissal of this case is not in the best interests of the estate or creditors. The Debtor's successfully prosecuted an action to avoid the lien of Wells Fargo Bank, N.A. on real property pursuant to 11 U.S.C. § 544 (the

Bank having recorded its deed of trust in the wrong county). Judgment, Adv. 12-2153 Dckt. 118. That lien, though avoided as to Wells Fargo Bank, N.A., is preserved for the benefit of the Bankruptcy Estate. 11 U.S.C. § 551.

If the court were to just dismiss the case, the creditor's right and ability to be paid from this preserved lien would be lost. As a fiduciary of the bankruptcy estate, the Debtors cannot just "throw away" that asset of the estate. On its face, this assets has a value of approximately $222,593.65 (plus additional accrual of interest) in the amount of the obligation secured by the avoided lien. See Civil Minutes from June 19, 2014 hearing on Motion to Confirm Plan, DCN: PGM-7, which are incorporated herein and made part of the ruling on this Motion.

The bankruptcy estate having a $222,593.65 asset which would be lost if the case were dismissed and creditors holding general unsecured claims thereby forfeiting the right to be paid pro rata from such monies if the case was dismissed, the Motion is granted and the case is converted to one under Chapter 7 of the Bankruptcy Code.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the case is converted to one under Chapter 7.

6. 13-34907-E-13 VICTORIA VALENTE
LBG-5 Lucas Garcia

MOTION FOR COMPENSATION BY THE LAW OFFICE OF STEPHEN J. JOHNSON FOR LUCAS GARCIA, DEBTOR'S ATTORNEY(S)
9-3-14 [77]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 3, 2014. By the court's calculation, 27 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6), 21 day notice requirement.)

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

The Motion for Allowance of Professional Fees is granted in the amount of $349.46 and denied for all other fees requested.

The Law Offices of Stephen Johnson("Applicant"), as the attorneys for Victoria Valente the Chapter 13 Debtor ("Client" or "Debtor"), makes a First Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period November 15, 2013 through September 4, 2014. Below is all that has been provided for the breakdown of hours beyond the Exhibits. FN.1.

FN.1. Lucas Garcia is the individual attorney for said Law Office who is the attorney of record in this case. Mr. Garcia received his license to practice law in December 2008. Stephen Johnson, the named partner of the Law Office has been an attorney licensed to practice law since November 1979. The court's records reflect that Stephen Johnson has been representing parties in bankruptcy cases in this District since 1989, appearing in 1,874 matters. Lucas Garcia has appeared in bankruptcy cases in this District since 2009, appearing in 634 matters.

OVERVIEW OF BANKRUPTCY CASE

This Bankruptcy Case was filed on November 11, 2013. The Original Chapter 13 Plan proposed the Debtor making $3,973.00 a month payments for a sixty-month term. Original Plan, Dckt. 5. The Original Plan provided for attorneys to be paid a "No-Look" fee of $4,000.00 as provided in Local Bankruptcy Rule 2016-1(c). The Original Plan provided for the payment of the following claims, in addition to the $4,000.00 administrative expense for Applicant (after applying a $500.00 retainer) and Chapter 13 Trustee fees,

A. Class 1:

1. $2,581.00 monthly for current mortgage payment to Bank of America, N.A.

2. $1,590.64 monthly to cure mortgage arrearage of $90,666.52 to Bank of America, N.A.

B. Class 7 General Unsecured Claims:

1. 0.00% dividend on general unsecured claims totaling $160,536.00. [It appears that this number is based on the amount that the Bank of America, N.A. claim exceeds the value of the Debtor's residence, plus a $700.00 general unsecured claim.]

No provision is made for paying any other claims or creditors. *Id.*

The Trustee objected to confirmation of the Original Chapter 13 Plan, stating that the payments to Bank of America, N.A. for the current and arrearage payment on the mortgage total $4,171.64 as proposed in the Plan, but the Plan payments are only $3,973.00. Second, Debtor has failed to detail her business expenses by which she computes her net income. Third, Debtor reports that she received $15,192.00 tax refunds for 2012 (the tax year prior to filing the bankruptcy case) and this additional income is not provided for in the Plan.

Debtor did not defend the Original Plan, but elected to file a first Amended Chapter 13 Plan. The Original Plan was not confirmed.

First Amended Plan

On January 28, 2014, Debtor filed her first Amended Chapter 13 Plan. Dckt. 21. This replaced the Original Plan, for which no hearing on

confirmation was conducted. The first Amended Plan continued to provide for monthly plan payments of $3,973.00 for a sixty-month term. For Applicant the election for attorneys' fees was changed from the No-Look provisions of Local Bankruptcy Rule 2016-1(c) to seeking fees as permitted by 11 U.S.C. §§ 329 and 330, and Federal Rule of Bankruptcy Procedure 2002, 2016, and 2017. In addition to paying the administrative expenses for Applicant's fees and Trustee fees, the first Amended Plan provided for paying the following claims:

A. Class 1:

1. $2,581.00 monthly for current mortgage payment to Bank of America, N.A.

2. $1,300.00 monthly to cure mortgage arrearage of $78,000.00 to Bank of America, N.A.

B. Class 7 General Unsecured Claims:

1. 0.00% dividend on general unsecured claims totaling $700.00.

Id.

In support of the Motion to Confirm the first Amended Plan Debtor provided her declaration. Dckt. 24. In the Declaration Debtor's testimony under penalty of perjury includes:

A. Debtor filed the bankruptcy case to deal with (1) "unexpected [and unidentified] changes in my month-to-month finances," (2) "significant mortgage delinquency," (3) "burdensome tax debts," and (4) "overwhelming unsecured debt." FN.2.

FN.2. Though the Debtor states that two of the reasons for filing bankruptcy were "burdensome tax debts" and "overwhelming unsecured debt," Schedule E (priority debt, such as taxes) states that Debtor has no tax or other priority debts and Schedule E (general unsecured claims, which include non-priority taxes) states that Debtor has only one creditor, "Portfolio Recvry & Affil," with a general unsecured claim of $700.00. This information stated on Schedules E and F is in conflict with the testimony under penalty of perjury by Debtor in her declaration.

B. Debtor's average monthly net income is $8,346.09 and her average monthly expenses are ($4,372.02).

Id.

The first Amended Chapter 13 Plan and Motion to Confirm was opposed by the Chapter 13 Trustee. Dckt. 36. The opposition included,

a. The payments provided for in the plan exceed the maximum sixty month term permitted for a Chapter 13 Plan in 11 U.S.C. § 1322(d). The Plan cannot be completed as proposed.

b. The first Amended Chapter 13 Plan fails to provide for the additional income of the Debtor which is received through tax refunds [Debtor overpaying her taxes which works to artificially, and improperly, understate her monthly income for computing projected disposable income.] The court notes that the failure to properly provide for tax refunds being included in the plan payments, to the extent that Debtor elects to overpay her taxes, is perplexing as the Debtor previously stated in response to the Trustee's objection to the Original Chapter 13 Plan,

i. "The Trustee has raised that they do not oppose an agreement where the Debtor turn over any tax refunds she may receive, to be contributed to the plan to pay toward unsecured claims. Debtor agrees to stipulate to this."

Debtor's Opposition to Objection to Confirmation, Dckt. 27. Though stating that such a provision would be included in a plan, Debtor and Applicant "neglected" to include it in the first Amended Plan.

c. The additional provisions of the Plan which provide that the Debtor shall pay, outside of the Plan, any attorneys' fees approved by the court. If the Debtor's testimony under penalty of perjury is true as to her income and expenses, Debtor could not have any money to pay the attorneys. Therefore, the plan is not feasible. [Conversely for the court, taking the Plan provision to be a statement by Applicant that it believes or knows that Debtor has money to pay the fees, then the Applicant and Debtor admit that the testimony under penalty of perjury in Debtor's declaration and the Statement of Financial Affairs is false.]

The hearing on Debtor's Motion to Confirm the first Amended Plan was conducted on March 25, 2014. Civil Minutes, Dckt. 39. The court's findings in denying the Motion and denying confirmation of the first Amended Plan included (1) the plan exceeds the sixty-month maximum permitted under the Bankruptcy Code, (2) the Debtor failed to provide all of her income (the tax refunds) to be paid into the plan, and (3) that the Plan provided for paying attorneys' fees from monies which do not exist [or as it appears, were not disclosed by Debtor and Applicant].

Second Amended Plan

On May 9, 2014, Debtor and Applicant filed a Second Amended Chapter 13 Plan, Motion to Confirm, and Declaration. Dckts. 45, 42, 46. The Second Amended Plan maintains a monthly plan payment of $3,973.00 for the first thirty (30) months of the Plan, then increases the monthly plan payment to $5,050.00 for the next thirty (30) months of the Plan. In addition, the Debtor is required to make a $5,000.00 lump sum payment in month eighteen (18) and a $5,000.00 lump sum payment in month thirty (30). The Second Amended Plan provides for Applicant to opt-out of the No-Look Fees, and that the approved attorneys' fees may be paid either through the Second Amended Plan as an

administrative expense or by the Debtor directly outside the Plan [which appears to presume that Debtor has additional income and assets other than used to compute her projected disposable income for the monthly plan payment]. Dckt. 45.

The Second Amended Plan provides for payment of the following claims, in addition to the Applicant's administrative and Chapter 13 Trustee fees,

A. Class 1:

1. $2,581.00 monthly for current mortgage payment to Bank of America, N.A.

2. $900.00 monthly to cure mortgage arrearage of $93,886.62 to Bank of America, N.A. [At $900.00 a month it would take one hundred-five (105) months to cure the arrearage, well in excess of the statutory maximum sixty (60) months. However, the Additional Provisions state that "Any additional funds each month shall be paid to the arrears of this creditor..." While saying that, no provision is made for additional funds to be paid into the plan so that they would be available to pay any and all creditors.]

B. Class 7 General Unsecured Claims:

1. 100.00% dividend on general unsecured claims totaling $700.00. [This is an increase from the 0.00% divided for the Class 7 Claims provided in the first Amended Plan.]

Id.

Debtor testifies under penalty of perjury in her Declaration to support confirmation of the Second Amended Plan. Dckt. 44. Debtor once again confirms, under penalty of perjury, that her average monthly income is $8,346.09 and her monthly expenses are ($4,372.02). This, as she testifies, leaves $3,974.07 in projected disposable income to fund a Plan. She also provides her conclusion, which appears to be contrary to the specific income and expense testimony, that she can fund the plan. She also provides non-specific testimony that her plan "involves the turnover of several expected tax refunds, and that if those refunds do not occur it will be necessary to step up my monthly plan payment."

This testimony by the Debtor is troubling, especially in light of the two prior runs at testifying that she and Applicant had in this case. She provides no testimony as to how the tax refunds are computed or why she is so significantly overpaying her taxes. Second, she never testifies that all of the tax refunds are provided for in the Plan, but merely two lump sum amounts. Third, she states that if there are not tax refunds then she will have to increase her Plan payments – but provides no testimony as to how those payments can be increased. Taken as truthful, her testimony is that she has no ability to increase the Plan payments.

Once again Debtor and Applicant forced the Chapter 13 Trustee to incur the cost and expense of having to object based on obvious defects in the Second Amended Plan. The first opposition is that the Debtor is delinquent in the plan payments, having defaulted in the May 2014 payment of $3,963.00 and the payment of $3,973.00 coming due on June 25, 2014 (which was only one week after the opposition was filed by the Trustee).

The Trustee next opposed confirmation because the Plan failed to provide for a priority claim filed by the State Board of Equalization on March 4, 2014 – two months prior to the Second Amended Plan being filed. Proof of Claim No. 1. Though only for $117.33, Debtor and Applicant just ignored this Proof of Claim.

Once again the Trustee had to object based on Debtor and Applicant failing to provide evidence that performance of the Plan was feasible. Specifically, no basis was shown for making the two lump sum payments. The Second Amended Plan does not provide for tax refunds being paid into the plan. The Debtor provides no evidence to support the increase in Plan payments to $5,050.00 for months thirty-sixty (30-60) of the Second Amended Plan.

Debtor and Applicant again forced the Trustee to expend time and resources objecting to the attorneys' provision which allowed the Debtor to pay attorneys' fees outside the Plan. As stated earlier, it appears that by repeatedly stating this provision both Debtor and Applicant admit that there is "extra" income the Debtor has and is not being disclosed to the court, creditors, Chapter 13 Trustee, and U.S. Trustee.

Confirmation of the Second Amended Plan was denied by order of the court filed on July 16, 2014. Order, Dckt. 56. At the time of the confirmation hearing the Debtor remained in default on the Plan payments, evidencing that the Second Amended Plan was not feasible. The court also found that the Debtor failed to provide evidence of how she could make the Plan payments (the two lump sum payments and the increase in plan payments in months thirty-sixty) and failed to provide for tax refunds to be paid into the Plan. Finally, the court found that Applicant and Debtor were continuing to improperly attempt to pay attorneys' fees with monies being diverted from the Plan. Civil Minutes, Dckt. 54.

Renewed Motion to Confirm Second Amended Plan

On August 1, 2014, Debtor and Applicant refiled the Second Amended Plan (as an exhibit), Motion to Confirm, and Declaration of Debtor. Dckts. 65, 62, 64. The first Motion to Confirm the Second Amended Plan was denied by the court (not denied without prejudice). Order, Dckt. 56; Civil Minutes, Dckt. 54. Notwithstanding the motion having been denied with prejudice, the court having entered a final order denying confirmation of the Second Amended Plan. Fed. R. Civ. P. 54, Fed. R. Bankr. P. 9014, 7054.

All that Applicant and Debtor did was to reload the Second Amended Plan, file a new motion, and then seek to relitigate issues previously determined – that the Second Amended Plan does not comply with the requirements of 11 U.S.C. §§ 1325 and 1322.

In reloading the Second Amended Plan to take a second shot at confirmation, the Debtor provides her declaration, repeating what was previously determined to be deficient testimony under penalty of perjury. Declaration, Dckt. 64. Debtor continues to state under penalty of perjury that her projected disposable income is limited to $3,973.00. Debtor carefully fails to state that she is proposing a plan that requires for all tax refunds to be paid in the plan – only saying some additional payments would be made. Debtor fails, or refuses, to provide (and Applicant fails, or refuses, to prepare and file) truthful testimony as to how and why Debtor is receiving substantial tax refunds, why she intends to overpay her taxes, and how Debtor can fund the proposed Plan.

For the fourth time Debtor and Applicant have forced the Chapter 13 Trustee to incur what otherwise reasonably would be unnecessary costs and expenses in having to oppose a motion for an unconfirmable plan. The Trustee's Opposition to the second Motion to Confirm the previously denied Second Amended Plan includes,

A. The Debtor being in default with $11,907.00 in plan payments, with an additional payment of $3,973.00 being due on September 25, 2014 (three weeks after the Opposition was filed). [That Debtor and Applicant would proceed with filing a plan with substantial defaults and make no provision for cure other than that the Debtor would have an "extra" $15,000.00 to bring the plan current in one month, when the Debtor testifies under penalty of perjury that she has only $3,973.00, all but begs the court, creditors, Chapter 13 Trustee, and U.S. Trustee to infer that Applicant and Debtor are hiding income and assets in this case.]

B. Debtor provides no evidence that the payment of the two proposed lump sum payments of $5,000.00 is feasible and the source of any such monies. The Trustee concludes the Opposition stating, "Debtor has not disclosed all sources of income projected into the plan."

Opposition, Dckt. 74.

Debtor's counsel (Applicant) filed a Reply to the Opposition, but Debtor failed (or refused) to provide a declaration for the factual contentions made in the Reply. Applicant argues,

A. Trustee has raised the fact that Debtor is in default, but "Debtor rectified the delinquency on Friday September 5, 2014."

In making this argument, Applicant provides no evidence. More significantly Applicant and Debtor are careful not to provide any representation or evidence as to how Debtor has access to $11,907.00 of monies (whether her own assets or she is having to engage in unauthorized, 11 U.S.C. § 364, borrowing) to try and fund the re-proposed Second Amended Chapter 13 Plan to pay the delinquent monies she had previously borrowed but has been unable to repay. Instead, Applicant merely argues,

A. With respect to the lump sum payment, "The two lump sum payments are *intended* [emphasis added] to come from Debtor's tax returns, which the Trustee pointed out at the 341 hearing as being fairly high."

In making this argument, Applicant and Debtor admit that there are substantial tax refunds, of which only a portion will be paid into the Plan. Debtor and Applicant continue to refuse to provide any testimony as to what the tax refunds are projected to be or why the Debtor continues to overpay taxes so as to generate substantial tax refunds. Such overpayment and making "free loans" to the government defies any economic reason. It also begs the court, creditors, Chapter 13 Trustee, and U.S. Trustee to infer that Debtor and Applicant are actively working to improperly divert monies from the bankruptcy Plan, subvert the Bankruptcy Code, and defraud the court, creditors, Chapter 13 Trustee, and the U.S. Trustee.

The court for a second time denied, by final order, the re-proposed Second Amended Plan. Dckt. 98. The court's findings of fact and conclusions of law are telling as to how thin the veil is on Applicant's improper efforts to try and confirm unconfirmable plans and force the Chapter 13 Trustee to waste time and resources, which include,

> "However, Debtor provides no evidence that the default has been cured. Further, Debtor has not provided any evidence as to how he has an extra $12,000.00 to cure the default, and than the required $3,973.00 for the current monthly payment. Even more concerning is that Debtor offers no explanation (and no credible evidence) as to where the $11,907.00 in plan payments have been diverted, why the payments were not made, and why defaults will not continue to occur.
>
> Counsel for Debtor casually states in the Reply (which consists of three sentences spread over five lines) that two lump sum payments will come from the Debtors tax refund. Counsel does not argue (and no evidence is presented) (1) why the Debtor has such large tax refunds and (2) what has been done to prevent such large tax refunds from recurring.
> ...
> The arguments (unsupported by evidence) stated by Debtors Counsel does not resolve the Trustee's objections to confirmation. They also raise troubling concerns first, no explanation given as to (1) how the Debtor is able to have an extra $12,000.00 in one month to cure the default. In her declaration in support of the present motion, Debtor states that she has $8,432.02 a month for expenses (not including the mortgage, property taxes, and insurance to be paid through the Plan), she has $3,984.07 of projected disposable income. As event has transpired, this is not correct she has failed to make at least three of the monthly payments.
>
> A closer look at Amended Schedule J (Dckt. 20) shows why Debtors statement of income and expenses under penalty of perjury in her declaration is not accurate. Though Amended Schedule J is made under penalty of perjury, it appears that

the dollar amounts stated for expenses are fabrications by Debtor, made only to generate a pre-determinated Monthly Net Income to create an illusion that the proposed plan was feasible. (These outcome determinative, inaccurate, income and expense statements by debtors under penalty of perjury are commonly called Liar Declarations in this court. Such Liar Declarations do not only show false statements under penalty of perjury by a debtor, but that such consumer counsel obtaining and filing such statements are equally culpable in the improper (and illegal) conduct of submitting such false statements to the court.

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

A. Electricity/Heating.....($ 50.00)

B. Water/Sewer.....($ 0.00)

C. Telephone.....($ 25.00)

D. Cable/Internet.....($ 48.00)

E. Home Maintenance.....($ 0.00)

F. Food.....($ 150.00)

G. Clothing.....($ 25.00)

H. Laundry.....($ 30.00)

I. Medical/Dental.....($ 0.00)

J. Transportation.....($ 185.00)

K. Recreation.....($ 25.00)

L. Health Ins.....($ 0.00)

M. Auto Ins.....($ 65.00)

N. Taxes (not deducted).....($ 0.00)

O. Business Expenses.....($3,763.01)

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

Though under penalty of perjury, the court does not find this statement of expenses to be credible or truthful. No explanation is provided as to how electricity and heating expenses for someone living in Northern California is only $50.00 a month. Further, Debtor lists no water or sewer

expenses. If Debtor is on a well and septic tank, then there are expenses which go with that (power to fun pump, maintenance, and repairs).

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

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

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

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

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

By her own evidence, with the assistance of her attorneys, Debtor has demonstrated that the proposed Plan is not feasible. She cannot afford to make the plan payments. Her expenses are

> a fabrication solely to create the illusion that she can prosecute a Chapter 13 Plan to provide for curing her substantial arrearage on the loan secured by her home. If it was the Debtor's intention to confirm a plan which includes a loan modification negotiation provision with adequate protection payments to the creditor, that has not been presented to the court. For almost four years attorneys in this court have utilized such an Ensminger Additional Plan Provision (so named after the consumer attorney who worked with creditor attorneys and other consumer attorneys to develop such a provision which is consistent with the Bankruptcy Code). Instead of using such a provision, Debtor has fabricated expenses, and has demonstrated that such expenses (stated under penalty of perjury) are a fabrication by her defaulting in at least three required plan
> payments.
>
> The amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is not confirmed."

Civil Minutes, Dckt. 96.

FEES REQUESTED

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: Attorney Hours = 2.9 ($225.00), b. Legal Assistant Hours = 3.4($115.00), c. Clerical Hours = 0.1 ($65.00)

§341 Meeting of Creditors: Attorney Hours = 2.8($225.00), b. Legal Assistant Hours = 0.00($115.00), c. Clerical Hours = 1.3 ($65.00)

Motion to Confirm Plan: Attorney Hours = 2.5($225.00), b. Legal Assistant Hours = 2.3($115.00), c. Clerical Hours = 0.00 ($65.00)

Motion to Confirm Plan: Attorney Hours = 2.2($225.00), b. Legal Assistant Hours = 1.7($115.00), c. Clerical
Hours = 0.00 ($65.00)

Motion to Confirm Plan: Attorney Hours = .5($225.00), b. Legal Assistant Hours = 1.25($115.00), c. Clerical Hours = 0.00 ($65.00)

Trustee's Motion to Dismiss: Attorney Hours = 0.7 ($225.00), b. Legal Assistant Hours = 1.0($115.00), c. Clerical Hours = 0.00($65.00)

Notice of filed Claims: Attorney Hours = .5 ($225.00), b. Legal Assistant Hours = 0.00 ($115.00), c. Clerical Hours = 0.00 ($65.00)

Objection to Filed Claim: Attorney Hours = 2.3 ($225.00), b. Legal Assistant Hours = 2.55 ($115.00), c. Clerical Hours = 0.2 ($65.00)

Motion For Attorney's Fees: Attorney Hours = .7 ($225.00), b. Legal Assistant Hours = 2.2 ($115.00), c. Clerical Hours = 0.00 ($65.00)

In addition to fees, Applicant requests compensation for the following expenses: mailings total $26.46, filing fee total $281.00, credit check fee total $40.00, Pacer fee total $2.00, and courtcall fee total $71.20.

Applicant has provided brief summaries in the Motion in addition to time sheets in the exhibits, with limited explanations.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant motion on September 16, 2014. Dckt. 89.

The Trustee has stated that the fees should be reduced by at least $500 as the Debtor has already paid a $500 retainer prior to filing. Attorneys' fees exceed the amount in Plan. Applicant indicated estimated fees of $4,000, including the $500 retainer. The case has still not been confirmed causing concern to the Trustee as to why the fees are greater than anticipated.

Additionally the Trustee is concerned that the attorney fees exceed the amount in the plan. Applicant has filed four plans for the Debtor which the trustee has objected to each filing for delinquency, not Debtors best efforts, Plan exceeding 60 months, missing priority claims, failure to itemize business expenses, and attorney fee provision leaving potential for direct billing outside of plan.

The Trustee was concerned by the fact that even after the Debtor has presented 4 Chapter 13 plans in less than one year since filing her bankruptcy. The Rights and Responsibilities of Chapter 13 Debtor and Their Attorneys was filed on November 22, 2013 (Dckt. 7). The last paragraph on page 3 states in part, "While the initial fee should be sufficient to fully and fairly compensate counsel for all pre-confirmation services and most post-confirmation services rendered in the case, where substantial and unanticipated post-confirmation work is necessary, the attorney may request that the court approve additional fees ... " (Emphasis added).

The first Plan (Dckt. 5), filed on November 22, 2013 was objected to due to: payment being insufficient to Pay the Class 1 obligations, Debtor failing to itemize business expenses as required per Schedule I and J, and not all of Debtor's income was being committed to the plan.

The First Amended Plan (Dckt. 21), was objected to because the Plan: exceeded 60 months, was not Debtors best efforts, did not include attorney fee provision which allowed for Counsel to pay outside of the plan.

The Second Amended Plan (Dckt. 45), was objected to by the Trustee based on: delinquency due to missed plan payments; priority claim not provided for based on a claim filed by the Creditor; not all debts and assets reported based on a claim filed by a secured creditor on a real property not listed on the schedules; Debtor's inability to make payments as proposed; and attorneys' fee provision left the potential for direct billing of Debtor outside of the Plan.

Trustee had filed a Motion to Dismiss which was heard on September 10, 2014 and continued to October 15, 2014. The reason for the motion was due to concern over inaccuracies of the schedules filed and within the Debtor's budget.

DISCUSSION

In considering this Motion for allowance of attorneys fees the court begins with the basic statutory requirements. 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.

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 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.

Simple Bankruptcy Case

As the court reviewed the file and the present Motion it was struck with how simple the present Chapter 13 case could have, and should have, been for the Debtor. If the information provided by Debtor on Schedules D, E, and F, and on the Master Address List, then she has less than $700.00 in general unsecured claims and only a very large, almost $100,000.00 arrearage, to cure with Bank of America, N.A. on the debt secured by her residence. As addressed in this Decision, the accuracy of the Schedules and Master Mailing List is in doubt due to the misstatements and partial disclosures repeatedly made by Debtor and Applicant in this case.

Debtor, represented by Applicant, filed a prior Chapter 13 case on September 5, 2012. Bankr. E.D. Cal. 12-36159. That case was dismissed on November 14, 2012. The prior case was dismissed pursuant to the Motion of the chapter 13 trustee in that case asserting several grounds. 12-36159 Dckt. 35. Debtor failed to file and serve a motion to confirm a Chapter 13 plan. Thus, the Debtor could have a hearing on confirmation of a plan within the statutorily mandated time period. 11 U.S.C. § 1324.

Additionally, the chapter 13 trustee in the prior case asserted that Debtor failed to provide the financial information concerning her business as required by 11 U.S.C. § 521.

The amended chapter 13 plan filed by Applicant for Debtor in the prior Chapter 13 case is almost identical to the various Chapter 13 Plans filed in the current bankruptcy case. It required Debtor to make monthly plan payments of $3,762.00. After payment of Applicant’s $4,000.00 legal fees in that case

(for which there was a $2,000.00 pre-petition retainer) and the chapter 13 trustee fees, the following claims would be paid.

A. Class 1:

1. $2,663.00 monthly for current mortgage payment to Bank of America, N.A.

2. $888.75 monthly to cure mortgage arrearage of $53,325.09 to Bank of America, N.A. [At $888.75 a month the arrearage would be cured in the statutory maximum sixty (60) months. However, such would be premised on the arrearage of $53,325.09 stated by Applicant and Debtor to be accurate. Such appears to be questionable, as by the time the Current Bankruptcy Case was filed in 2013, one year after the Prior Bankruptcy Case, the arrearage is now stated to be $93,886.62.]

B. Class 7 General Unsecured Claims:

1. 0.00% dividend on general unsecured claims totaling $961.00.

Chapter 13 plan, 12-36159 Dckt. 25. No proofs of claim were filed in the prior case. That may have occurred because the case was dismissed so quickly or because the master mailing list included only one creditor – "Bank of America" at Post Office Box in Simi Valley, California. *Id.* Dckt. 4, which was prepared by Debtor in pro se, prior to Applicant substituting in as her counsel in the prior case.

The Proof of Claim filed by Bank of America, N.A. in the Current Bankruptcy Case states that the last payment received by Bank of America, N.A. from Debtor on its secured claim was February 17, 2011. Proof of Claim No. 4, Attachment 1. Thus, notwithstanding contentions that the Debtor can prosecute a bankruptcy case in good faith, the Debtor has not made payments on this debt for the thirty-three (33) months prior to the commencement of this bankruptcy case. A review of Schedule B does not disclose any accounts into which thirty-three months of the unpaid mortgage payments have been deposited and held – presuming that Debtor's testimony under penalty of perjury and Applicant's statements to the court that Debtor can afford to make the payments are true, correct, and accurate. Rather, it demonstrates that such statement and representations are false.

This Debtor has effectively been using the bankruptcy process since 2012 to "reorganize" her finances. Yet, she has been unable to simply, clearly, and truthfully state her finances. On its face, the Debtor would merely need to provide accurate information about her business and income. She would merely need to truthfully and accurate state the taxes she pays, the reason she is overpaying her taxes, and include in the Chapter 13 Plan a provision that (1) copies of all tax returns will be provided to the Chapter 13 Trustee when filed and (2) all tax refunds will be paid to the Chapter 13 Trustee upon receipt.

Additionally, the Debtor would merely need to truthfully and accurate state her expenses and show the court how her projected disposable income is computed.

Instead, Debtor and Applicant have failed to provide such truthful and accurate information. Debtor refuses to provide testimony about her taxes, why she is generating such large refunds, and her projected tax payments during the term of the Chapter 13 Plan. Debtor also refuses to provide for the tax refunds to be paid into the Chapter 13 Plan, but only makes the cryptic statement that some portion of vague tax refunds will be used to pay Bank of America, N.A. and her attorney.

If Debtor and Applicant had presented a good faith bankruptcy plan that complied with the Bankruptcy Code and the Debtor's obligations in a bankruptcy case, a Plan would have been confirmed long ago at very little expense.

From the testimony provided by Debtor, the pleadings filed in the Current Bankruptcy Case, and consideration of the prior case, it appears that Debtor is desperate, but financially unable, to retain the real property. Applicant has been all too willing to do whatever the Debtor wants, irrespective of whether it is founded in reasonable economics or presents a proper, confirmable plan under the Bankruptcy Code. As all bankruptcy attorneys are well aware, a bankruptcy case is not a proceeding in which "anything goes" and the bankruptcy judge blindly grants orders for whatever is demanded so long as nobody objects. In *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), the United States Supreme Court directed that bankruptcy judges have an independent duty to make sure that bankruptcy plans comply with the Bankruptcy Code.

FEES ALLOWED

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**
Lucas Garcia	15.1	$225.00	$3,397.50
Legal Assistant	13.4	$115.00	$1,541.00
Clerical Hours	1.6	$65.00	$104.00
Total Fees For Period of Application [FN.2]			$5,042.50

FN.2. After calculating the hours from the time log provided in Exhibit A the court finds that these numbers contradict those listed on the Application for Approval (Dckt. 77) and the Declaration of Attorney (Dckt. 79). The sums provided are calculated from the time log. (Exhibit A, Dckt. 81)

The court finds that the while the hourly rates would be reasonable for necessary services provided in assisting the Debtor in the good faith prosecution of a Chapter 13 case, they are not reasonable for the services provided. In essence, Applicant is requesting that the court approve an hourly rate for legal services directed at circumventing the Bankruptcy Code, hiding information from the court, creditors, Chapter 13 Trustee, and U.S. Trustee, and repeatedly advancing bankruptcy plans for which insufficient evidence, non-credible evidence, and false evidence was presented.

Other courts have wrestled with this issue - not focusing on whether the efforts succeed, but whether they were based on a good faith prosecution of the case. As stated by the Seventh Circuit Court of Appeals,

> "A lawyer hired by a trustee [Debtor in Possession or Chapter 13 Trustee] in bankruptcy to do legal work for the estate like the trustee himself is a fiduciary of the estate. [citations omitted]...[Attorney] was not a wind-up toy set in motion by the trustee. He had an independent fiduciary duty to the estate...The Bankruptcy Code limits professionals' compensation to '*reasonable* compensation for actual, *necessary* services.' 11 U.S.C. § 330(a) (emphasis added)...[b]ankruptcy is not intended to be a feast for lawyers...."

In re Matter of Taxman Clothing Company, 29 F.3d 310, 314, 316, (7th Cir. 1995).

This conduct of Debtor having his or her attorney floating unconfirmable plans which do not comply with the Bankruptcy Code is similar to the issues addressed by the Ninth Circuit Court of Appeals in *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1218-1219 (9th Cir. 1994), stating,

> "Counsel for the estate, nevertheless, has now proposed three plans that do not comply with the Code's requirements. He has defended Plan III on appeal before the BAP and before us despite what appears to have been his clear understanding that section 1129(b)(2) was not satisfied. This conduct may well have helped Perez as an individual, but it's not clear why this benefitted the estate or how it satisfied Perez's fiduciary responsibilities.
> ...
> Counsel for the estate must keep firmly in mind that his client is the estate and not the debtor individually. Counsel has an independent responsibility to determine whether a proposed course of action is likely to benefit the estate or will merely cause delay or produce some other procedural advantage to the debtor. While he must always take his directions from his client, where counsel for the estate develops material doubts about whether a proposed course of action in fact serves the estate's interests, he must seek to persuade his client to take a different course or, failing that, resign. Under no circumstances, however, may the lawyer for a bankruptcy estate pursue a course of action, unless he has determined in good

faith and as an exercise of his professional judgment that the course complies with the Bankruptcy Code and serves the best interests of the estate."

The court finds that the legal services provided were not reasonable or necessary for the good faith, proper prosecution of a bankruptcy case by Debtor. Rather, the services were provided as demanded, or pleaded for, by the Debtor – irrespective of whether they advanced positions based upon fact, law, or the good faith extension or repeal of existing law. Applicant chose to be wound up by the Debtor and then do the Debtor's bidding. Though Applicant did what it was told by Debtor, that does not make a basis for the approval of fees under the bankruptcy Code. If the Debtor had the financial ability to perform a plan, this case could have been very, very simple to prosecute. The Debtor does not have such financial ability, and apparently Applicant is not able to so tell Debtor.

The pattern of conduct by Debtor and Applicant demonstrate that Debtor sent Applicant out to wage a war of attrition with the Chapter 13 Trustee. Debtor and Applicant actively worked to make the cost of litigation so expensive that the Trustee would just give up and let the Debtor and Applicant proceed with the deception. Such belief was another miscalculation by Debtor and Applicant, and ignored the clear requirements for confirmation as enunciated by the Supreme Court in *Espinosa*.

COSTS AND EXPENSES ALLOWED

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $420.66 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
Pulled Documents	$2.00	$2.00
Regular Mail	$0.49	$26.46
Courtcall	$41.20	$41.20
Courtcall	$30.00	$30.00
Total Costs Requested in Application		$420.66

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 two Telephonic Appearance fees which total $71.20. 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 charged in additional to the professional fees requested as compensation. This court does not generally allow the recovery of court call expenses on the theory that generally counsel use the Courtcall service to make themselves more competitive in a larger geographic area. For those counsel, the Court Call service is akin to having phones in the office, legal resources, a desk and chair. The court disallows $71.20 of the requested costs.

The First and Final Costs in the amount of $349.46 pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Debtor 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 court is authorizing that Chapter 13 Debtor pay $349.46 of the fees and costs allowed by the court.

CONCLUSION

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

Fees	$ 0.00
Costs and Expenses	$349.46

pursuant to 11 U.S.C. § 330 in this case. All other fees and costs are disallowed.

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 Law Office of Stephen Johnson, Lucas Garcia the attorney of record from said Law Office, ("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 Law Office of Stephen Johnson, Lucas Garcia as attorney of record, 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 $ 0.00
> Expenses in the amount of $ 349.46,
>
> **IT IS FURTHER ORDERED** that all other fees in excess of $0.00 and costs in excess of $349.64 are not allowed by the court.

IT IS FURTHER ORDERED that the Law Office of Stephen Johnson is authorized to pay the allowed $349.46 in costs from the $500.00 retainer it received for this case. The Law Office of Stephen Johnson, Stephen Johnson, and Lucas Garcia, and each of them, and their agents and representatives, are not authorized to receive payment for any fees or costs requested in the Motion or allowed by the court from any source (including the Debtor personally) from any source other than the retainer as authorized in this order.

IT IS FURTHER ORDERED that the Law Office of Stephen Johnson shall pay to the Chapter 13 Trustee on or before October 21, 2014, the unused $150.54 portion of the $500.00 retainer. The Trustee shall hold the $150.54, subject to any attorney lien which the Law Office of Stephen Johnson may assert, and not disburse such monies except (1) on further order of this court or (2) upon the dismissal of the case to the Debtor if no order for the disbursement of the monies has been entered at that time.

7. 10-20910-E-13 ROBERT/MICHELLE JONES — MOTION TO VALUE COLLATERAL OF U.S. BANK, N.A.
CAH-1 Aaron C. Koenig — 8-28-14 [80]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on U.S. Bank, N.A., Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 28, 2014. 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Value secured claim of U.S. Bank, N.A. ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Robert and Michelle Jones ("Debtors") to value the secured claim of U.S. Bank, N.A. ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 8883 Mandalay Way, Elk Grove, California, "Property." Debtors seek to value the Property at a fair market value of $231,500.00 as of the petition filing date. As the owners, Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $393,192.01. Creditor's second deed of trust secures a claim with a balance of approximately $48,137.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Robert and Michelle Jones ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of U.S. Bank, N.A., secured by a second in priority deed of trust recorded against the real property commonly known as 8883 Mandalay Way, Elk Grove, California, is determined to be a secured claim in the amount of $0.00, and the balance of the

claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $231,500.00 and is encumbered by a senior lien securing a claim in the amount of $393,192.01, which exceeds the value of the Property which is subject to Creditor's lien.

8. 10-37215-E-13 JEFFREY/PATRICIA KINST — MOTION TO MODIFY PLAN
BLG-5 Patricia Wilson — 8-15-14 [84]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 15, 2014. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The 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 15, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

9. 13-24415-E-13 ANTONIO/MARIA HERNANDEZ MOTION TO MODIFY PLAN
CAH-4 C. Anthony Hughes 8-12-14 [77]

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

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Debtor has failed to file Proof of Service stating which parties have been served with the Motion and supporting pleadings. 35 days' notice is required.

The Motion to Confirm the Modified Plan 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 Confirm the Modified Plan is denied without prejudice.

Antonio and Maria Hernandez ("Debtors") filed the instant Motion to Confirm the Modified Plan on August 12, 2014. However, Debtors have not filed

a proof of service to show that proper service was given to all necessary parties. Because of the failure to determine if all necessary parties were properly served, the court cannot rule on the motion and denies the Motion to Confirm the Modified Plan.

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.

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

ALTERNATIVE RULING

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 12, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

10. 11-33916-E-13 TROY/SARA TAPPARO
RMD-1 Mary Ellen Terranella

MOTION TO APPROVE LOAN MODIFICATION
8-27-14 [40]

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, and Office of the United States Trustee on August 27, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Nationstar Mortgage, LLC ("Creditor") seeks court approval for Troy and Sara Tapparo ("Debtors") to incur post-petition credit. Creditor, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $1,836.00 a month to $1,741.77 a month. The modification will include all arrears, defer part of the principal balance, and provide for an interest rate of 4.625% over the.

The Motion is supported by the Declaration of Andrew Kempe, Assistant Secretary of Creditor. The Declaration, however, does not provide evidence of Debtors' ability to pay this claim on the modified terms.

OPPOSITION

David Cusick, the Chapter 13 Trustee, has filed an objection to this motion. The Trustee states that Creditor does not have the authority under 11 U.S.C. § 363(b) to make such a motion, it is a power of the Debtors only. The Trustee alleges that the court may find that Creditor has derivative standing to exercise powers that are otherwise reserved to another entity, like the trustee, but there exists no declaration by the debtors affirming that they still desire the loan modification.

DEBTORS' JOINDER TO MOTION TO APPROVE LOAN MODIFICATION

On September 22, 2014, the Debtors filed a joinder to Creditor's Motion to Approve Loan Modification. Dckt. 48.

In support of the joinder, Debtors filed a supporting declaration in which they assert that Debtors have made all required payments under the modification agreement. The Debtors state that they were unaware that the Debtors were required to initiate the motion. The purpose of the loan modification is to allow the Debtors to retain their home. The joinder and supporting declaration re-iterates the terms of the loan modification.

DISCUSSION

11 U.S.C. § 364(d) provides that the court "may authorize the obtaining of credit or incurring of debt secured by a senior or equal lien on property of the estate" if the trustee cannot otherwise obtain such credit and the interests of the lienholder are adequately protected. From the language of this section, the trustee is authorized to incur debts like this. Additionally, case law provides that debtors are subject to section 364 as fiduciaries of their own estates. *Thompson v. Margen (In re McConville*), 110 F.3d 47, 50 (9th Cir. 1997).

While Creditors have not been granted the requisite authority to move under section 364 for a loan modification, the Debtors' joinder to the instant motion in support of approval of the loan modification cures this authority deficiency.

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 Nationstar Mortgage, LLC 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 Troy and Sara Tapparo ("Debtor") to amend the terms of the loan with Nationstar Mortgage, LLC, which is secured by the real property commonly known as 797 Sage Drive, Vacaville, California on such terms as stated in the Modification Agreement filed as Exhibit 1 in support of the Motion, Dckt. 43.

11. 10-39217-E-13 STEPHEN/ELIZABETH DICKSON — CONTINUED MOTION TO MODIFY PLAN
CK-6 Catherine King — 4-4-14 [93]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 4, 2014. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the motion on the basis that there has been no substitution of parties or suggestion of death filed by Debtor. On September 30, 2014, the court granted the motion for Stephen Dixon to be appointed as the personal representative for the late Elizabeth Dixon.

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

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

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

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

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

JUNE 26, 2014 HEARING

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

AUGUST 5, 2014 HEARING

The Chapter 13 Trustee filed a response to the Motion, stating that Debtor has filed documents with the court that have resolved most of the Trustee’s objections. Trustee states the discrepancy of the attorneys fees remains. The order confirming plan reflects attorney fees $726.00 were paid prior to filing and an amount of $2,774 is to be paid through the plan. The Trustee will not have an objection if this is cured in the order confirming.

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

Movant had not having provided sufficient information regarding insurance proceeds regarding the deceased co-debtor.

At the hearing, the court continued the Motion to Confirm the Chapter 13 Plan, ordering that the Debtor file and serve supplemental pleadings on of before September 4, 2014 and ordered that any replies by the Trustee be filed on or before September 18, 2014.

SEPTEMBER 30, 2014 HEARING

The Debtor filed a Supplemental Declaration of Debtor in Support of Motion to Approve Nomination of Debtor's Representative. Dckt. 176. While the Declaration is not linked to the instant motion by Docket Control Number, the Declaration does explain the life insurance proceeds and what the Debtor has done with the proceeds. Attached to the Declaration is a copy of Debtor's proposed Amended Schedules B and C which now includes the insurance proceeds and the relevant exemptions to fully exempt the proceeds. Dckt. 177. However, Debtor has not filed any amended schedules in the docket or motions to amend the schedules outside of merely attaching them as an exhibit with the intent to eventually formally file the schedules with the court.

Exhibit A, Dckt. 77, is identifies as "Proposed" Amended Schedules B and C. While the court does not issue advisory rulings as to these Schedules if the Debtor chooses to file them, there are several glaring deficiencies. First, Proposed Amended Schedule B would state under penalty of perjury that $50,000.00 in life insurance proceeds existed as of the commencement of this case. That is clearly incorrect, as an insurance policy existed as of that date. It is only after the post-petition death of Elizabeth Dickson that $50,000.00 of insurance proceeds came into the bankruptcy estate.

Then Proposed Amended Schedule C purports to claim an exemption in the insurance proceeds that did not exist as of the commencement of the case pursuant to California Code of Civil Procedure § 703.140(b)(11)(C), which provides for an exemption in "A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of that individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

Supplemental Schedule I filed on July 21, 2014, states that Debtor has income of $4,478,95 a month (which is $53,747.40 for one person). From his income the Debtor has $872.93 withheld for state and federal taxes, $322.32 mandatory contributions for a retirement plan (however, no interest in any retirement plan is disclosed on Schedule B or Proposed Amended Schedule B), a $58.50 deduction for life insurance (which is not disclosed on Schedule B or Proposed Amended Schedule B), $144.19 for additional, non-mandatory, retirement contribution (which is not disclosed on Schedule B or Proposed Amended Schedule B).

Schedule B and Proposed Amended Schedule B list this one Debtor owning three vehicles. Debtor now testifies that he purchased a 2011 Jetta for approximately $17,000, apparently not selling any of the three other vehicles which have a value of $12,925.00 (as stated on Schedule B and Proposed Amended Schedule B).

At the hearing, ----------

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

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

12. 10-39217-E-13 CK-7 | STEPHEN/ELIZABETH DICKSON
Catherine King | CONTINUED MOTION TO APPROVE NOMINATION OF DEBTORS' REPRESENTATIVE
7-21-14 [152]

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

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

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

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

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

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

The Motion to Approve Nomination of Debtor's Representative is granted.

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

TRUSTEE'S OPPOSITION

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

AUGUST 5, 2014 HEARING

The court continued the hearing to September 30, 2014 at 3:00 p.m. to allow the parties to follow supplemental pleadings.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor filed a Supplemental Declaration of Debtor in Support of Motion to Approve Nomination of Debtor's Representative on August 27, 2014. In the Declaration, the Debtor argues that he would be able to be an impartial representative for his deceased wife and co-debtor, Elizabeth Dickson.

As to the life insurance proceeds, Debtor provides the following explanation:

> Total amount received was $50, 000 of which there was no intestate and no further claims nor further assets. With the funds I paid the following:
>
> Funeral costs $3000 and taxes of $2500 to $3000;
>
> I purchased a 2011 Jetta for approximately $17,000 so that I would have a reliable vehicle;
>
> I purchased tires for my older cars costing approximately $1000;
>
> I hired a tree service to do necessary tree trimming of 22 pine trees because of fire hazard and personal hazard which cost approximately $3000;
>
> I purchased and installed approximately 400 feet of new fencing for the property with a cost of $3000;
>
> I had necessary service done on my boat and trailer at a cost of $300;
>
> I purchased eexterior paint for the house since it has been many years since the house has been painted for a cost of $1500;
>
> I deposited in my checking account $2000 for emergency, and/or unexpected expenses;

> I also deposited to my savings account $2000 and have on hand approximately $1500;
>
> I also deposited in my other bank account [sic] $1500.
>
> I paid the Chapter 13 Trustee $3500; for a total of approximately $42,300.00. The difference was used to help supplement my income while I took two months off work directly following my wife's death and funeral for obvious personal reasons.

Dckt. 176.

The Debtor attached as an Exhibit to the Declaration a copy of a proposed Amended Schedules B and C to include the insurance proceeds and the alleged exemptions that apply to the proceeds. Debtor alleges that neither himself or his deceased wife "were aware of the existence of the life insurance policy at the time of filing and thus did not disclose it." However, to date, Debtor has not filed any amended schedules to reflect these proposed changes.

DISCUSSION

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

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

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

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in**

> **Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

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

In this case, the court remains concerned if co-Debtor Stephen Dickson is a proper representative for the deceased. While the Debtor has filed a Statement Noting a Party's Death as to co-Debtor Elizabeth Dickson's passing, there remains issues still as to whether co-Debtor Stephen Dickson is a proper representative. The Declaration filed, while explaining what Debtor has done with the insurance proceeds, create more questions and potential liabilities. The use of funds outside the plan for such things as purchasing a new car or

painting a house or retaining funds for emergencies are not typically permitted and may result in Debtor being liable to the estate to return those funds.

Furthermore, no amended schedules B or C have been filed to reflect Debtor's intention of claiming the insurance policy as personal property and the exemptions Debtor claims it falls under. Merely attaching the proposed amended schedules to a Declaration does not put other parties on notice or trigger the other parties right to object to the claimed exemptions. It is very possible that the Trustee may want to pursue an objection to Debtor claiming the insurance policy exempt under Cal. § 704.130(d)(11)(c).

The result of appointing co-Debtor Stephen Dickson as personal representative may be the conversion of the case to a Chapter 7 or possibly dismissal. This is the risk in which co-Debtor Stephen Dickson is taking by seeking to be appointed personal representative when he was the beneficiary of co-Debtor Elizabeth Dickson's life insurance policy which may be property of the estate that must be distributed to creditors.

However, even with the court's reservation about whether or not co-Debtor Stephen Dickson is a proper representative for co-Debtor Elizabeth Dickson, for the sake of judicial economy and to ensure that the case can move forward, the court will grant the motion and appoint co-Debtor Stephen Dickson as the personal representative of co-Debtor Elizabeth Dickson. Creditors, the Chapter 13 Trustee, and the U.S. Trustee provide various parties in interest who can insure that Mr. Dickson properly fulfills his duties and obligations 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 Approve Nomination of Debtor's Representative filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and co-Debtor Stephen Dickson is appointed as the personal representative of co-Debtor Elizabeth Dickson.

13. 10-42317-E-13 MET-5 | **EDWARD HENSCHEL AND DENISE MARGLON** | **CONTINUED MOTION TO APPROVE LOAN MODIFICATION**
Mary Ellen Terranella | **7-2-14 [93]**

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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 48 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 Edward Henschel and Denise Marglon ("Debtor") seeks court approval for Debtor to enter into a Loan Modification Agreement. Wells Fargo Bank, N.A., serviced by America's Servicing Company ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $2,858.11 a month. The modification will provide for a fixed interest rate of 6.125% over the next 264 months.

The Motion is supported by the Declaration of Edward Henschel and Denise Marglon. 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.

TRUSTEE'S OPPOSITION

Trustee opposes the motion on the basis that the Debtors have stated the incorrect party in the loan modification. Debtors state in their motion that "Wells Fargo Bank, N.A. (Lender), serviced by America's Servicing Company" is the creditor but the copy of the loan modification provided by Wells Fargo Bank, N.A. Trustee states that Proof of Claim No. 5 was filed asserting a claim for money loaned in the amount of $372,466.10 with the creditor identified as U.S. Bank, N.A., as Trustee for SG Mortgage Securities Asset Backed Certificates, Series 2006-FRE2, with payments to be sent to America's Servicing Company. The last Notice of Mortgage Payment Change filed on June 5, 2014 also identifies the creditor as U.S. Bank, N.A. but refers to wellsfargo.com for a guide to escrow questions. No assignment or transfer of claim appears on the docket transferring the debt to Wells Fargo Bank, N.A. The Trustee questions how Wells Fargo Bank, N.A. can offer a loan modification when it appears the obligation is owed to another entity.

DEBTOR'S RESPONSE

Debtor's Counsel has been in contact with Brian Fairman, an attorney with Pite Duncan regarding the authority of Wells Fargo Bank, N.A. to make the loan modification with the Debtors. Mr. Fairman is seeking the appropriate documentation from his client so that it can be reviewed by the Trustee and the court. The Debtors request a continuance of the hearing on their motion to allow for the review of the anticipated documentation from Wells Fargo Bank, N.A.'s counsel.

AUGUST 19, 2014 PRIOR HEARING

At the August 19, 2014 hearing, the court continued the hearing to 3:00 p.m. on September 30, 2014 based on the representations of Debtor's counsel that documentation explaining the authority of Wells Fargo Bank, N.A. to offer a loan modification for an obligation that is owed to another legal entity.

DISCUSSION

On September 23, 2014, U.S. Bank, National Association, as Trustee for SG Mortgage Securities Asset Backed Certificates, Series 2006-FRE2 ("U.S. Bank, N.A., Trustee") filed it statement in support of the motion. U.S. Bank, N.A., Trustee, confirms that Wells Fargo Bank, N.A., is authorized to execute the Loan Modification Agreement as U.S. Bank, N.A., Trustee's, agent.

Though the court accepts this confirmation by U.S. Bank, N.A., Trustee, and approves the proposed Loan Modification, several issues arise.

First, U.S. Bank, N.A., Trustee, asserts that in the Power of Attorney authorizes Wells Fargo Bank, N.A. to execute loan modifications for U.S. Bank, N.A., Trustee. Exhibit D, Dckt. 122. This power is exercised as the agent of U.S. Bank, N.A., Trustee, not for the personal interests of Wells Fargo Bank, N.A.

Next, U.S. Bank, N.A., Trustee, directs the court to the Servicing Agreement which addresses how Wells Fargo Bank, N.A. will provide the services when exercising the power of attorney. It states that the servicer "shall have full power and authority, to do or cause to be done any and all things in connection which such servicing and administration which I may deem necessary

or desirable." U.S. Bank, N.A., Trustee, then directs the court to the provision stating that "the Servicer in its own name" may execute and deliver on behalf of U.S. Bank, N.A., Trustee, (1) instruments of satisfaction or cancellation, (2) partial or full release or discharge or subordination, (3) all other comparable instrument, (4) institute foreclosure proceedings, (5) obtain a deed in lieu of foreclosure, and (6) to hold or cause to be held title to such properties on behalf of U.S. Bank, N.A., Trustee. It appears that U.S. Bank, N.A., Trustee, is arguing that it has assigned away all of its fiduciary duties as the Trustee to Wells Fargo Bank, N.A., which is then authorized to do whatever it chooses to do. Even more troubling is that U.S. Bank, N.A., Trustee, appears to be arguing that Wells Fargo Bank, N.A. may act in its own name, hiding the existence of U.S. Bank, N.A., Trustee, from the court, consumers, public, other governmental entities, and county recorders to create a series of questionably executed documents. While Wells Fargo Bank, N.A. may communicate and "act" in its own name, no good reason is presented as to why it would hide the principal-agent relationship, or why it would execute loan documents and title documents in its name.

U.S. Bank, N.A., Trustee, also directs the court to a limitation in the Servicing Agreement to Wells Fargo Bank, N.A. exercising the power of attorney to bind U.S. Bank, N.A., Trustee, to loan modifications. Section 2.07 of the Servicing Agreement provides that notwithstanding the authority granted to Wells Fargo Bank, N.A., the Servicer may modify the loan only if (1) the loan is in default or (2) "in the judgment of the Servicer, such default is reasonably foreseeable."

The Loan Modification Agreement presented to the court does not disclose that it is U.S. Bank, N.A., Trustee, that is modifying the loan (whether acting directly or through its authorized agent) with the Debtors. The signature block for the Loan Modification Agreement misidentifies Wells Fargo Bank, N.A., in its personal capacity, as the "Lender" entering into the Agreement with the Debtors.

The Loan Modification Agreement further states that Wells Fargo Bank, N.A. "loaned" the monies owed on the Note to the Debtors. However, the promissory note which is the subject of the Loan Modification states that the lender who loaned the monies to the Debtors was Fremont Investment and Loan. Proof of Claim No. 5 filed by U.S. Bank, N.A., Trustee.

Being clear and accurate is not an undue burden on creditors, servicers, or debtors. Failing to do so only sews the seeds of confusion and will lead to costly and expensive litigation. Clearly identifying the parties to a transaction is not only proper business practices, but essential to parties seeking relief in federal court. Article III, Section 2, limits the exercise of federal judicial power to the real parties in interest who have an actual case or controversy for which Congress has granted federal court jurisdiction. If the court cannot identify how or why a purported party has an interest for which relief is sought, then it is not proper to grant such relief in the federal court.

The court has no reason to believe that Wells Fargo Bank, N.A., U.S. Bank, N.A., Trustee, the Debtors, or their respective attorneys are intending to engage in improper activities or "pull one over on the court." But good intentions are not a substitute from proper documentation and conduct.

Inaccurate or incomplete disclosures can lead well intention but ill informed employees to take improper acts. More significantly, it creates an environment where those with evil hearts intending to do ill on other can thrive – reeking harm on damages on consumers and creditors.

In connection with the present Motion and Agreement the court rectifies any shortcomings by ordering Wells Fargo Bank, N.A., if it is signing the Loan Modification Agreement as the agent of U.S. Bank, N.A., Trustee, to so expressly state in the signature block of the Loan Modification Agreement. FN.1.

FN.1. The court cannot overstate that it does not believe that Wells Fargo Bank, N.A., U.S. Bank, N.A., Trustee, and their attorneys and representative, are intending to engage in improper behavior or mislead the court. Both of these creditors appear regularly in this court and have conducted themselves as "better creditors," properly advancing their interests and reasonably addressing concerns of the court and consumer attorneys. However, the court also notes that when documents contain "bonehead errors," such as incorrectly stating that Wells Fargo Bank, N.A. made the original loan to the Debtors, it begets owe to wonder what other misstatements have been made in the Loan Modification Agreement.

The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Edward Henschel and Denise Marglon having been presented to the court, U.S. Bank, National Association, as Trustee for SG Mortgage Securities Asset Backed Certificates, Series 2006-FRE2 having filed its statement that it, as the creditor, is entering into the Loan Modification through its agent, Wells Fargo Bank, N.A., and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Edward Henschel and Denise Marglon are authorized to enter into the Loan Modification with U.S. Bank, National Association, as Trustee for SG Mortgage Securities Asset Backed Certificates, Series 2006-FRE2, which may be acting through its agent Wells Fargo Bank, N.A., on the terms set forth in Exhibit A filed in support of the Motion (Dckt. 102.)
>
> IT IS FURTHER ORDERED that if the Loan Modification Agreement is executed by Wells Fargo Bank, N.A., said bank shall expressly state in the signature block for the Loan Modification Agreement that it is executing the Loan Modification Agreement as the agent of U.S. Bank, National

Association, as Trustee for SG Mortgage Securities Asset Backed Certificates, Series 2006-FRE2

14. 10-42317-E-13 MET-6 EDWARD HENSCHEL AND DENISE MARGLON — CONTINUED MOTION TO MODIFY PLAN 7-2-14 [98]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 2, 2014. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the motion based on the pending loan modification, which capitalizes mortgage arrears. Trustee also filed an objection to the pending Motion to Approve Loan Modification on the basis that it fails to name the proper creditor.

Additionally, Trustee states Debtors current Supplemental Schedules I and J filed as exhibits were not the proper form effective December 2013. The

Debtors have used these forms as exhibits, in lieu of constructing a spread sheet stating income and expenses. With the amendment of the Schedule I and J form, debtors may now file Supplemental Schedules I and J to take into account post-petition changes in income and expenses. The court accepts the Exhibits used in this case.

At the August 19, 2014 hearing, the court continued the hearing on the Motion to Approve Loan Modification to allow Debtor's counsel the opportunity to provide documentation explaining the authority of Wells Fargo Bank, N.A. to offer a loan modification for an obligation that is owed to another legal entity. Because of the dependency of the loan modification to the modified plan, the court continued the Motion to Confirm the Modified Plan to be heard concurrently with the Motion to Approve Loan Modification at 3:00 p.m. on September 30, 2014.

Here, the Trustee's objection that the modified plan is based on the pending loan modification is well taken by the court. Having granted the Motion to Approve Loan Modification, the court grants the Motion to Confirm the Modified Plan

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 2, 2014, 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.

15. 14-27618-E-13 MAS-1 | JERRY WADLEY AND TRACY URBANO-WADLEY | OBJECTION TO CONFIRMATION OF PLAN BY DONNA M. CHRISTIN 9-4-14 [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's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 4, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Donna Christin ("Creditor") opposes confirmation of the Plan on the basis that Jerry Wadley and Tracy Urbano-Wadley ("Debtors") have not committed all of their disposable income to their Plan. Creditor alleges that between the two Debtors, $459.00 per month is contributed voluntarily to retirement plans. This is considerably more than the $200.00 per month that Debtors propose to pay into their Chapter 13 Plan.

In order for a plan to be confirmed, a Chapter 13 debtor must dedicate all disposable income to the plan. 11 U.S.C. § 1325(b)(1)(B). Disposable income is the Debtors' monthly income, less reasonably necessary expenses. Creditor cites *Parks v. Drummond (In re Parks)*, 475 B.R. 703 (B.A.P. 9th Cir. 2012), which supports Creditor's assertion that voluntary contributions to retirement plans are not considered "necessary expenses" and that any amounts contributed are part of a debtor's disposable income. *Id.* at 709. Debtors, by contributing $459.00 monthly to their retirement plans, have not committed a significant portion of their disposable income to their Plan.

Reviewing Schedule I indicates that neither Debtor has mandatory contributions to retirement plans. As stated by Creditor Debtors state that they are contributing $459.00 a month to a voluntary plan. Debtors list two Costco 401k Retirement Plan on Schedule B, but do not list a value, asserting that they are not estate property. These plans, and the amount therein, are relevant for the court in considering what reasonably be contributed by the Debtors in determining projected disposable income.

Schedule I also discloses that the Debtors are paying $559.00 a month back into their 401k plans for loans previously taken out by them. In effect, Debtors are paying themselves $559.00 a month. When added to the currently monthly deduction, Debtors are "paying themselves" $1,018.00 a month into their 401k plan. This represents 17% of Debtors' income after payment of taxes and Social Security.

Creditor's objection to confirmation based on the Debtors deducting a voluntary retirement contribution, when considered in light of Debtors also paying their 401ks $559.00, is well taken and sustained.

Debtors' Plan, then, cannot be confirmed under 11 U.S.C. § 1325(b).

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 Donna Christin 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.

16. 09-23720-E-13 TERRENCE/LISA RICHARDSON
WW-7 Mark Wolff

MOTION TO DETERMINE THAT DEBTOR HAS CURED ALL DEFAULTS AND PAID ALL REQUIRED POST PETITION PAYMENTS
8-29-14 [150]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor and Creditor's Counsel on August 29, 2014. However, the Debtors failed to serve the Chapter 13 Trustee. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Determine that Debtor has Cured All Defaults and Paid All Required Post Petition Payments 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 Determine that Debtor has Cured All Defaults and Paid All Required Post Petition Payments is continued to 3:00 p.m. on November 4, 2014.

Terrence and Lisa Richardson ("Debtors") filed the instant Motion to Determine that Debtor has Cured All Defaults and Paid All Required Post Petition Payments on August 29, 2014.

MOTION

Debtors filed the instant motion pursuant to Federal Rule of Bankruptcy Procedure 3002.1(h) to determine whether the Debtors have cured all defaults and paid all required post-petition amounts due, and otherwise determine the status of Debtors' obligations with respect to a claim provided for pursuant to 11 U.S.C. § 1322(b)(5) of their Chapter 13 Plan.

The bankruptcy case was filed On March 4, 2009. At the time of filing, Debtors owned a residence commonly known as 9203 Delair Way, Elk Grove, California ("Property") subject to two notes secured by deeds of trust in favor of Countrywide Home Lending. Debtors also had past due property taxes owed to Sacramento County.

In Debtors original Plan which Debtors proposed to retain their residence and provide for the cure of all past due property taxes, past due payments on the note secured by a first position deed of trust as well as providing for ongoing payments on the note secured by a position deed of trust. The original Plan classified Countrywide Home Lending as a "Class 1" creditor for the payment of both ongoing monthly payments and pre-petition arrears with respect to the note secured by a first petition deed of trust. Under the original Plan, Sacramento County Tax Collector were classified as a Class 2 claim to be paid in full through the Plan. Debtors original Plan classified Countrywide Home Lending as a Class 2 claim with respect to the note secured by a second position deed of trust. The original Plan was confirmed on June 1, 2009. Dckt. 28. On June 1, 2009 as well, the court determined that the value of the collateral securing the Countrywide Home Lending's second position note and deed of trust and the amount of the secured claim of such creditor to be $0.00. Dckt. 28.

On or about March 17, 2009, Countrywide Home Loan Servicing, L.P. cause a claim to be filed representing the amount due with respect to the note secured by a first position deed of trust. Claim No. 1.

On or about May 6, 2014 Ocwen Loan Servicing LLC gave notice pursuant to Federal Rules of Bankruptcy Procedure 3001(e)(2) of the transfer of Countrywide's Claim 1-1 representing that the Transferor was Countrywide Home Loans Servicing, LLP and the Transferee is Ocwen Loan Servicing LLC. Dckt. 139.

On or about June 24, 2009, the Sacramento County Tax Collector cause a claim to be filed which indicated that the past due property taxes at the time this case was filed totaled $4,4559.18. Claim 22.

Debtors have filed a total of six modified plans since the case was filed. The reason for the numerous modified plans arose because Debtors experienced difficulties in making the required payments under the Plan and filed multiple modified plans to excuse delinquencies, adjust their Chapter 13 Plan payments, and to provide for post petition missed payments on Class 1 Claims.

Debtors allege that in connection with their Modified Chapter 13 Plans, Debtors provided for post petition arrears to Countrywide's Class 1 claim to be paid as a Class 2 claim. Through Debtors' Sixth Modified Chapter 13 Plan, Debtors changed the classification of Countrywide's Class 1 claim to Class 4. Debtors allege that all pre-petition and post-petition arrears and ongoing monthly payments were paid.

According to Debtor, the Chapter 13 Trustee paid all post petition monthly payments due on account of Countywide's Class 1 claim. Beginning April 30, 2009, the Chapter 13 Trustee commenced monthly payments to Countrywide in the amount of $1,650.00. Beginning May 30, 2011, by way of a double payment on

June 30, 2011, Debtors allege that the Chapter 13 Trustee commenced monthly payments to Countrywide in the amount of $1,684.45.

Debtors allege that beginning with the check written July 10, 2012, the Chapter 13 Trustee experienced problems with payments to Countrywide where Countrywide was not cashing the checks and were no longing accepting them. The Chapter 13 Trustee and Debtors' attorney attempted to determine the proper payee for ongoing payments. Debtors state that the issue was not resolved until 2014. Each of the payments between July 10, 2012 and April 4, 2014 remain uncashed. Debtors state that on or about May 16, 2014, the Chapter 13 Trustee distributed $28,636.75. Debtors allege that the Chapter 13 Trustee's records show that payments were distributed to Countrywide Home Lending or Ocwen Loan Servicing LLC, Countrywide Home Loans, Countrywide Home Loans, Inc. And Ocwen Loan Servicing LLC.

Debtors allege that the Chapter 13 Trustee paid all pre-petition taxes due to the Sacramento County Tax Collector pursuant to the terms of Debtors' Chapter 13 Plans. Debtors further state that at all times during the course of Debtors' Chapter 13 Plan, Debtors have maintained insurance on their residence.

Following the confirmation of Debtors' Sixth Modified Chapter 13 Plan, Debtors allege that they commenced making direct payments to Ocwen Loan Servicing LLC until such payments were rejected by Ocwen Loan servicing LLC. Debtors state that they are currently holding funds which were rejected by Ocwen Loan servicing LLC and subsequent payments coming due. On July 21, 2014, Debtors caused a "Notice of Final Cure Payment Pursuant to BR 3002.1(f) to be filed with the court and served upon parties in interest, including Ocwen Loan Servicing, LLC.

Debtors state that on August 8, 2014, Ocwen Loan Servicing, LLC filed a "Response to Notice of Final Cure Payment" alleging that "Secured Creditor agrees that Debtors have paid in full the amount required to cure the default on the claim. However, Debtors are contractually due for their November 1, 2013 mortgage payment and have incurred an escrow advance in the amount of $24,243.95." No docket number has been giving to this response.

Debtors allege that the secured creditor has not provided Debtors with any "Notice of Payment Changes," pursuant to Federal Rule of Bankruptcy Procedure 3002.1(c).

OCWEN LOAN SERVICING, LLC'S RESPONSE

Ocwen Loan Servicing, LLC filed a response on September 16, 2014. Ocwen Loan Servicing, LLC states that it is the holder of the first Deed of Trust on Debtors' Property. Ocwen Loan Servicing, LLC states that it filed a proof of claim on March 17, 2009 and it is currently Claim 12.

Ocwen argues that the two issues identified in Debtors' motion is whether Debtors have made all the post-petition payments required and whether Debtors had accumulated any outstanding fees and costs associated with the account. Ocwen separates its response into two categories: 1) Post-Petition Accounting and 2) Escrow Advances.

As to the post-petition accounting, "Debtors assert that these payments have been rejected by Ocwen but counsel for [Ocwen] invites the Debtors to send the payments to this office for submission to Ocwen." Dckt. 156, pg. 2. Ocwen argues that Debtors are delinquent in payments from November 1, 2013 to September 1, 2014 for a total of $18,528.95. Ocwen alleges that Debtors have yet to offer proof that these payments have been made or to the fact that Debtors are currently holding on to these funds. According to Ocwen, 666 payments have come due since the time of filing. Since the filing, Ocwen alleges that the mortgage payment has always remained $1,684.45. Ocwen states that, based on its records, Ocwen has received $86,764.60 from the Trustee to be applied to post-petition payments, an additional $3,370.00 on May 19, 2014 from the Debtors and another payment of $1,650.00 on May 27, 2014 from the Debtors. Ocwen states that Debtors have paid approximately 55 monthly payments making the Debtor due for November 1, 2013. Ocwen alleges that a review of the Trustee's Ledger confirms that they have disbursed $86,764.60 on the claim.

As to the Escrow Advances, Ocwen argues that Debtor has accumulated $19,901.87 in escrow delinquency which Ocwen has advanced. Ocwen states that they are currently in the process of obtaining an accounting and breakdown of the escrow advances. Ocwen notes that at the time it filed its "Response to Notice of Final Cure Payment rule 3002.1," the escrow advances were $24,243.95 but upon further review, Ocwen determined that the 2008 tax in the amount of $4,342.08 was paid through the plan and therefore the correct delinquency is $19,901.87.

Ocwen argues that Debtors have made no reference or offer evidence that they have paid all taxes owed and due on the account. While the Debtors do assert that they have maintained insurance on the property, Ocwen argues that the nature of the advances by Ocwen were all based on taxes from 2009 through 2013. Since the account is a fixed rate loan, the payments have not changed since filing and is the reason why the Debtors' account is not impounded. Ocwen maintains that the escrow advances are correct and due remain owing on the property.

Ocwen requests that the court continue the hearing 30-45 days to allow the parties to resolve the issues or to allow Ocwen time to provide an accounting on the escrow arrears.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant motion on September 23, 2014. Dckt. 161.

In the response, the Trustee first notes that the Trustee was not served with the instant motion and was not included in the Certificate of Service. Dckt. 153.

The Trustee confirms that Ocwen's statement that it has received $86,764.60 from the Trustee to be applied to post petition payments is an accurate reflection of the Trustee's accounting. The Trustee clarifies that the addition $3,370.00 that Ocwen says was received by the Debtors on May 19, 2014 was actually made by the Debtors. The Trustee notes that the delinquency in question appears to have occurred after the plan was modified to pay the mortgage as a Class 4 debt.

Lastly, the Trustee states that the Debtors reference to Ocwen not providing any "Notice of payment changes" pursuant to Federal Rule of Bankruptcy Procedure 3002.1 may not be applicable because the latest confirmed plan calls for the claim to be paid directly by the Debtors.

DISCUSSION

Upon review of the pleadings, the court continues the hearing to 3:00 p.m. on November 4, 2014. The court orders that Ocwen Loan Servicing, LLC shall file on or before October 21, 2014 a final accounting of what Ocwen Loan Servicing, LLC alleges is owed in post-petition payments and any escrow arrears. The court will further order that Debtors shall file on or before October 28, 2014 any responses or supplemental pleadings.

The court agrees with Ocwen that this matter could have, and should have, been resolved without court intervention. However if court intervention is deemed necessary, the court will determine what the amount of post-petition payments and escrow arrears may be due. If the matter cannot be resolved by the parties prior to the continued hearing date, the court will order a senior officer at Ocwen Loan Servicing, LLC to appear in court and order that the Debtors appear as well with a cashier's check in the amount the court determines is owed to Ocwen Loan Servicing, LLC so the payment can be on the record. FN.1.

FN.1. The finds Ocwen Loan Servicing, LLC's Counsel's "invitation" for the Debtors to send the payments to Counsel's office for submission to Ocwen Loan Servicing, LLC to be a non-productive, sarcastic comment intended to inflame rather than resolve. It appears that the court could infer from this comment that Ocwen Loan Servicing, LLC does not communicate with borrowers or attempt to obtain payments, but merely winds-up its attorneys to create an environment in which consumers are afraid to make payments.

If it turns out that such "invitation" was extended because Ocwen Loan Servicing, LLC refused to accept the payments made by Debtors, the court will leave it to the parties to determine what, if any, further judicial proceedings flow from such conduct. If, on the other hand, the payments were not delivered to Owen Loan Servicing, LLC, the court also leaves that to the parties to determine what further, if any, judicial proceedings are appropriate.

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 Motion to Determine that Debtor has Cured All Defaults and Paid All Required Post Petition Payments 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 hearing on the Motion for Motion to Determine that Debtor has Cured All Defaults and Paid All Required Post Petition Payments is continued to 3:00 p.m. on November 4, 2014.

IT IS FURTHER ORDERED that on or before October 21, 2014, Ocwen Loan Servicing, LLC. shall file and serve a final accounting of what Ocwen Loan Servicing, LLC alleges is owed in post-petition payments and any escrow arrears.

IT IS FURTHER ORDERED that on or before October 28, 2014, Debtors shall file any responses or supplemental pleadings.

17. 14-27422-E-13 ALP-1 — LONNIE/SHARON SHURTLEFF — C. Anthony Hughes — OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, N.A. — 8-29-14 [32]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on August 29, 2014. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

JPMorgan Chase Bank, N.A. ("Creditor") opposes confirmation of the Plan on the basis that Lonnie and Sharon Shurtleff's ("Debtors") Plan is proposed based on the assumption that Creditor's lien will be avoided if the Debtor's motion to value is granted. Dckt. 18. Creditor has filed its opposition to the motion to value independently. Dckt. 37. If the Debtors' Motion to Value is denied, Debtors will be unable to comply with the terms of their Plan, making the Plan infeasible.

The Creditor's objection is correct — the Debtors' plan will not be feasible should the pending Motion to Value not be granted. In order for the court to confirm a plan, that plan must be feasible. 11 U.S.C. § 1325(a)(6). However, given the court's tentative ruling to grant the Motion to Value at the continued hearing on September 16, 2014 and the fact that nothing further has been filed in opposition to the motion, this objection will be overruled.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by JPMorgan Chase Bank, N.A. having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on July 21, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

18. 14-27422-E-13 LONNIE/SHARON SHURTLEFF
CAH-1 C. Anthony Hughes
CONTINUED MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, N.A.
8-15-14 [18]

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

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 - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on JPMorgan Chase Bank, N.A., Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 15, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to 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 Motion to Value secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Lonnie and Sharon Shurtleff ("Debtors") to value the secured claim of JPMorgan Chase Bank, N.A. ("Creditor").

SEPTEMBER 16, 2014 HEARING

The hearing for this motion was set for September 16, 2014. The hearing was continued to September 30, 2014 to allow the Creditor and Debtor to come to a settlement or stipulation regarding the value of the Property central to the instant motion. A review of the docket shows that no supplemental documents, stipulations, or claims have been filed in relation to this motion.

MOTION

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

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

OPPOSITION

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

DISCUSSION

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

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

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

The senior in priority first deed of trust secures a claim with a balance of approximately $284,133.33. FN.1. Creditor's second deed of trust secures a claim with a balance of approximately $30,661.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. FN.2. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB*

Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

FN.1. The court notes that Creditor, who is also the holder of the first deed of trust, disputes the outstanding balance on the first deed of trust. However, Creditor has offered no evidence of supporting its contention that the first deed of trust secures a claim of less than $284,133.33, the amount shown on Debtors' Schedule D. Exh. B, Dckt. 21. A review of the record shows that Creditor has not filed a proof of claim in this case for either of its liens on the Property. The court notes that Creditor has filed a request for judicial notice on August 29, 2014 (Dckt. 34), asking the court to take notice of a claim transfer, there remains no claims in this case for either the Creditor nor the original claim holder.

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

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

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

19. 14-27422-E-13 LONNIE/SHARON SHURTLEFF
DPC-1 C. Anthony Hughes
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
8-27-14 [27]

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 27, 2014. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Lonnie and Sharon Shurtleff ("Debtors") cannot afford to make the payments or comply with the plan. 11 U.S.C. § 1325(a)(6). Debtors' plan relies on the Motion to Value Collateral of JPMorgan Chase Bank (Dckt. 18) on a second deed of trust, a hearing on which has been continued to September 30, 2014. Dckt. 43. If the Motion to Value is not granted, Debtors' plan does not have sufficient monies to pay the claim in full and therefor should be denied confirmation.

The Trustee's objection is correct — the Debtors' plan will not be feasible should the pending motion to value not be granted. In order to be confirmed, the plan must be feasible. 11 U.S.C. § 1325(a)(6). However, given the court's tentative ruling to grant the motion to value at the continued hearing on September 16, 2014 and the fact that nothing further has been filed in opposition to the motion, this objection will be overruled.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by 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 is overruled, Debtor's Chapter 13 Plan filed on July 21, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

20. 13-35629-E-13 MARCIE ZAHOUREK **MOTION TO MODIFY PLAN**
SJS-2 Scott J. Sagaria **8-25-14 [45]**

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 25, 2014. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor 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 25, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so

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

21.	**14-27630-E-13** **DPC-1**	**ROSIE GOMEZ** **Gary Ray Fraley**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK** **9-3-14 [15]**

Final Ruling: No appearance at the September 30, 2014 hearing is required.

The Trustee filed a "Notice of Withdrawal" on September 23, 2014, Dckt. 22, stating that the Objection to Confirmation was withdrawn. The court construes this "Notice" as an election to dismiss the Objection to Confirmation without prejudice Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041. No opposition to the Motion was filed. **The Motion having been dismissed without prejudice, the matter is removed from the calendar.**

22. 11-44232-E-13 SANDRA TODD **MOTION TO INCUR DEBT**
CAH-1 C. Anthony Hughes **8-27-14 [41]**

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Internal Revenue Service, the U.S. Department of Education, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 27, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Sandra Todd ("Debtor") seeks court approval for Debtor to incur post-petition credit. FN.1. Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment to $836.04 a month. FN.2. The modification will capitalize the pre-petition arrears and result in an increase in the minimum percentage dividend to the general unsecured creditors.

FN.1. The court notes that the Debtor filed the motion as a Motion to Incur Debt. While this is a correct classification, per se, loan modifications have different considerations and factors so the court will analyze the motion as a motion to approve loan modification.

FN.2. The Class 4 classification is based upon Debtor's pending modified plan which is set for confirmation hearing on October 28, 2014. Under the confirmed plan, the Creditor is listed as Class 2.

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Sandra Todd 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 Sandra Todd ("Debtor") to amend the terms of the loan with Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A., which is secured by the real property commonly known as 2039 Buckingham Drive, Fairfield, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 44.

23. 14-23533-E-13 JOSEPH CARDOZA
PLC-1 Peter Cianchetta

MOTION FOR CONTEMPT AND/OR MOTION FOR TURNOVER OF PROPERTY
9-4-14 [17]

Tentative Ruling: The Motion for Civil Contempt and Turnover Over Property of the Estate 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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 4, 2014. The Proof of Service states that the Motion and supporting pleadings were served on "Collectable Management Resources, A General Partnership," but it was not addressed to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process as required by Federal Rule of Bankruptcy Procedure 7004(b)(3). By the court's calculation, **26** days' notice was provided. **28** days' notice is required.

The Motion for Civil Contempt and Turnover Over Property of the Estate 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 Turnover is denied without prejudice.

Joseph Cardoza ("Debtor), through Peter Cianchetta, Debtor's Counsel, in the above entitled case and Movant, seeks an order for turnover as to $634.00 seized by Edward Bonner, Placer County Sheriff, pursuant to a Notice of Levy in favor of Collectable Management Resources, a General Partnership. The Debtor additionally seeks an order holding Edward Bonner, Placer County Sheriff, and Collectable Management Resources, a General Partnership, in contempt for violating the automatic stay under 11 U.S.C. § 362(k) and 11 U.S.C. § 105.

SERVICE REQUIREMENT

Federal Rule of Bankruptcy Procedure 7004 incorporates Rule 4 of the Federal Rules of Civil Procedure concerning providing service upon a party whom relief is sought. "Rule 7004 provides three alternative procedures for serving process on a corporation." *In re Ass'n of Volleyball Prof'ls*, 256 B.R. 313, 317 (Bankr. C.D. Cal. 2000). Service by first-class mail is not the only option available to the Committee.

Under Federal Rule of Bankruptcy Procedure 7004(b)(3), service of process may be made within the United States by first class mail postage prepaid "upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing of a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires by also mailing a copy to the defendant." Fed. R. Bankr. P. 7004(b)(3).

"Service of process by first class mail is a rare privilege which should not be abused or taken lightly and . . . where the alternative to service by mail is hiring a process server to serve the papers in person, it seems like a small burden to require literal compliance with the rule." *Beneficial Cal., v. Villar* (*In re Villar*) 317 B.R. 88, 93 (B.A.P. 9th Cir. 2004) (quoting *In Re Schoon* 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993)).

Here, the Debtor failed to properly serve Collectable Management Resources, a General Partnership. The Debtor did not serve Collectable Management Resources, a General Partnership by first class mail nor was the service addressed "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires by also mailing a copy to the defendant." Fed. R. Bankr. P. 7004(b)(3).

Additionally, a motion for turnover requires 28 days notice. The Debtor only provided the parties 26 days of notice.

Because of the servicing deficiencies in both notice and service, the court denies the Motion for Civil Contempt and Turnover Over Property of the Estate without prejudice. FN.1.

FN.1. If the Debtor chooses to re-file the motion with proper service and notice, the court notes that Debtors' combination of two types of relief in one pleading is procedurally incorrect. Federal Rule of Bankruptcy Procedure 7018 makes Federal Rule of Civil Procedure 18 applicable in adversary proceedings. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, however, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014 does not incorporate Rule 7018 for contested matters, which includes motions. Debtors have improperly attempted to join two separate requests for relief in one motion.

As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate–proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. The Supreme Court and Rules Committee excluded the provision of Fed. R. Bankr. P. Rule 7018 and Fed. R. Civ. P. Rule 18 from the rapid law and motion practice in the bankruptcy court. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice.

The Debtors have improperly attempted to join a motion to turnover with a motion for civil contempt. This is improper. Each motion must assert one claim against the other party. The Motion is denied without prejudice for this independent ground.

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 Civil Contempt and Turnover Over Property of the Estate filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Civil Contempt and Turnover Over Property of the Estate is denied without prejudice.

24. 12-34737-E-13 TERESA NABER **CONTINUED MOTION TO MODIFY PLAN**
PGM-2 Peter Macaluso **6-17-14 [80]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on June 17, 2014. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

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

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

NOTICE

While notice was properly provided pursuant to Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g), this case was dismissed by order on June 3, 2014. Neither the Notice or the Motion mention this fact or the fact that there is a pending Motion to Vacate Dismissal. The parties receiving notice may not be aware that this Motion is taking place.

Furthermore, Debtor's Notice, Motion, Declaration, Exhibits, and Proof of Service all indicate that the hearing will be before the Honorable

Judge Christopher Klein in Department C, when in fact the hearing will be before the Honorable Judge Ronald H. Sargis in Department E.

TRUSTEE'S OBJECTION

The Trustee opposes confirmation offering evidence that the Debtor is $479.83 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

Additionally, Trustee states Section 2.06 of Debtor's modified plan provides for $1,500.00 in attorney's fees that shall be paid through the plan, $0.00 paid prior to the filing of the case, and that Debtor's counsel shall file and serve a motion for attorney's fees. Section 2.07 provides for a monthly dividend of $25.00 for administrative expenses. Attorney's fees under the confirmed plan are $0.00 per Debtor's prior attorney's Amended Disclosure of Compensation of Attorney, and the Order confirming. Debtor filed a Substitution of Attorney on June 5, 2014, which was granted June 10, 2014. Counsel's Disclosure of Compensation of Attorney (DN 78) indicates counsel has agreed to accept $300.00 per hour and received $1,000.00 prior to the filing of the disclosure statement. The Trustee believes Section 2.06 should reflect information as to the actual attorney's fees expected, including any amounts paid directly.

The Trustee is also uncertain of the plan payment proposed. Debtor's Motion and Declaration indicate payments of $1,675.00 per month shall begin June 2014, where Section 1.01 of the proposed modified plan indicates plan payments beginning June 2014 shall be $1,640.00.

Trustee also states that Section 2.11 of Debtor's proposed modified plan provides for one month of mortgage payments in Class 4. Debtor indicates the May mortgage payment of $1,160.16 to Dovenmuehle Mortgage was paid directly to the lender in lieu of the plan payment since Debtor's case was dismissed. Debtor has not provided proof that the May mortgage payment was made either by way of bank statement or a copy of the cancelled check.

The Trustee cannot tell if the Debtor can afford the plan payments based on the Declaration, 11 U.S.C. § 1325(a)(6). Debtor's Declaration fails to adequately explain the numerous changes regarding her individual expenses.

Debtor filed Supplemental Schedules I and J filed on June 13, 2014 indicate Debtor is now self employed with a monthly income of $4,014.00. Debtor's Business Income and Expenses, which was not included as part of Debtor's updated Schedules I and J filed as an Exhibit, reflect an average gross monthly income of $3,500.00 and a net monthly income of $2,364.00. Trustee states that it is unclear whether the $1,650.00 difference between the claimed monthly income of $4,014.00 and the net business income of $2,364.00 is Debtor's rental income, since this is not clearly stated and Debtor did not include a statement for the property. Additionally, Debtor lists her business expenses as $1,136.00, which includes $450.00 for travel. Debtor's personal expenses include transportation expenses of $425.00. Combined this would reflect a monthly travel and transportation expense of $875.00, which appears excessive.

Lastly, Debtor's provides on Schedule I that she is self employed in real estates sales and her employer is Client First Investments Inc. According to the State of California Bureau of Real Estate website, debtor's employing broker is Loans Realty Group Corporation, 1121 Ventura Dr., Pittsburgh, CA. Additionally, Debtor's Schedule I reflects her employer's address as Madison Ave., Sacramento, but Debtor's Business Expenses do not reflect any kind of rental expense.

DEBTOR'S REPLY

Counsel for Debtor filed a response, stating that Debtor believes she is not delinquent and requests more time to provide proof of the payment. Counsel states that the declaration was incorrect regarding the amount of the monthly payments. Counsel for Debtor states that the total change of $193.76 in living increases is reasonable, necessary and non-material. Counsel states the Debtor as an agent does not pay rent, but a percentage of her commissions.

JULY 22, 2014 HEARING

The instant Motion to Modify Plan was continued to 3:00 p.m. on September 30, 2014.

DEBTOR'S SUPPLEMENTAL DECLARATION

On September 23, 2014, Debtor filed a Supplemental Declaration of Teresa Naber in Support of Motion to Modify. Dckt. 104. In the Declaration, the Debtor states that due to her position as a real estate saleswoman for the last nine years, her income and expenses vary and Debtor "done [her] best at the beginning of the case when working with John Tosney in averaging the part-time income with Grupe Company and a budget that would work."

Debtor states that following the death of her attorney, she was able to find a new attorney to help create a new budget reflecting the new average expenses and income. Debtor states that she wishes to complete the plan because Debtor only has three years remaining, the value of the property is increasing, and Debtor is underwater on the property and must strip the second deed so that Debtor will not lose her house. Debtor states that at the beginning of the case she was both a property manager, which was a salaried position, and had a real estate license but the property manager position ended approximately six months after she started.

Debtor alleges that she made the payments for the mortgage during the dismissal of the case and is post-petition current with the mortgage. Debtor explains that due to her role as a commissioned agent, her car expenses varies depending on how many clients, averaging about $425.00. Debtor states that the personal expense for the vehicle allows Debtor to go to school at night, make repairs and maintain the vehicle, and attend out of town seminars to further Debtor's education.

Debtor alleges that she has chosen to make the proposed budget work by: "moving out of the home, renting a apartment for $700, rent the house out at $1,650, while the $1,410.00 is applied to the mortgage, the profit being

applied t the mortgage and the trustee on a steady basis, and is part of the total net income of $4,014.00 per month." Dckt. 104, pg. 2.

Debtor concludes by stating, "I do believe that I can make the payments called for under the plan, and that I have sufficiently modified my income and lifestyle to enable me to complete the remainder of my plan."

DISCUSSION

This case demonstrates the "real person" aspect to legal proceedings. Here, Debtor was represented by a very experienced bankruptcy attorney. Unfortunately (for both the Debtor and that attorney's friend and family, during the pendency of this case that experienced bankruptcy attorney passes away. In the period following his death Debtor struggled financially and did not find counsel who would prosecute the case in a manner she desired until after her bankruptcy case was dismissed.

The court has vacated the dismissal. Order, Dckt. 101. Debtor and her current attorney seek to confirm this First Modified Plan. Debtor testifies that she is current on her plan payments. She also testifies as to how she has developed a more stable income by renting out her house for $1,650.00 a month, and then renting an apartment for herself at a cost of ($700.00) a month.

However, Supplemental Schedule I does not show income from rental of Debtor's house. Dckt. 79. Supplemental Schedule J does not show expenses relating to the rental of Debtor's House. *Id.*

The First Modified Chapter 13 Plan requires monthly plan payments of $1,640.00 from Debtor. This is the net monthly income of the Debtor as shown on Supplemental Schedules I and J. *Id.* It appears that Debtor states her gross income from working as a real estate agent to be $3,500.00, and there being ($1,138.00) in expenses to generate this income. With net income from employment of $2,364.00, then an additional $1,650.00 a month for renting her house would total $4,014.00 in income. This is the same amount as shown on Supplemental Schedule I.

However, the $1,650.00 is the gross monthly rent for the house, with no provision made for rental housing expenses. Presumably Debtor has notified her insurance carrier of the change in the property use, which most likely has caused the insurance to increase. Additionally, Debtor may well have obtained a number of deductions for rental property, which may offset a portion of her increased income tax obligations for an additional $19,800.00 in rental income.

Supplemental Schedules I and J make list only a $250.00 a month for income taxes for the $3,500.00 a month in real estate agent income. No provision for the payment of any other income taxes or self-employment taxes is made by the Debtor. This budget appears to ignore that Debtor is now generating almost $20,000.00 a year in rental income.

While it may be possible, and the court will not be surprised to see, that the various expenses on Supplemental Schedule J can be "moved around" to create a plausible budget, the court will not blindly assume such

is the case. Significantly troubling is the possible tax time bomb being created by the short term cover for the mortgage payment.

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 without prejudice and the proposed Chapter 13 Plan is not confirmed.

25. 13-34540-E-13 LORI SMYLIE **MOTION TO MODIFY PLAN**
RK-3 Richard Kwun **8-22-14 [76]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 22, 2014. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Lori Smylie ("Debtor") filed the Motion to Confirm Modified Plan on August 22, 2014.

DEBTOR'S MOTION

Debtor seeks to modify her Chapter 13 Plan to make payments pursuant to a trial, then permanent loan modification as offered by SPS, Inc., Debtor's loan servicer. Additionally, Debtor's budget has changed. Debtor's parents are no longer contributing $4,129 per month, PG&E's rising rates and Debtor's need to pump more well water have increased Debtor's electricity costs. Debtor also seeks to correct an error in her previous schedule's phone cost amount. Debtor's transportation costs have increased as Debtor's husband works in the Bay Area.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, has filed opposition to this motion on September 16, 2014. The Trustee opposes the Motion to Modify Plan on the basis that:

1. Debtor's modified plan proposes to reduce the commitment period from 60 months to 36 months. Debtor's Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Dckt. 1) indicates Debtor is under median income and the commitment period is three (3) years. Debtor's Motion and Declaration, however, provide no reason for the reduction in plan term.

2. Section 1.01 refers to the additional provisions in Section 6.01, which state "Trustee authorized to pay former Class 1 creditor SPS Servicing $41,110.48." It appears that Debtor intended to refer to Section 6.02. This section does not specify a plan payment for the months of December 2013 through July 2014.

3. The Debtor's Declaration fails to address the decrease in the term of the confirmed plan from 60 months to 36 months proposed.

4. The Debtor is proposing to move creditor SPS Inc. from Class 1 of the confirmed plan to Class 4. In additional provisions (Section 6.03.2), Debtor refers to SPS Inc.'s claim as secured by a First Deed of Trust. Per court claim no. 1-1, the actual creditor is Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-11. Debtor states in Section 6.03.3, Adequate Protection Payment, that a Trial Period Loan Modification is in process and attaches as Exhibit A, a one-page letter from Select Portfolio Servicing, Inc. as support. Debtor has not shown that Select Portfolio Servicing, Inc. has the authority to make such a modification on behalf of the actual creditor. Additionally, the Debtor states in Section 6.03.3 that "The Chapter 13 Plan does not modify the rights of Bank of America, N.A. for this secured claim, but provides adequate protect payments during the loan modification process. The adequate protection payment should be made through the plan as a Class 1 Monthly Contract Installment Amount as the claim was a delinquent secured claim that matures after the completion of the plan.

DEBTOR'S REPLY

Debtor filed a reply to the Trustee's opposition on September 23, 2014. The Debtor states that:

1. Debtor proposed a shortened term because she is not eligible for a discharge and was an under median debtor. Debtor's purpose in filing for Chapter 13 relief was to either cure the arrears or obtain a permanent loan modification. She has met the trial payment plan and wishes to modify her plan consistent with the terms offered by SPS, Inc. Debtor will change the term of the plan to 60 months, should Objection 1 be sustained.

2. The plan payments and duration from December 2013 to July 2014 was pursuant to the Debtor's initially filed plan, filed November 13, 2013. If the Court finds Objection 2 valid, Debtor will add that "$41,110.48 was authorized to be paid by Trustee for plan months December 2013 through July 2014" in the order confirming plan.

3. Debtor has filed a supplemental declaration in support of the modification of her plan.

4. No collateral documentation is necessary to show that SPS, Inc. has authority to make a modification for the Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-11 when the proof fo claim lists SPS, Inc. as the agent for notice and payment with McCarthy Holthus filing the claim. Debtor states that Trustee's objection that SPS, Inc. cannot be the agent offering a loan modification is inconsistent with the fact that McCarthy Holthus can file a claim listing SPS, Inc. without dispute.

5. The reference to Bank of America, N.A. is a scrivener's error that Debtor will correct in the order confirming plan, if authorized.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. However, the Trustee's objections to the plan are well-taken.

The Trustee objected to the fact that the modified plan reduces the plan term from 60 to 36 months without any explanation from the Debtor. It is the Debtor's burden to establish that the plan is proposed in good faith, including any modifications. *Mattson v. Howe (In re Mattson)*, 468 B.R 361, 372 (B.A.P. 9th Cir. 2012).

Debtor has offered some explanation of her reasoning behind the plan reduction in her Reply, Debtor's Declaration filed with her Reply only states that she is willing to extend the plan term to 60 months if the Trustee's objection is sustained. However, Debtor asserts that the 60 month plan was required to cure the arrearage, which has now been resolved by the potential loan modification. Debtor was a below median income debtor, and as such any term past 36 months was "voluntary," done as necessary to achieve the arrearage cure. See Chapter 13 Statement of Current Monthly Income, Form B22C, computing Debtor's income and determining that the applicable commitment period is three years. Dckt. 1 at 36-37.

The proposed Modified Plan incorporates a modified version of the Ensminger Loan Modification Provision commonly used in this court. It has the Debtor make the direct payments to the lender – not having the payments made through the Plan until the actual loan modification is approved. This is necessary to insure that less scrupulous debtors and counsel then the ones in this case would not misrepresent the terms of a loan modification for purposes of improperly diverting monies around a Chapter 13 plan.

While the court does not "distrust" this Debtor and Counsel, they do not get special exemption from the basic rules that govern all debtors and attorneys.

The Trustee also objects that the modified plan does not provide for the plan payments made between December 2013 through July 2014. This oversight in properly identifying payments made through the previous plan. This also may indicate a lack of good faith under 11 U.S.C. § 1325(a)(3). Debtor has states that she will amend the provision at issue. This change is significant, not a simple scrivener's error. The Debtor may correct the provision in a new modified plan.

Debtor and her Counsel also miss the point about the plan misidentifying SPS, Inc. as the creditor. It is not the creditor but "merely" the loan servicer for the creditors. Just as great confusion has come from the securitization of notes and creditors not clearly and correctly identifying who actually owns the note, such confusion can also arise from debtor's who do not clearly and correctly identify the creditors in their bankruptcy case.

The Trustee correctly objects to the plan on the basis that the Debtor has not provided the necessary documentation to support the assertion the Debtor's loan servicer, Select Portfolio Servicing, Inc. or SPS, Inc., has the requisite authority to modify the terms of Debtor's loan. Although Debtor and Debtor's Counsel believe that SPS, Inc. has the authority to offer the loan modification in question and bind the actual creditor (Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-11 ["DBNTC"]), the court has no documentary evidence to support this assertion.

Select Portfolio Servicing, Inc. has appeared in this court on other unrelated matters and has expressed an understanding of this concerns about misidentification of creditors in motions to value secured claims (11 U.S.C. § 506(a)) and loan modification agreements. The actual creditor needs to be identified in both, and if a loan servicer is executing documents in an agency capacity, then that agency capacity and the identify of the principal disclosed.

Debtor's counsel is incorrect in stating that merely because a lawyer files a proof of claim that "no authority is necessary to show that SPS Inc. has authority to make a modification of the loan [for the undisclosed creditor in the Plan]...." Merely filing a proof of claim is not a grant of agency or the authority to "play with assets of the creditor" as if they were personal assets of the agent.

Further, Debtor's counsel arguing that since payments and general bankruptcy notices are to be set to sent to the creditor through Select Portfolio Servicing, Inc. then the court can "assume" that Select Portfolio Servicing, Inc. has the authority to "be the creditor" is misplaced. Notice are not service of process, which is governed by Federal Rule of Bankruptcy Procedure 7004. Given the depth and detail in which this court has addressed the basic Due Process service requirements and the specific requirements arising under Federal Rule of Bankruptcy Procedure 7004, the court cannot fathom how or why such an argument by Debtor has been advanced in connection with this motion.

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.

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.

26. 14-25140-E-13 KEN JIMENEZ **OBJECTION TO DEBTOR'S CLAIM OF**
DPC-2 Todd M. Peterson **EXEMPTIONS**
8-25-14 [41]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on August 25, 2014. By the court's calculation, 36 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). The defaults of the Debtor and the other parties in interest are entered.

The objection to claimed exemptions is sustained and the exemption as in the two 1025 Mott Airport Road, Mr. Shasta, California parcels (APN 037-410-020 and APN 037-410-030) are each disallowed in their entirety, respectively.

David Cusick, the Chapter 13 Trustee, objects to Ken Jimenez's ("Debtor") use of the California exemptions § 704.730 because the Trustee alleges that Debtor has over-claimed under the exemption. The Trustee notes that the Debtor's Schedule C cites to "CCP 704.710 et seq" for the two parcels of land, without citing specifically to the subsection of § 704 that applies. The Trustee assumes for purposes of the objection that the Debtor is exempting under § 704.730, which covers "Exemption of Homestead and Proceeds Thereof." Specifically, the Trustee objects on three distinct grounds:

1. The Debtor claims the exemption without citing a specific statute but instead included "et seq." Where the Debtor is not claiming a specific exemption statute, the Court should deny

the claim of exemptions unless the Debtor amends the claim to cite a specific statute;

2. To the extent that the court is willing to consider the asserted exemption as a homestead exemption, where the Debtor makes the claim as to a second parcel, the court should disallow the claim. If it is a second parcel, the Debtor is not residing in both places. While a homestead includes outbuilding, it is only a, "house together with the outbuildings and the land upon which they are situated," CCCP § 704.710(a)(1); and

3. To the extent that the court is willing to consider the asserted exemption as a homestead exemption, the Debtor has claimed over $75,000.00 and has not specified which circumstance he claims allows the exemption, CCCP § 704.730(a)(2) or (3). The Trustee does not believe the Debtor is of the age of 65 years, based on the meeting of creditors, but the Trustee would seek discovery in the event that the Debtor asserts this – seeking a copy of the Debtor's driver's license.

Debtor has not filed any response or opposition to Trustee's objection to exemptions.

EXEMPTION AS CLAIMED ON AMENDED SCHEDULE C (Dckt 12 at 3)

Debtor first lists the real property identified as 1025 Mott Airport Road, Mt. Shasta, California, residence on APN 037-410-030, as exempt in the amount of $43,000.00. Debtor states that the property has a value of $90,000.00 and is collateral (along with the second property) for the claim of Greetree Servicing, LLC (though the court notes that since Green Tree Servicing, LLC is a company that services loans for the actual creditor, Green Tree is most likely not the creditor having a claim in this case. The statutory basis for the exemption is "CCP 704.710 et seq."

Debtor then claims an exemption in a second real property, identified as 1025 Mott Airport Road, Mt. Shasta, California, APN 037-410-020, with airplane hanger/shop located on it. Debtor further states that is "attached to residence." Debtor claims a $60,000.00 exemption, stating that the property has a value of $60,000.00. Debtor states that this parcel also secures the claim of "Greentree Servicing, LLC." This exemption is also claimed pursuant to "California Code of Civil Procedure § 704.710 et seq."

Debtor, with the assistance of counsel, asserts an exemption pursuant to a range of statutes, California Code of Civil Procedure §§ 704.710 - 704.850 appears to be the statutory range that is referenced by "CCP 704.710 et seq." These provision provide,

Cal. C.C.P. § 704.710 — Definitions

Cal. C.C.P. § 704.720 – Exemption from Sale, Exemption of Sales Proceeds or Indemnification

Cal. C.C.P. § 704.730 – Amount of Homestead Exemption

(a) The amount of the homestead exemption is one of the following:

(1) $ 75,000.00
(2) $100,000.00
(3) $175,000.00

Cal. C.C.P. § 704.740 – Court Order For Sale, Exemption Claim Where Court Order For Sale Not Required

Cal. C.C.P. § 704.750 – Application for Sale Order

Cal. C.C.P. § 704.760 – Contents of Application

Cal. C.C.P. § 704.770 – Notice of Hearing

Cal. C.C.P. § 704.780 – Hearing

Cal. C.C.P. § 704.790 – Procedure After Order of Sale

Cal. C.C.P. § 704.800 – Minimum Bid

Cal. C.C.P. § 704.810 – Acceleration Clauses and Prepayment Penalties

Cal. C.C.P. § 704.820 – Procedure Where Judgment Debtor is Co-Owner or Owns Less Than Fee

Cal. C.C.P. § 704.830 – Extensions of Time and Appeals

Cal. C.C.P. § 704.840 – Costs

Cal. C.C.P. § 704.850 – Distribution of Proceeds of Sale of Homestead

Amended Schedule C does not identify which of these "et seq." sections are the basis for the exemption.

Debtor seeks to claim $100,000.00 of exemption value over two different parcels of property. He states that Parcel -030 is his residence. California Code for Civil Procedure § 704.710(a)(1) defines a "dwelling" as " a place where a person resides and may include but is not limited to the following: (1) A house together with the outbuildings and the land upon which they are situated." Section 704.710(c) defines "homestead" as "the principal dwelling (1) in which the judgment debtor. . . resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor. . . resided continuously thereafter until the date of the court determination that the dwelling is a homestead."

According the Schedule C, the Debtor claims an exemption of $60,000.00 as to the second parcel of land under the ambiguous "CCP 704.710 et seq." The court agrees with the Trustee that the Debtor appears to have been claiming the exemption under the homestead exemption, CCCP § 704.730. Under the definition of "homestead" and "dwelling" the court finds that the second parcel of land which has an airplane hanger/shop on it does not qualify as an "outbuilding"

for purposes of the exemption. The fact that the two parcels have distinct APNs suggests that the two parcels are separate, although adjacent.

It appears that to the extent that Debtor is claiming a homestead exemption, he has sewn the seeds of confusion by asserting it in an airplane hanger and possibly in a "residence." Rather than specifically identifying the statute, Debtor (represented by counsel) has merely thrown a "pile of statutes" in front of the court and said "pick whatever you like, so long as I get what I want." It is the Debtor's responsibility to identify the basis for the exemption.

To the extent that the court concludes that the exemption is claimed on the second parcel, APN -020, which would then to read Debtor's Amended Schedule C to be a *de facto* cancellation of the exemption claimed on Parcel APN -030, then it would be improperly claimed. If the court were to re-write Amended Schedule C to assert a homestead exemption in APN -030, then it would be providing legal services for the Debtor – something which a federal court does not do.

Therefore, The Trustee's objection to claimed exemptions is sustained, and the exemptions claimed in 1025 Mott Airport Road, Mt. Shasta, California (APNs 037-410-020 and 037-410-020) are disallowed in their entirety.

To afford Debtor and counsel to clearly and correctly assert a homestead exemption, the sustaining of the exemption is without prejudice to Debtor filing an amended Schedule C claiming a homestead exemption in either or both parcels, which will clearly identify the statutory basis for the exemption and amount of the exemption – not merely a general reference to an Article of the California Code of Civil Procedure. An amended Schedule C shall be filed on or before October 31, 2014.

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 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 Trustee's objection to claimed exemptions is sustained, and the exemptions claimed in 1025 Mott Airport Road, Mt. Shasta, California (APNs 037-410-020 and 037-410-020) are disallowed in their entirety.
>
> **IT IS FURTHER ORDERED** that sustaining the Objection is without prejudice to Debtor filing an amended Schedule C claiming a homestead exemption in either or both parcels, which will clearly identify the statutory basis for the exemption and amount of the exemption – not merely a general reference to an Article of the California Code of Civil Procedure. An amended Schedule C to claim an exemption in either or both APNs 037-410-020 and 037-410-020) shall be

filed on or before October 31, 2014. If not timely filed, then the court's order sustaining the Objection is final and with prejudice to a subsequent attempt to claim an exemption in either or both parcels.

27. 13-20944-E-13 DEBRA WARRINGTON — MOTION TO REFINANCE
RWF-1 Robert Fong — 9-2-14 [23]

Tentative Ruling: The Motion to Refinance 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 Chapter 13 Trustee, and Office of the United States Trustee on September 2, 2014. By the court's calculation, 28 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 Motion to Approve Loan Modification is denied.

The Motion to Approve Loan Modification filed by Debra Warrington ("Debtor") seeks court approval for Debtor to incur post-petition credit. However, the motion is not state with particularity the grounds and parties to whom the relief relates. The Motion states the following:

A. Debtor seeks to refinance the loan secured by her home.

B. The amount of the refinance loan will vary, but be in the approximate amount of $112,850.00, depending on closing date and lien amounts to be paid.

C. A title company named Orange Coast Title is involved in an unstated way.

D. The payment will be $721.52 (PIIT).

E. Interest rate will be 4.875%.

F. Debtor will not receive any cash from the refinance.

G. The balance of pre-petition mortgage arrears, if any, shall be paid to the Chapter 13 Trustee for disbursement to that creditor, with the principal balance to be paid directly to the creditor.

H. Debtor seeks a waiver of the fourteen day stay arising under Federal Rule of Bankruptcy Procedure 6004(b) and Interim Rule 6004(h). [The court is unsure which Rules the Debtor is referring or how they are relevant to this motion to obtain post-petition credit.]

Motion, Dckt. 23.

On the one hand, the Motion reads as if it is only seeking authority for the Debtor to obtain a loan sometime in the future, and the court granting the Debtor the authority to do so on any and all terms as the Debtor may decide in the future. No lender is identified and no loan agreement is provided to the court - which is required pursuant to Federal Rule of Bankruptcy Procedure 4001(c)(1)(A).

On the other hand, the Motion makes reference to some specific terms, including the interest rate. The Debtor states under penalty of perjury in her declaration that she has already arranged for the refinancing loan. Dckt. 25. However, both the Motion and Debtor's Declaration conspicuously fail to identify the lender. The Debtor also testifies under penalty of perjury that she seeks to have the "10-day stays" under Bankruptcy Rule 6004(g) and Interim Rule 6004(h) waived. In addition to the Debtor's "testimony under penalty of perjury" not showing a basis for how or why she has knowledge of such rules, those Rules do not apply to obtaining post-petition credit.

While it may all be innocent that the identify of the lender has been withheld from the court and that the Debtor has withheld the loan agreement, such could also indicate that something amiss is afoot.

David Cusick, the Chapter 13 Trustee filed a statement of non-opposition on September 8, 2014. Quite possibly he has been provided with the omitted information and documents. Nevertheless, due to the defects in the motion itself and the evidence, the Motion to Approve the Loan Modification is denied without prejudice.

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

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

The Motion to Approve the Loan Modification filed by Debra Warrington 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.

28. 14-28348-E-13 MET-2 CAROLYN WILLIAMS Mary Ellen Terranella MOTION TO VALUE COLLATERAL OF DEUTSCHE BANK NATIONAL TRUST COMPANY 9-1-14 [18]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Deutsche Bank National Trust Company, Specialized Loan Servicing, Capital Corporate Services, Inc., Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 2, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Deutsche Bank National Trust Company ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Carolyn Williams ("Debtor") to value the secured claim of Deutsche Bank National Trust Company ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 137 Dewberry Drive, Vacaville, California

("Property"). Debtor seeks to value the Property at a fair market value of $291,750.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $444,437.00. Creditor's second deed of trust secures a claim with a balance of approximately $95,515.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Deutsche Bank National Trust Company secured by a second in priority deed of trust recorded against the real property commonly known as 137 Dewberry Drive, Vacaville, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $291,750.00 and is encumbered by a senior lien securing a claim in the amount of $444,437.00, which exceeds the value of the Property which is subject to Creditor's lien.

29. 14-21349-E-13 MARK/TRISHELE SWASEY
AJP-4 Al J. Patrick

OBJECTION TO CLAIM OF ROBIN SUROVIK, CLAIM NUMBER 13
8-16-14 [86]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 16, 2014. By the court's calculation, 47 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 of Robin Surovik, Claim Number 13 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 Objection to Proof of Claim Number 13 of Robin Surovik is overruled as moot.

Mark and Trishele Swasey, the Chapter 13 Debtors, ("Objector") requests that the court disallow the claim of Robin Surovik ("Creditor"), the former wife of Debtor Mark Swasey, Proof of Claim No. 13 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be a priority in the amount of $25,945.78. The Claim alleges that the $25,954.78 arises in unpaid medical expense for Mark Swasey, the issue of Debtor Mark Swasey and Creditor, over the past 17.5 years under an Agreement and Stipulation Re: Permanent Orders of Dissolution of Marriage. Objector asserts that:

1. Debtor Mark Swasey was never informed of any such amount due save and except one half health insurance premiums;

2. Creditor has hid the amounts due, whereabouts of the minor child, and acted with unclean hands, and delayed so as to cause the doctrine of latches to be applicable;

3. The Claim contains bare assertions but absolutely no proof of actual payment by Creditor, no cancelled checks, money orders, or other proof of payment was made by the Creditor.

4. Debtor received information in the past that there was no such sum due and the Creditor had in fact won a lawsuit on behalf of the minor child that resulted in no payment being due from the Creditor. Debtor also believes that others made gifts to defray said medical expenses.

Creditor has filed a lengthy reply to Debtor's Objection to Claim, attaching exhibits in support. Dckt. 102, 103, and 104. However, because the case was dismissed on September 18, 2014 (Dckt. 98), Debtor's Objection to Claim is overruled as moot.

Therefore, he case having previously been dismissed, the Objection to Claim is overruled 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 Claim 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 overruled as moot, the case having been dismissed.

30. 12-25050-E-13 CARLOS/MARTHA MORALES MOTION TO MODIFY PLAN
BLG-6 Chad M. Johnson 8-14-14 [85]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 14, 2014. By the court's calculation, 47 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 14, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to

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

31. 11-23451-E-13 PGM-4 — CLARENCE ISADORE AND DEATRA JONES-ISADORE — MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTORS' ATTORNEY(S) 8-26-14 [107]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 26, 2014. By the court's calculation, 35 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). 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 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 Allowance of Professional Fees is granted.

FEES REQUESTED

Peter G. Macaluso ("Counsel"), the Attorney for Clarence Isadore and Deatra Jones-Isadore, the Chapter 13 Debtors ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period October 2, 2013 through August 4, 2014, when substantial and unanticipated costs were incurred.

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

Significant Motions and Other Contested Matters: Counsel spent 23.25 hours in this category. Counsel prepared several motions, including: a motion

to approve loan modification and a joinder for a motion to consent to enter into loan modification, and a motion to modify plan to provide for the loan modification. Counsel also responded to several motions filed by the Chapter 13 Trustee, including: responding to a motion for examination, a motion to dismiss. In relation to the motion to dismiss, Counsel prepared a motion to modify the plan.

The fees requested are computed by Counsel 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**
Peter G. Macaluso	23.25	$200.00	$4,650.00
Total Fees For Period of Application Application Requests only 20 hours of time to be compensated.			$4,000.00

However, Counsel is requesting a reduced amount of fees at $4,000.00 total. This represents only 20 hours of work at Counsel's hourly rate of $200.00.

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 Counsel related to the estate enforcing rights and obtaining benefits including modifying loans and the Chapter 13 plan, as needed. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

"NO-LOOK" FEES

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

> "(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> ...
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

The Order Confirming the Chapter 13 Plan expressly provides that Counsel is allowed $3,500.00 in attorneys fees, the maximum set fee amount under Local

Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 95. The order confirming the Plan was prepared by Counsel.

If Counsel believes that there has been substantial and unanticipated legal services which have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). He may file a fee application and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

Counsel's motion states that the motions prepared in this case were for unanticipated items, like Debtors receiving a loan modification or the Trustee' motion to dismiss and a related motion to modify the Debtors' plan. Counsel also states that the work was done in relation to an adversary proceeding arising out of the motion to modify plan to account for the loan modification and the Trustee's motion for examination. These motions, and Counsel's time expended preparing and responding to them, can rise to the level of "substantial and unanticipated work." The fees are also reasonable by the fact that Counsel has applied for a fee amount that is reduced from the total number of hours Counsel worked on these motions and responses.

Counsel is allowed, and the Chapter 13 Debtors under the confirmed plan are authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$4,000.00
Costs and Expenses	$ 0.00

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Peter Macaluso ("Counsel"), Attorney for the Chapter 13 Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Peter Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter Macaluso, Professional Employed by Chapter 13 Debtor

Fees in the amount of $ 4,000.00
Expenses in the amount of $ 0.00,

IT IS FURTHER ORDERED that the Chapter 13 Debtor is authorized to pay the fees allowed by this Order 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.

32. 11-46456-E-13 ADR-3 | **SCOTT/MELISSA CUNNINGHAM** **Justin Kuney** | **MOTION FOR CONSENT TO ENTER INTO LOAN MODIFICATION AGREEMENT** **9-16-14 [67]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on September 16, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Approve Loan Modification is granted, and the Debtors are authorized to make trial loan modification payments directly to the creditor for the months of September 2014 through January 2015.

The Motion to Approve Loan Modification filed by Scott and Melissa Cunningham ("Debtor") seeks court approval for Debtor to incur post-petition credit, specifically in the form of a trial loan modification with Christiana Trust ("Creditor"). Creditor, whose claim the plan provides for in Class 4, has

agreed to a loan modification which will reduce Debtor's mortgage payment from the current $1,363.54 a month to $1,415.00 a month. The modification will reduce the fixed interest rate from 8.54% to an estimated 2.00% (unless the modified interest rate is below current market value and in which case after the 5th year may increase by 1% until it reaches a cap).

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

The original Proof of Claim that was filed in the case for the mortgage only lists CitiMortgage as the creditor with no mention of Carrington Mortgage Services, LLC. as an agent, trustee, or servicer of the claim. This proof of claim is the subject of the current Motion to Approve the Loan Modification.

On March 12, 2014, Christina Trust filed Proof of Claim No. 20, claiming to be the Creditor of the mortgage on the Property. On Item 3a, Christiana Trust lists "Citimortgage, Inc." as the account in which Debtor may have scheduled the mortgage under. Christina Trust also lists Carrington Mortgage Services, LLC as name and address where payment should be sent.

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 with the following conditions:

1. The Trial Loan Modification is authorized and the Debtor is authorised to make direct payments to Creditor for the Months of September 2014 through January 2015.

2. After January 2015, all payments made on the claim which relates to the Trial Loan Modification must be made through the Chapter 13 Trustee, commencing with the February 2015 payment, unless the plan is modified or by the Debtors pursuant to further order of the court.

3. At the completion of Trial Loan Modification, Debtor shall obtain approval of a final loan modification or move to modify the plan to provide for payment of the unmodified claim as permitted under the Bankruptcy Code.

In connection with the present Motion and Agreement the court notes that if Carrington Mortgage Services, LLC is signing the Loan Modification Agreement as the agent of Christiana Trust, it must so expressly state in the signature block of the Loan Modification Agreement.

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 Scott and Melissa Cunningham 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 authorized the Debtor to enter into a Trial Loan Modification on the terms and conditions stated in Exhibit C, Dckt. 70, in support of the Motion.

IT IS FURTHER ORDERED that the Debtors are authorised to make direct payments to Creditor for the Months of September 2014 through January 2015.

IT IS FURTHER ORDERED that all payments after January 31, 2015, made on the claim which relates to the Trial Loan Modification must be made through the Chapter 13 Trustee, commencing with the February 2015 payment, unless the plan is modified or by the Debtors pursuant to further order of the court.

IT IS FURTHER ORDERED that upon completion of Trial Loan Modification period, Debtors shall obtain approval of a final loan modification or move to modify the plan to provide for payment of the unmodified claim as permitted under the Bankruptcy Code.

IT IS FURTHER ORDERED that with respect to the present Trial Loan Modification and any final loan modification, Carrington Mortgage Services, LLC executes loan modification documents or agreements, as the agent of Christiana Trust, such agency status and the identity of Christiana Trust, as the "creditor" as defined in 11 U.S.C. § 101(10) and (5), must be expressly stated in the document or at a minimum the signature blocks for agreements or documents executed by Carrington Mortgage Services, LLC.

33. 11-46456-E-13 SCOTT/MELISSA CUNNINGHAM CONTINUED MOTION TO MODIFY PLAN
ADR-2 Justin Kuney 7-15-14 [54]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 15, 2014. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

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

Scott and Melissa Cunningham ("Debtors") filed the instant Motion to Confirm the Modified Plan on July 15, 2014. Dckt. 54.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, objects to confirmation of the proposed plan on multiple grounds.

First, the Trustee objects to the treatment proposed for creditor Christiana Trust. The creditor is in Class I of the confirmed plan for the property at 6544 Creekmont Way. The Debtors are proposing now to treat that creditor as a Class 4 claim holder. Debtors' supporting declaration, Dckt. No. 57, states in part that "we began to pay the trial loan modification amount of $1415.00 per month, directly to our mortgage servicer beginning in May of

2014." Trustee has no record of a loan modification being requested by Debtors or being granted by the court. Debtors have provided no proof that they have been paying mortgage payments directly to the creditor. The Debtors' attorney filed Proof of Claim No. 20, which reflects $28,000 in arrears at the time of filing.

Second, the Motion to Confirm Plan may not comply with Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. These grounds, stated with particularity, are:

A. Debtors' Plan was confirmed on December 30, 2011.

B. After "Careful Review" it has been determined that Debtors are in need of a modification to the confirmed plan.

C. The Motion is supported by Debtors' Declaration, Notice of Hearing, and Exhibits.

D. Wherefore, Debtors pray the plan be amended.

Motion, Dckt. 54.

As this court has stated on many previous occasions, all pleadings in matters before this court and all bankruptcy courts, for that matter, must comply with the requirements of Federal Rule of Bankruptcy Procedure 9013, which incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b) (which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007). In adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

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

In this case, Trustee indicates that important information has been omitted from the Motion to Confirm, and that the Motion may not pass muster under the court's plausibility test in *Ashcroft*, determining that a complaint must contain sufficient factual matter that states a claim to relief that is "plausible on its face," in order to survive a motion to dismiss. Here, the Debtors have not provided, for instance, a description of additional provisions of the plan that differ from the form plan, whether the filing fees have been paid and the total plan payments to date; the goal of the plan (such as a payment toward a house, car, or taxes); the amount of non-exempt equity, if any; the nature and history of debtors' income; what happened to debtor prior to the filing that led to the bankruptcy; whether there are domestic support

obligations owed and if it is current and post-petition; and whether the debtor has filed all tax returns for the last four years. 11 U.S.C. § 1325.

Third, Debtors have paid ahead $300.00 under the proposed plan. Debtors' modified plan proposes payments of $64,119.00 for months 1 through 31, and $113.00 for months 32 through 60. The Trustee's records reflect that June 2014 was month 31. Under the modified plan, Debtors would have needed to have paid to the Trustee a total of $64,232.00 through July 2014. Trustee's records reflect that Debtors have actually paid a total of $64,532.00, a difference of $300.

AUGUST 19, 2014 HEARING

The court continued the hearing on the instant motion to 3:00 p.m. on September 30, 2014 to allow the Debtor to supplement the record.

DEBTOR'S SUPPLEMENTAL DECLARATION

Debtor filed a Supplement to Debtors' Motion to Modify Chapter 13 Plan Post Confirmation on September 16, 2014. While the Debtor states that the supplemental filing is a motion, the court interprets this as a supplemental declaration to the Motion to Modify. In the supporting document, the Debtor states that a modified plan is necessary to reduce the payments to a Class 1 creditor by way of a Trial Loan Modification paid directly by the Debtor. The proposed modified plan proposes payments for 60 months and will complete within five years. The Debtor states that no priority claims have been filed in the case and as such, all priority claims have been provided for by the plan and that there are no ongoing domestic support obligations.

The proposed plan provides that the plan payments would be: "$64,119.00 for months 1-31, and $113.00 per month for months 32-60 of the plan. The percentage paid to unsecured creditors would remain the same so that all unsecured creditors would be paid no less than zero (0) cents on the dollar, based upon the actual claims allowed and approved by the office of the Trustee." Dckt. 71.

DISCUSSION

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

Upon review of the pleadings and responses, the court finds that the modified Plan is confirmable.

While the Trustee's objections concerning particularity are well-taken, the Debtor's supplemental declaration appears to cure the deficiencies in which the Trustee originally objected.

The Trustee's objection concerning the $300.00 deficiency in plan payments for the months 1-31, at the hearing ------

As to the treatment of the Christiana Trust debt, the court having approved the trial loan modification, the court overrules the Trustee objection. Instead, the court requires that following the trial loan modification and after the Debtor moves the court to approve the final loan

modification, that the Debtor file an ex parte motion with the court to move Christian Trust to a Class 1 creditor.

At the hearing, the parties ----------

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 15, 2014, as amended to provided (stated in the order confirming):
>
> 1. Christiana Trust is provided for in the Additional Provisions, with the Debtors authorised to make Trial Loan Modification Payments directly to the Christiana Trust, for whom Carrington Mortgage Services, LLC is the loan servicer, for the period of September 2014 through January 2015;
>
> 2. All payments after January 31, 2015, made on the claim which relates to the Trial Loan Modification must be made through the Chapter 13 Trustee, commencing with the February 2015 payment, unless the plan is modified or by the Debtors pursuant to further order of the court.
>
> 3. Upon completion of Trial Loan Modification period, Debtors shall obtain approval of a final loan modification or move to modify the plan to provide for payment of the unmodified claim as permitted under the Bankruptcy Code.
>
> 4. Upon obtaining approval of a final loan modification which cures all defaults and allows the claim of the Christiana Trust to be a Class 4 Claim in the Chapter 13 Plan, Debtors and the Chapter 13 Trustee shall file an ex parte motion to modify the plan to provide for Class 4 claim treatment of the Christiana Trust Claim.

34. 14-27557-E-13 DOUGLAS HAYCOCK **OBJECTION TO CONFIRMATION OF**
DPC-1 W. Steven Shumway **PLAN BY DAVID CUSICK**
9-3-14 [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 September 3, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Douglas Haycock ("Debtor") is $805.00 delinquent in plan payments to the Trustee to date. The next scheduled payment of $805.00 is due on September 25, 2014. The case was filed o July 24, 2014 and 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 has paid $0.00 into the plan to date.

2. Debtor failed to appear at the First Meeting of Creditors held on August 28, 2014. The Trustee does not have sufficient information to determine whether or not the case is suitable for confirmation with respect to 11 U.S.C. § 1325. The Meeting has been continued to September 25, 2014 at 10:30 AM. This is the Debtor's fifth bankruptcy in two years; the Debtor should have known that he was expected to attend the First Meeting of Creditors. The Debtor's attorney stated at the First Meeting of Creditors that the Debtor indicated that he did not receive notice of the meeting and that is why he did not attend.

3. The debtor has filed the previous bankruptcy cases:

   a. Case No. 12-38001-13, filed October 9, 2012 and the case was dismissed on January 10, 2013 as the Debtor failed to provide a tax return to the Trustee.

   b. Case No. 13-20352-13, filed January 11, 2013 and the case was dismissed on April 4, 2013 for Debtor's failure to appear at the First Meeting of Creditors, no tax return provided to the Trustee, and no business documents provided to the Trustee.

   c. Case No. 13-24791-13, filed April 8, 2013 and the case was dismissed on September 13, 2013 for failure to timely confirm a plan.

   d. Case No. 13-34984-13, filed on November 25, 2013 and the case was dismissed on May 17, 2014 for delinquency and failure to timely amend the plan. FN.1.

FN.1. Steve Shumway, Esq. has represented the debtor in all prior cases and now in the current case.

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4. Debtor failed to provide business documents to the Trustee. Debtor has filed four prior Chapter 13 cases and should have known that the Trustee requires business documents to be provided. Debtor's Schedule I lists his employment as "Self-Research Consultant," and lists business income of $2,000.00 per month. Debtor fails to list any business expenses on the attachment to Schedule I or on Schedule J.

5. Debtor lists JPMorgan Chase Bank on Schedule D, which provides "dependant on debtor being successful in wrongful foreclosure lawsuit." Debtor has failed to provide for this debt in the plan, and while treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment could indicate that Debtor either cannot afford the payments called for under the plan because he has additional debts, or that Debtor wants to conceal the proposed treatment of a creditor. Bains Family Investments, LLC has a motion for relief from the automatic stay, or alternatively, a

confirmation of the absence of the automatic stay, SMR-1, set for hearing on September 9, 2014 at 1:30 PM.

6. It appears that the plan is not Debtor's best effort under 11 U.S.C. § 1325(b). Debtor provided the Trustee with the Declaration of Barbara Haycock, Debtor's mother. Exh. A, Dckt. 23. This declaration has not been filed with the court in this case. The Declaration provides that Debtor's mother provides Debtor with $3,000.00-$3,500.00 per month to help with his finances until he can rebuild his business. The Declaration also states that Mrs. Haycock will continue making these payments for the duration of the plan, if necessary. This Declaration has the following deficiencies:

   a. The Declaration is from a prior Chapter 13 case (number 13-24791-A-13J).

   b. The Declaration is inconsistent with Debtor's Schedule I, which states that Debtor receives $900.00 from his mother.

   c. The Declaration is dated June 10, 2013 and the case was filed July 24, 2014.

The Trustee alleges that the Debtor has not remitted monthly plan payments of $805.00, as required by the terms of Debtor's plan. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Another basis for the Trustee's 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).

The continued meeting of creditors was held on September 25, 2014 and the Trustee's Report indicates the Debtor appeared. The Trustee has filed nothing further, and the court therefore determines the Debtor's appearance has resolved his objection.

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

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for a creditor's secured claim raises doubts about the Plan's

feasibility. *See* 11 U.S.C. § 1325(a)(6). This is reason to sustain the objection.

As to the Trustee's Third objection, the Debtor's recent bankruptcy case has implications for the duration of the automatic stay, *see* 11 U.S.C. § 362(c)(3), but is not by itself reason to deny confirmation.

However, as discussed above, the Trustee's other objections are sufficient grounds to sustain the objection overall and not confirm Debtor's plan. The Debtor has not filed any responses to dispute the Trustee's objections.

Because the Debtor remains delinquent in plan payments, have not filed all necessary and required documentation, does not provide for a secured creditor, and the plan does not appear to be Debtor's best efforts, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by 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 Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

35. 14-24258-E-13 AEB-3 | BARNEY GAXIOLA
Andrew Bakos | MOTION TO VALUE COLLATERAL OF OCWEN FINANCIAL CORPORATION
8-22-14 [60]

Tentative Ruling: The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1).

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 Ocwen Financial Corporation, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 22, 2014. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Value the secured claim of Ocwen Financial Corporation is continued to 3:00 p.m. on October 28, 2014.

The Motion to Value filed by Barney Gaxiola ("Debtor") to value the secured claim of Ocwen Financial Corporation ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 7422 Mar Vista Way, Citrus Heights, California, ("Property"). Debtor seeks to value the Property at a fair market value of $195,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor offers the Declaration of Aaron Barcelon, a licensed real estate appraiser with 21 years' experience, who opines that the value of the property is $195,500.00.

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

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

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

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

UNIDENTIFIABLE CREDITOR NAMED IN MOTION

Debtor seeks to value the collateral of "Ocwen Financial Corporation" ("Ocwen"). It appears that the name "Ocwen Financial Corporation" refers to a loan and mortgage servicing company, which Counsel for Debtor states in his Declaration in Support of the Motion. Dckt. 63. Although a representative from Ocwen appears to have discussed the authority Ocwen may have in entering into lien stripping agreements that bind the actual creditor (an unidentified "investment group"), the court has no documentary evidence to support this assertion. However, this statement clearly shows that Ocwen Financial Corporation is merely serving as the agent for the actual creditor. The Debtor may use Federal Rule of Bankruptcy 2004 to aid in finding the appropriate creditor. FN.1.

FN.1. In a recent unrelated proceeding Ocwen Financial Corporation and its subsidiary Ocwen Loan Servicing, LLC appeared. It has been represented to this court that it is Ocwen Loan Servicing, LLC which provides the loan servicing services to creditors, not the parent company. It appears that the motion misidentifies the creditor on several levels.

Additionally, it is only at the recent hearing in September 2014 that representatives from Owen Financial Corporation and Ocwen Loan Servicing, LLC were present and heard directly the court's concerns relating to correctly identifying the creditor to proofs of claim, motions to value, motions to

approve loan modification, loan modification agreements, and the basic constitutional issue arising under U.S. Constitution Article III, Section 2, case or controversy between real parties in interest requirement for the exercise of federal judicial power.

NO PROOF OF CLAIM FILED

Additionally, the court has reviewed the Claims Registry for this bankruptcy case. No Proof of Claim has been filed by a creditor which appears to be for the claim to be valued.

DISCUSSION

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.

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.

If the court were to grant such order, it would be ineffective, subjecting Debtor to years of paying under a plan, only to discover that Debtor still owes that unidentified creditor the full amount of the debt. Such discovery after years of performing under a Chapter 13 Plan would be an unhappy day not only for the Debtor, but his counsel as well – most likely leaving the Debtor unable to either "lien strip" the true creditor's security interest or have the benefit of paying a reduced secured claim.

Supplemental Pleadings

On September 25, 2014, the Debtor and Ocwen Loan Servicing, LLC filed a stipulation, which purports to stipulate to "strip and avoid the junior lien recorded aginst Debtor's real property held and controlled by [Ocwen Loan servicing, LLC..." Dckt. 71. The Stipulation references Ocwen Loan Servicing, LLC by using the defined term "Creditor." The Stipulation states that Ocwen Loan Servicing, LLC is the "holder" and the "servicer" of the junior lien on Debtor's real property.

Due to the lack of evidentiary support for the assertion that Ocwen Financial Corporation, as servicer for the as-yet unidentified creditor for the Debtor's second in priority deed of trust, can enter into binding loan modifications or lien stripping proceedings on behalf of the unidentified creditor, this Motion to Value the secured claim cannot be granted.

No competent, admissible evidence has been provided by Ocwen Loan Servicing, LLC that it is the "creditor," as that term is defined by 11 U.S.C. § 101(10) and (5). Nor does Ocwen Loan Servicing, LLC provide evidence that it is a "holder" of bearer paper or note endorsed in blank entitled to enforce the note as if it were the actual owner of the note. Cal. Com. Code. §§ 3301, 3302, 3205.

The Stipulation makes various factual representations, but is not signed by an officer or employee of Ocwen Loan Servicing, LLC, but by an attorney for a law firm which represents various unrelated creditors in bankruptcy cases.

Exhibit B to the Stipulation is a notice that Ocwen Loan Servicing, LLC is the servicer for the actual creditor, not the creditor itself. The Notice does not identify the creditor. Dckt. 73. The Stipulation itself, appears to go to great length to hide the identify of the actual creditor from the court and Debtor.

The filing of the Stipulation on September 25, 2014, is just one week after the September 17, 2014 Evidentiary Hearing in case no. 09-44080-E-13, Carrie Rosell, in which representatives and counsel (not the current attorney) for Owen Loan Servicing, LLC and Ocwen Financial Corporation. The court addressed, and Ocwen Loan Servicing, LLC, Owen Financial Corporation, and HSBC Bank USA, National Association, as Trustee for ACE Securities Corp. Home Equity Loan Trust, Series 2006-OP1(the actual creditor whose loan was being modified) all seemed to understand the judicial concerns when creditors are not disclosed, when loan servicers represent (or misrepresent) that they are creditors, that if a loan servicer asserts that it is the holder of all the negotiable paper for all loans it services that evidence of such fact be provided, and that all a servicer must do is accurately disclose in the loan modification agreement that it is acting in an agency capacity and name the creditor (at least in the signature block if the servicer's forms are set up to only name the "servicer" in the agreement.

The attorney appearing for Ocwen Loan Servicing, LLC and Ocwen Financial Corporation was Robert Norman of the House and Allison Law Firm in Long Beach, California, and Gina Feezer appeared as the employee representative of Ocwen Financial Corporation and Ocwen Loan Servicing, LLC. Current counsel for Ocwen Loan Servicing, LLC is instructed to contact Mr. Norman and Ms. Feezer to ascertain whether the current representative made by current counsel are accurate and consistent with Ocwen Loan Servicing, LLC accurately and truthfully identifying the creditor whose loan is being modified.

The court continues the hearing to 3:00 p.m. on October 28, 2014. Supplemental Pleadings and any amended Stipulation shall be filed and served on or before October 14, 2014.

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 Barney Gaxiola ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion pursuant to 11 U.S.C. § 506(a) is continued to 3:00 p.m. on October 28, 2014.

36. 13-20059-E-13 IRMA QUIAMBAO **AMENDED MOTION TO MODIFY PLAN**
HLG-1 **8-14-14 [30]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 14, 2014. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

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

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

Irma Quiambao ("Debtor") filed the instant amended Motion to Confirm First Modified Chapter 13 Plan on August 14, 2014.

MOTION

Debtor states that the reason she is seeking to modify her plan is because Debtor fell behind with Plan payments to the Trustee in the amount of $5,945.00. Debtor alleges that the reason for the delinquency is due to two unplanned trips to Canada to assist her ailing grandmother and to attend Debtor's grandmother's funeral.

The new plan proposes to increase the monthly payment obligation to $2,860.00 beginning with the August 25, 2014 payment. The Debtor states that the proposed Modified Plan eliminates an unnecessary step-up in plan payments that was previously scheduled to occur in month 25 of the Plan. That step-up was based on Debtor's anticipation of receiving increased compensation from her employer in month 25 of the Plan. In support, Debtor states that she has received a small increase in compensation from her employer, as reflected in the supplemental Schedule I, but does not anticipate receiving additional increase during the pendency of the plan other than to account for cost of living adjustments. Furthermore, Debtor alleges that she will also begin receiving a $280.00 monthly household contribution from her adult son, which is also reflected in the supplemental Schedule I.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant motion on September 16, 2014. The Trustee objects on the basis that:

1. The Debtor has not correctly utilized the Chapter 13 Plan standard form. Local Rule 3015-1(a) states that the mandatory form plan EDC 3-080 shall be utilized as the standard form. The Debtor has modified the form to include Section 6.01. Additional provisions on the Signature Page and have checked the box Additional Provisions are not appended to this plan. The Standard Plan Form states on page 6, "All additional provisions shall be on a separate piece of paper appended at the end of this plan."

2. It appears the Debtor is attempting to cure a delinquency. The Debtor states $42,545.00 has been paid into the plan as of August 14, 2014. The Debtor states the proposed plan will cure the $5,945.00 plan arrears referenced in the Trustee's Notice of Default and Application to Dismiss filed July 15, 2014. The Debtor then states the plan payments are as follows:

   Months 1-12: $2,460.00

   Months 13-18: $2,710.00

   Months 19-60: $2,860.00 (for the remaining plan term)

   The Trustee would have no objection to clarifying in the order modifying plan that payments are to be: $42,545.00 paid in

through month 18 with monthly payments to be $2,860.00 for months 19 through 60.

DISCUSSION

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

Here, Debtor offers no response to not complying with the Local Bankruptcy Rules and using the Chapter 13 plan required in this District. Rather, Debtor and counsel merely state that the order confirming can "fix it" by saying what should have been done. This is not a satisfactory answer from lawyers who regularly practice in this court. There is little reason for such lawyers having an old, out of date form that just "slipped in."

The court is faced with the dilemma of enforcing the Local Rule which has been enacted to prevent attorneys from interlineating (and hiding) terms in Chapter 13 Plans and creating more work for the court and Trustee in having to re-visit this Plan. With the additional amendments, the proposed plan does appear to comply with 11 U.S.C. §§ 1322, 1325(a) and 1329.

The proposed plan seeks to approve $3,500.00 in fees for counsel pursuant to Local Bankruptcy Rule 2016-1(c) [commonly called the "No-Look Set Fee" by which counsel does not have to file a fee application or have the court consider whether the set fee is appropriate in each Chapter 13 case]. The court addresses the failure to use the proper plan form by allowing only $3,400.00 in fees pursuant to Local Bankruptcy Rule 2016-1(c). FN.1.

FN.1. Counsel should not look at a *de minimis* $100 reduction in fees as a "license to mislead" and think that using an out of date form is a new strategy to mislead creditors, the Chapter 13 Trustee and court. If the wrong form is used again, counsel can plan on having fees reduced to $0.00, the court considering other corrective sanctions, and the matter being referred to the United States District Court for consideration of punitive sanctions, including suspension of admission to practice in the Eastern District of California.

As to the Trustee's second objection, the court agrees that the clarification would be beneficial to reflect that the plan is curing the delinquencies. The court shall note that the payment terms are to be: $42,545.00 paid in through month 18 with monthly payments to be $2,860.00 for months 19 through 60.

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 14, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

IT IS FURTHER ORDERED that fees for counsel to the Debtor pursuant to Local Bankruptcy Rule 2016-1(c) that will be approved in the order confirming the Chapter 13 Plan are $3,400.00, with all amounts in excess stated in the plan disallowed.

37. 11-35060-E-13 ANTONETTE TIN **MOTION TO INCUR DEBT**
RK-7 Richard Kwun **9-15-14 [154]**

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

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

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

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

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

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Antonette Tin ("Debtor") seeks court approval for Debtor to incur post-petition credit. EverBank ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $1,555.92 a month to $1550.15 a month. The modification will defer $37,855.10 of the principal balance, upon which no interest will be paid. The interest bearing principal will have an interest rate of 4.000%. The new loan maturity date is December 1, 2053.

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Antonette Tin 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 Antonette Tin ("Debtor") to amend the terms of the loan with EverBank, which is secured by the real property commonly known as 8983 Richborough Way, Elk Grove, California, on such terms as stated in the Modification Agreement filed as Exhibit A in Support of the Motion, Dckt. 157.

38. 13-29563-E-13 JAVIER/JEANNE RODRIGUEZ — OBJECTION TO CLAIM OF U.S. BANK, N.A., CLAIM NUMBER 3
CAH-2 C. Anthony Hughes — 7-16-14 [43]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 16, 2014. By the court's calculation, 76 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. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The Objection to Proof of Claim Number 3 of U.S. Bank N.A., is sustained and the claim is disallowed in its entirety.

Javier Martinez Rodriguez and Jeanne Miller Rodriguez, the Chapter 13 Debtors in this case ("Objectors") requests that the court disallow the claim of U.S. Bank N.A. ("Creditor"), Proof of Claim No. 3 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $955.17.

The Objectors assert that the Debtors do not owe the amount asserted by Creditor because they were victims of identity theft, and did not actually use the bank account to write the unauthorized checks, which ended up bouncing. The Debtors include a police report on Debtors' claims and have attached as Exhibit B, Dckt. No. 47. Debtors have also filed a supplemental document to the initial police report, and have attached this report as Exhibit C, Dckt. No. 47.

In the factual background of Debtors' Memorandum of Points and Authorities, Dckt. No. 46, the Debtors state that they had a bank account with the Creditor ending in 7564. Debtors state that their daughter hijacked the account and began writing unauthorized checks from the account to herself and others, without the Debtors' knowledge. Debtors state that their daughter hijacked the account and began writing unauthorized checks from the account to herself and others, without the Debtors' knowledge. This resulted in bounced

checks which then caused Creditor to close the account and leave a deficit against the Debtors. Debtors state that Debtors' daughter intercepted bank statements that would have revealed the fraud. Because of this, a deficiency balance began to accrue.

Debtor Jeanne Rodriguez filed a report with the police department, which Debtors have filed in support of this Motion to show the court that the Debtors took action to report the crime. Debtors state that, because the nature of the crime went on for many years and because the back history is so voluminous, the debtor is not offering the evidence so that the court can make a determination as to whether a criminal act occurred; rather, the evidence is being offered to show that the "debtor filed documents with the police indicating that she was the victim of identity theft and that she took steps to report the crime to the police." The Debtors request the court admit the evidence as proof of due diligence on their part.

Debtors state that they are not responsible for the amount of money listed on the proof of claim because they were the victim of identity theft. In this instance, the thief managed to gain access to the Debtors' account and write unauthorized checks. The thief hid and destroyed proof of the transactions and assumed many different identities to conceal the crime. When the theft was discovered the Debtors called and notified the creditor and the police.

The Creditor has still filed a proof of claim and alleged that monies were owed. The Debtors are objecting to the proof of claim on the basis that it is unenforceable against them because they did not actually accrue the charges that the proof of claim alleges.

DISCUSSION

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

Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. Fed. R. Bankr. P. 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. The court must look to 11 U.S.C. § 502(b) for the exclusive grounds to disallow a claim. *In re Heath*, 331 B.R. 424, 426 (9th Cir. BAP 2005).

Debtors assert that they are not personally liable for the debt incurred as a result of their daughter's alleged criminal conduct. The police report attached as Exhibit B, Dckt. No. 47, filed with the Sacramento Police

Department, appears to be a Property Crime Report dated January 1, 2009. The report reflects that on May 20, 2013, an officer spoke to Debtor Jeanne Rodriguez, who reported that her daughter had committed financial identity theft. The Debtor states in the report that the couple believes that their daughter had taken their ATM card and withdrew $400 when Debtor and their daughter were out shopping. Additionally, four checks totaling $18,300 were cashed starting in January.

The Debtors later discovered that their retirement accounts had been depleted, and the application to withdraw these funds had listed their daughter's phone number. The Debtors state that they notified their various account providers and that the theft is under investigation.

The "Supplemental Report," Exhibit "C" filed in support of the Objection, Dckt. No. 47, appears to be a report containing the results of an investigation conducted of the Debtors' criminal claim against their daughter. The report appears to conclude that Debtors' daughter impersonated her parents in order to access their U.S. Bank, N.A. bank accounts. The Report states that Debtors' daughter caused the accounts to be delinquent and go into collection, thus negatively affecting Debtor Jeanne Rodriguez's credit. The Report further states that the Debtors' daughter assumed her mother's identity, without her knowledge, to implement a "multi-faced strategy" to cover up theft on both the two bank accounts from where payments were made, as well as the two Capitol One Accounts. The strategy included intercepting her mother's email, changing her email address where she received her monthly statements to that of the suspect, pretending to contact Capitol One multiple times on her mother's behalf to assist her in determining why she was having problems with her two accounts there.

The report states that Debtor Jeanne Rodriguez previously had an excellent payment history, until her daughter began stealing funds from her bank accounts and caused multiple bounced checks which resulted in suspension of electric, telephone, internet, and cable services. Debtor had originally believed that the problem with her accounts were the results of errors on the part of the Creditor, a perception that was reinforced by the fact that the suspect, her daughter, had maintained that she had contacted the Creditor on her mother's behalf to assure her that the accounts were not delinquent in any way. Debtors later discovered that all of their investment and retirement accounts, and their credit cards, had been drained, and that many of her checking account payments had bounced back after the funds in her accounts were exhausted.

Here, the Proof of Claim filed by U.S. Bank, N.A., asserts a $955.17 claim, with the basis for this claim indicated as "MONEY LOANED." The claim form indicates that the last four digits identifying the Debtor are "7564," the numbers stated by Debtors as the last four numbers of their account number. No supporting documentation is provided to substantiate the amount of the claim asserted.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety. 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 U.S. Bank, N.A., Creditor filed in this case by Javier Martinez Rodriguez and Jeanne Miller Rodriguez, 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 the objection to Proof of Claim Number 3 of U.S. Bank, N.A. is sustained and the claim is disallowed in its entirety.

39. 13-29563-E-13 CAH-3 | **JAVIER/JEANNE RODRIGUEZ** | **C. Anthony Hughes** | **OBJECTION TO CLAIM OF U.S. BANK, N.A., CLAIM NUMBER 4** | **7-16-14 [49]**

Final Ruling: No appearance at the September 30, 2014 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, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 16, 2014. By the court's calculation, 76 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. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The Objection to Proof of Claim Number 4 of U.S. Bank N.A., is sustained and the claim is disallowed in its entirety.

Javier Martinez Rodriguez and Jeanne Miller Rodriguez, the Chapter 13 Debtors in this case ("Objectors") requests that the court disallow the claim of U.S. Bank N.A. ("Creditor"), Proof of Claim No. 4 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $737.17.

The Objectors assert that the Debtors do not owe the amount asserted by Creditor because they were victims of identity theft, and did not actually use the bank account to write the unauthorized checks, which ended up bouncing. The Debtors include a police report on Debtors' claims and have attached as Exhibit B, Dckt. No. 52. Debtors have also filed a supplemental document to the initial police report, and have attached this report as Exhibit C, Dckt. No. 52.

In the factual background of Debtors' Memorandum of Points and Authorities, Dckt. No. 53, the Debtors state that they had a bank account with the Creditor ending in 5274. Debtors state that their daughter hijacked the account and began writing unauthorized checks from the account to herself and others, without the Debtors' knowledge. This resulted in bounced checks which then caused Creditor to close the account and leave a deficit against the Debtors. Debtors state that Debtors' daughter intercepted bank statements that would have revealed the fraud. Because of this, a deficiency balance began to accrue.

Debtor Jeanne Rodriguez filed a report with the police department, which Debtors have filed in support of this Motion to show the court that the Debtors took action to report the crime. Debtors state that, because the nature of the crime went on for many years and because the back history is so voluminous, the debtor is not offering the evidence so that the court can make a determination as to whether a criminal act occurred; rather, the evidence is being offered to show that the "debtor filed documents with the police indicating that she was the victim of identity theft and that she took steps to report the crime to the police." The Debtors request the court admit the evidence as proof of due diligence on their part.

Debtors state that they are not responsible for the amount of money listed on the proof of claim because they were the victim of identity theft. In this instance, the thief managed to gain access to the Debtors' account and write unauthorized checks. The thief hid and destroyed proof of the transactions and assumed many different identities to conceal the crime. When the theft was discovered the Debtors called and notified the Creditor and the police.

The Creditor has still filed a proof of claim and alleged that monies were owed. The Debtors are objecting to the proof of claim on the basis that it is unenforceable against them because they did not actually accrue the charges that the proof of claim alleges.

DISCUSSION

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

Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. Fed. R. Bankr. P. 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. The court must look to 11 U.S.C. § 502(b) for the exclusive grounds to disallow a claim. *In re Heath*, 331 B.R. 424, 426 (9th Cir. BAP 2005).

Debtors assert that they are not personally liable for the debt incurred as a result of their daughter's alleged criminal conduct. The police report attached as Exhibit B, Dckt. No. 52, filed with the Sacramento Police Department, appears to be a Property Crime Report dated January 1, 2009. The report reflects that on May 20, 2013, an officer spoke to Debtor Jeanne Rodriguez, who reported that her daughter had committed financial identity theft. The Debtor states in the report that the couple believes that their daughter had taken their ATM card and withdrew $400 when Debtor and their daughter were out shopping. Additionally, four checks totaling $18,300 were cashed starting in January.

The Debtors later discovered that their retirement accounts had been depleted, and the application to withdraw these funds had listed their daughter's phone number. The Debtors state that they notified their various account providers and that the theft is under investigation.

The "Supplemental Report," Exhibit "C" filed in support of the Objection, Dckt. No. 52, appears to be a report containing the results of an investigation conducted of the Debtors' criminal claim against their daughter. The report appears to conclude that Debtors' daughter impersonated her parents in order to access their U.S. Bank, N.A. bank accounts. The Report states that Debtors' daughter caused the accounts to be delinquent and go into collection, thus negatively affecting Debtor Jeanne Rodriguez's credit. The Report further states that the Debtors' daughter assumed her mother's identity, without her knowledge, to implement a "multi-faced strategy" to cover up theft on both the two bank accounts from where payments were made, as well as the two Capitol One Accounts. The strategy included intercepting her mother's email, changing her email address where she received her monthly statements to that of the suspect, pretending to contact Capitol One multiple times on her mother's behalf to assist her in determining why she was having problems with her two accounts there.

The report states that Debtor Jeanne Rodriguez previously had an excellent payment history, until her daughter began stealing funds from her bank accounts and caused multiple bounced checks which resulted in suspension of electric, telephone, internet, and cable services. Debtor had originally believed that the problem with her accounts were the results of errors on the part of the Creditor, a perception that was reinforced by the fact that the suspect, her daughter, had maintained that she had contacted the Creditor on her mother's behalf to assure her that the accounts were not delinquent in any way. Debtors later discovered that all of their investment and retirement accounts, and their credit cards, had been drained, and that many of her checking account payments had bounced back after the funds in her accounts were exhausted.

Here, the Proof of Claim filed by U.S. Bank, N.A., asserts a $737.17 claim, with the basis for this claim indicated as "MONEY LOANED." The claim form indicates that the last four digits identifying the Debtor are "5274," the numbers stated by Debtors as the last four numbers of their account number. No supporting documentation is provided to substantiate the amount of the claim asserted.

Additionally, on August 8, 2014, U.S. Bank, N.A. filed a Notice of Withdrawal of Proof of Claim No. 4. This was after the Objection to Claim was filed. The court accepts the Notice of Withdrawal as the creditor's non-opposition to Proof of Claim No. 4 being disallowed.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety. 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 U.S. Bank, N.A., Creditor filed in this case by Javier Martinez Rodriguez and Jeanne Miller Rodriguez, 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 the objection to Proof of Claim Number 4 of U.S. Bank, N.A. is sustained and the claim is disallowed in its entirety.

40. 13-29563-E-13 CAH-4 — JAVIER/JEANNE RODRIGUEZ — C. Anthony Hughes — OBJECTION TO CLAIM OF AMERICAN EXPRESS, FSB, CLAIM NUMBER 10 — 7-16-14 [55]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

The court having previously sustained the Objection to Claim #10 Filed by American Express, FSB, pursuant to the Stipulation of the parties, and having entered the order denying Claim #10 in its entirety (Dckt. 83), the matter is removed from the Calendar.

41. 13-29563-E-13 JAVIER/JEANNE RODRIGUEZ
CAH-5

OBJECTION TO CLAIM OF ALTAIR OH XIII, LLC, CLAIM NUMBER 11
7-17-14 [61]

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, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 17, 2014. By the court's calculation, 75 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 Proof of Claim Number 11 of Altair OH XIII, LLC, is sustained and the claim is disallowed in its entirety.

Javier Martinez Rodriguez and Jeanne Miller Rodriguez, the Chapter 13 Debtors in this case ("Objectors") requests that the court disallow the claim of Altair OH XIII, LLC ("Creditor"), Proof of Claim No. 11 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $1,294.06.

DEBTORS' OBJECTION

The Objectors assert that the Debtors do not owe the amount asserted by Creditor because they were victims of identity theft, and did not actually

use the credit card to make the purchases that are allegedly owed. The Objection appears to presume that the Creditor in this case is collecting a credit card debt allegedly owed by Debtors to Capitol One. The Debtors include a police report on Debtors' claims and have attached as Exhibit B, Dckt. No. 65. Debtors have also filed a supplemental document to the initial police report, and have attached this report as Exhibit C, Dckt. No. 65.

In the factual background of Debtors' Memorandum of Points and Authorities, Dckt. No. 64, the Debtors state that they had a Capital One credit card ending in 8753. The Debtors took out a Capital One Credit card and it had a line of credit of $750. Debtors used the credit cards and made the payments each month. Debtors state that their daughter hijacked the account and began running up charges on the credit card. Because of this late fees and interest began to accrue.

The Debtors initially believed that the money owed to the Capitol One was a mistake and worked with Capital One to fix what they thought was an error. However, these efforts were hampered by an unknown "thief who intercepted mail and took on multiple identities in order to delay the process." The thief made unauthorized purchases on the account. Debtors state that they were unaware of these purchases because of the intercepted mail/emails.

Debtor Jeanne Rodriguez filed a report with the police department, which Debtors have filed in support of this Motion to show the court that the Debtors took action to report the crime. Debtors state that, because the nature of the crime went on for many years and because the back history is so voluminous, the debtor is not offering the evidence so that the court can make a determination as to whether a criminal act occurred; rather, the evidence is being offered to show that the "debtor filed documents with the police indicating that she was the victim of identity theft and that she took steps to report the crime to the police." The debtors request the court admit the evidence as proof of due diligence on their part.

Debtors state that they are not responsible for the amount of money listed on the proof of claim because they were the victim of identity theft. In this instance, the thief managed to gain access to the debtor's credit card and make unauthorized charges. The thief hid and destroyed proof of the transactions and assumed many different identities to conceal the crime. When the theft was discovered the debtor called and notified the creditor and the police.

The Creditor has still filed a proof of claim and alleged that monies were owed. The debtors are objecting to the proof of claim on the basis that it is unenforceable against them because they did not actually accrue the charges that the proof of claim alleges. Debtors also allege that the proof of claim is not valid because it does not comply with Federal Rule of Bankruptcy Procedure 3001(c) which requires supporting information to substantiate the amount of the claim. In this case the creditor attached an "account summary" to the proof of claim and lists the creditor as "Cerastes, LLC" and the issuer as "capital One." The creditor has not attached any identifying information that shows that they are the purchaser of the debt. Further, the proof of claim lacks a real or "/s" signature on page 2 of the claim.

TRUSTEE'S RESPONSE

On August 18, 2014, David Cusick, the Chapter 13 Trustee, filed a response, requesting that if the claim objection is sustained, the claim will be allowed in the amount of $17.13, which is the amount already disbursed by the Trustee.

In support of this request, the Trustee states that a Notice of Filed Claims was filed and served on March 14, 2013 (Dckt. 32 & 33) which listed the claim on page 7, as Claim No. 24 WEINSTEIN & RILEY PS as unsecured for $1,294.06 with a Note: CAPITAL ONE/ALTAIR OH. Trustee states that no objection was filed within 60 days and Debtors' plan calls for disbursement to unsecured claims (Dckt. 10). By the time Debtors filed the instant objection to the claim on July 17, 2014, the Trustee already disbursed funds in the amount of $17.13.

DISCUSSION

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

Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. FRBP 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. The court must look to 11 U.S.C. § 502(b) for the exclusive grounds to disallow a claim. *In re Heath*, 331 B.R. 424, 426 (9th Cir. BAP 2005).

Debtors assert that they are not personally liable for the debt incurred as a result of their daughter's alleged criminal conduct. The police report attached as Exhibit B, Dckt. No. 71, filed with the Sacramento Police Department, appears to be a Property Crime Report dated June 5, 2013. The report reflects that on May 20, 2013, an officer spoke to Debtor Jeanne Rodriguez, who reported that her daughter had committed financial identity theft. The Debtor states in the report that the couple believes that their daughter had taken their ATM card and withdrew $400 when Debtor and their daughter were out shopping. Additionally, four checks totaling $18,300 were cashed starting in January.

The Debtors later discovered that their retirement accounts had been depleted, and the application to withdraw these funds had listed their daughter's phone number. The Debtors state that they notified their various account providers and that the theft is under investigation.

The "Supplemental Report," Exhibit "C" filed in support of the Objection, Dckt. No. 65, appears to be a report containing the results of an investigation conducted of the Debtors' criminal claim against their daughter. The report appears to conclude that Debtors' daughter impersonated her parents in order to access their Capital One credit card accounts. The Report states that Debtors' daughter caused the accounts to be delinquent and go into collection, thus negatively affecting Debtor Jeanne Rodriguez's credit. The Report further states that the Debtors' daughter assumed her mother's identity, without her knowledge, to implement a "multi-faced strategy" to cover up theft on both the two bank accounts from where payments were made, as well as the two Capitol One Accounts. The strategy included intercepting her mother's email, changing her email address where she received her monthly statements to that of the suspect, pretending to contact Capitol One multiple times on her mother's behalf to assist her in determining why she was having problems with her two accounts there.

The report states that Debtor Jeanne Rodriguez previously had an excellent payment history, until her daughter began stealing funds from her bank accounts and caused payments to Capitol One to be rejected for insufficient funds. Debtor had originally believed that the problem with her accounts were the results of errors on the part of the Creditor, a perception that was reinforced by the fact that the suspect, her daughter, had maintained that she had contacted the Creditor on her mother's behalf to assure her that the accounts were not delinquent in any way. Debtors later discovered that all of their investment and retirement accounts, and their credit cards, had been drained, and that many of her checking account payments had bounced back after the funds in her accounts were exhausted.

Here, the Proof of Claim filed by Altair OH XIII, LLC, asserts a $1,294.06 claim, with the basis for this claim indicated as "CREDIT CARD/OTHER." The claim form indicates that the last four digits identifying the Debtor are "8753," the numbers stated by Debtors as the last four numbers of their credit card account number. No supporting documentation is provided to substantiate the amount of the claim asserted.

As to the Trustee's response, the court agrees that the de minimis nature of the payout of $17.13 will be allowed. The Trustee, under 11 U.S.C. § 1302, may not pursue reimbursement if it would not be beneficial to the estate. Here, the court agrees that the estate's resources would not be well spent attempting to reclaim $17.13 from Creditor. This does not prevent the Debtors from attempting to have the funds reclaimed. The court finds the delay of Debtors in filing an objection to Creditor's claim after the 60 day window following the Notice of Filed Claims and the de minimis nature of the disbursement reason to allow the claim to the extent of $17.13 but disallow as to the remaining balance of $1,276.93.

Based on the evidence before the court, the creditor's claim is disallowed as to $1,276.93 but allowed as to $17.13 which has already been paid to Creditor through the plan. The Objection to the Proof of Claim is sustained in part.

On August 15, 2014, after this Objection to Claim was filed, Altair OH XIII, LLC filed a withdrawal of Proof of Claim No. 11. The court accepts this

withdrawal as the Creditor's non-opposition to the entry of the order disallowing the claim.

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 Altair OH XIII, LLC, Creditor filed in this case by Javier Martinez Rodriguez and Jeanne Miller Rodriguez, the Chapter 13 Debtors, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 11 of Altair OH XIII, LLC is sustained and the claim is disallowed in its entirety.
>
> **IT IS FURTHER ORDERED** that for the disbursements of $17.13 made by the Chapter 13 Trustee under the Plan, the Debtors may seek to recover such monies, if they deem it appropriate. The Chapter 13 Trustee is relieved of any obligation to attempt to recover such $17.13 disbursement (given the de minimis amount) and shall account for it as having been made pursuant to the Chapter 13 plan then before the court to this creditor prior to the disallowance of its claim.

42. 13-29563-E-13 JAVIER/JEANNE RODRIGUEZ
CAH-6 C. Anthony Hughes
OBJECTION TO CLAIM OF ALTAIR OH XIII, LLC, CLAIM NUMBER 12
7-17-14 [67]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 17, 2014. By the court's calculation, 75 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 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 Objection to Proof of Claim Number 12 of Altair OH XIII, LLC, is sustained and the claim is disallowed in its entirety.

Javier Martinez Rodriguez and Jeanne Miller Rodriguez, the Chapter 13 Debtors in this case ("Objectors") request that the court disallow the claim of Altair OH XIII, LLC ("Creditor"), Proof of Claim No. 12 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $1,102.40.

The Objectors assert that the Debtors do not owe the amount asserted by Creditor because they were victims of identity theft, and did not actually use the credit card to make the purchases that are allegedly owed. The Objection appears to presume that the Creditor in this case is collecting a credit card debt allegedly owed by Debtors to Capitol One. The Debtors include a police report on Debtors' claims and have attached as Exhibit B, Dckt. No. 71. Debtors have also filed a supplemental document to the initial police report, and have attached this report as Exhibit C, Dckt. No. 71.

In the factual background of Debtors' Memorandum of Points and Authorities, Dckt. No. 70, the Debtors state that they had a Capital One credit

card ending in 9503. The Debtors took out a Capital One Credit card and it had a line of credit of $750. Debtors used the credit cards and made the payments each month. Debtors state that their daughter hijacked the account and began running up charges on the credit card. Because of this late fees and interest began to accrue.

The Debtors initially believed that the money owed to the Capitol One was a mistake and worked with Capital One to fix what they thought was an error. However, these efforts were hampered by an unknown "thief who intercepted mail and took on multiple identities in order to delay the process." The thief made unauthorized purchases on the account. Debtors state that they were unaware of these purchases because of the intercepted mail/emails.

Debtor Jeanne Rodriguez filed a report with the police department, which Debtors have filed in support of this Motion to show the court that the Debtors took action to report the crime. Debtors state that, because the nature of the crime went on for many years and because the back history is so voluminous, the debtor is not offering the evidence so that the court can make a determination as to whether a criminal act occurred; rather, the evidence is being offered to show that the "debtor filed documents with the police indicating that she was the victim of identity theft and that she took steps to report the crime to the police." The debtors request the court admit the evidence as proof of due diligence on their part.

Debtors state that they are not responsible for the amount of money listed on the proof of claim because they were the victim of identity theft. In this instance, the thief managed to gain access to the debtor's credit card and make unauthorized charges. The thief hid and destroyed proof of the transactions and assumed many different identities to conceal the crime. When the theft was discovered the debtor called and notified the creditor and the police.

The Creditor has still filed a proof of claim and alleged that monies were owed. The debtors are objecting to the proof of claim on the basis that it is unenforceable against them because they did not actually accrue the charges that the proof of claim alleges. Debtors also allege that the proof of claim is not valid because it does not comply with Federal Rule of Bankruptcy Procedure 3001(c) which requires supporting information to substantiate the amount of the claim. In this case the creditor attached an "account summary" to the proof of claim and lists the creditor as "Cerastes, LLC" and the issuer as "capital One." The creditor has not attached any identifying information that shows that they are the purchaser of the debt. Further, the proof of claim lacks a real or "/s" signature on page 2 of the claim.

DISCUSSION

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

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

Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. FRBP 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. The court must look to 11 U.S.C. § 502(b) for the exclusive grounds to disallow a claim. *In re Heath*, 331 B.R. 424, 426 (B.A.P. 9th Cir. 2005).

Debtors assert that they are not personally liable for the debt incurred as a result of their daughter's alleged criminal conduct. The police report attached as Exhibit B, Dckt. No. 71, filed with the Sacramento Police Department, appears to be a Property Crime Report dated June 5, 2013. The report reflects that on May 20, 2013, an officer spoke to Debtor Jeanne Rodriguez, who reported that her daughter had committed financial identity theft. The Debtor states in the report that the couple believes that their daughter had taken their ATM card and withdrew $400 when Debtor and their daughter were out shopping. Additionally, four checks totaling $18,300 were cashed starting in January.

The Debtors later discovered that their retirement accounts had been depleted, and the application to withdraw these funds had listed their daughter's phone number. The Debtors state that they notified their various account providers and that the theft is under investigation.

The "Supplemental Report," Exhibit "C" filed in support of the Objection, Dckt. No. 71, appears to be a report containing the results of an investigation conducted of the Debtors' criminal claim against their daughter. The report appears to conclude that Debtors' daughter impersonated her parents in order to access their Capital One credit card accounts. The Report states that Debtors' daughter caused the accounts to be delinquent and go into collection, thus negatively affecting Debtor Jeanne Rodriguez's credit. The Report further states that the Debtors' daughter assumed her mother's identity, without her knowledge, to implement a "multi-faced strategy" to cover up theft on both the two bank accounts from where payments were made, as well as the two Capitol One Accounts. The strategy included intercepting her mother's email, changing her email address where she received her monthly statements to that of the suspect, pretending to contact Capitol One multiple times on her mother's behalf to assist her in determining why she was having problems with her two accounts there.

The report states that Debtor Jeanne Rodriguez previously had an excellent payment history, until her daughter began stealing funds from her bank accounts and caused payments to Capitol One to be rejected for insufficient funds. Debtor had originally believed that the problem with her accounts were the results of errors on the part of the Creditor, a perception that was reinforced by the fact that the suspect, her daughter, had maintained that she had contacted the Creditor on her mother's behalf to assure her that the accounts were not delinquent in any way. Debtors later discovered that all

of their investment and retirement accounts, and their credit cards, had been drained, and that many of her checking account payments had bounced back after the funds in her accounts were exhausted.

Here, the Proof of Claim filed by Altair OH XIII, LLC, asserts a $1,102.40 claim, with the basis for this claim indicated as "CREDIT CARD/OTHER." The claim form indicates that the last four digits identifying the Debtor are "9503," the numbers stated by Debtors as the last four numbers of their credit card account number. No supporting documentation is provided to substantiate the amount of the claim asserted.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety. 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 Altair OH XIII, LLC ("Creditor"), Proof of Claim No. 12 ("Claim") filed in this case 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 objection to Proof of Claim Number 12 of Altair OH XIII, LLC is sustained and the claim is disallowed in its entirety.

43. 13-29563-E-13 JAVIER/JEANNE RODRIGUEZ OMNIBUS OBJECTION TO CLAIMS
CAH-7 C. Anthony Hughes 7-24-14 [73]

Final Ruling: No appearance at the September 31, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 24, 2014. By the court's calculation, 67 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. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The Objection to Proof of Claim Numbers 6-1 of US Bank, N.A., is sustained and Claim No. 6-1 is disallowed in its entirety.

Javier Martinez Rodriguez and Jeanne Miller Rodriguez, the Chapter 13 Debtors in this case ("Objectors"), object to the allowance of Claim #5-1 and #6-1, filed by creditor US Bank N.A. ("Creditor"), pursuant to 11 U.S.C. § 502(b)(1) and Federal Rule Of Bankruptcy Procedure 3001 and 3007. Objector asserts that these Claims are a duplicate of Proof of Claim Number 4-1.

On August 23, 2013, US Bank N.A. filed Proof of Claim No. 4-1 in the amount of $737.17. That same day on August 23, 2013, an additional proof of claim (Claim #5-1) was filed by Creditor US Bank N.A. in the amount of $737.17. On August 30, 2013, a third proof of claim (Claim #6-1) was filed by creditor US Bank N.A. in the amount of $30. On all three accounts, the proof of claim states that the account number associated with the amount owed is #5274. Therefore, Debtors assert that all three proof of claims are for the same account and none of the proof of claims have marked the box "check this box if this claim amends a previously filed claim."

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).

A comparison of Proof of Claims No. 4-1 and 5-1 reveals that the Claims are nearly identical, with one additional item of information not reflected in Claim No. 4-1 but listed in Claim No. 5-1: Claim No. 5 lists the information of the individual who appears to have filed the claim. Tawna Frerson, who is listed as a "Bank Representative" for U.S. Bank, N.A., represents that she is the creditor of this claim, and dates the Claim August 23, 2013. The basis for the claim is "Money Loaned," and the last four identifying digits for the Debtor are listed as 5274.

Proof of Claim No. 6-1, which similarly lists U.S. Bank, N.A. as the Creditor, requesting that notices be sent to the Bankruptcy Department of U.S. Bank, N.A., also asserts a claim for "money loaned," for the Debtor identified by the last four digits of "5274." The claim is also listed as being filed by Tawna Frerson, but asserts $30.00 as the amount of the claim as of the case filing date. The Claims appear to be based on the same subject account being held by Debtor Javier Rodriguez, based on "money loaned" to the named account holder.

WITHDRAWAL OF PROOF OF CLAIM NO. 4-1

The court's Claims Registrar reflects that Proof of Claim 4-1 was by the Claimant, creditor U.S. Bank, N.A., on August 8, 2014. Thus, the court cannot disallow both Proof of Claim Nos. 5-1 and 6-1 on the basis that the claims are duplicates of Claim No. 4-1, as Claim No. 4-1 has been withdrawn.

In asserting that Proof of Claim No. 4-1 was the "correct" claim in this case, however, the Debtors appear to accept the amount of U.S. Bank, N.A.'s claim as totaling $737.17 at the date of filing. The Claim Attachment to Claim No. 5-1 shows that the claim is based on a Line of Credit, with an account number ending in #5274. The charges reflected are $528.32 for the principal amount owed, with $65.85 asserted to be the amount in interest, and the "fees" total $140.00. The total account balance at the time of filing is listed to be $737.17. The customer is listed as Debtor Jeanne Rodriguez (instead of Javier Rodriguez, whose name appears on the actual Proof of Claim Form), who is listed as having filed a Chapter 13 Bankruptcy on July 19, 2013.

Proof of Claim No. 6-1 appears to list information for the same Debtor and the same account held by the customer Debtor (Jeanne Rodriguez, instead of Joint Debtor Javier Rodriguez). The last four digits of Debtor Jeanne Rodriguez's account is also listed as #5274. The Contract Dates differ significantly, however, with the date listed on Claim No. 5-1 to be January 18, 2006, and the date listed on Claim No. 6-1 to be November 1, 1982. However, the Account Summary Statement of Proof of Claim No. 6-1 does not contain additional information, regarding the transaction, charge off dates, and the name of the entities owning the accounts, included in Proof of Claim No. 5-1.

The only charge that appear on the Account Statement for Proof of Claim No. 6-1 is "fees" of $30.

Based on the weight of evidence before the court, the court determines Proof of Claim Nos. 5-1 and 6-1 to be duplicate claims. Proof of Claim No. 4-1 having been withdrawn, and the Debtors appearing to accept the claim amount of $737.17 as the amount of the claim being held by Creditor U.S. Bank, N.A. on an account identified as ending in the last four digits of #5274, the court will allow Proof of Claim No. 5-1 to remain active in Debtors' case, and disallow Proof of Claim No. 6-1 in its entirety. The Objection to the Proof of Claim is sustained as to Proof of Claim No. 6-1.

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 U.S. Bank, N.A., Creditor filed in this case by Javier Martinez Rodriguez and Jeanne Miller Rodriguez, Chapter 13 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim No. 6-1 of U.S. Bank is sustained and the claim is disallowed in its entirety.

44. 10-50165-E-13 DONALD/LUCILE STEWART CONTINUED MOTION TO MODIFY PLAN
RHM-5 Robert Hale McConnell 7-9-14 [94]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 9, 2014. By the court's calculation, 48 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 has been withdrawn by the Trustee. 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 court's decision is to grant the Motion to Confirm the Modified Plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Here, the Chapter 13 Trustee opposes confirmation of the proposed modified plan, on the following grounds:

1. The Trustee is uncertain of the proposed plan payment. The debtors specify in Section 1.01 a payment of $341.00. The debtors in the additional provisions state a monthly plan payment of $1,420.00 commencing on April 2014 with delinquent amounts of $11,019.00 under the previous plan being waived. The debtors have paid a total of $45,781.00 through March 2014. The Trustee has received monthly payments of $1,420.00 for the period of April 2014 through July 2014. It appears that the debtors are intending for the plan payment to be $45,781.00 total paid in through March 2014, with the remaining 20 payments to be $1,420.00 monthly.

2. The proposed plan, Dckt. No. 89, is not signed by the joint debtor Luicile Paguio Stewart. The Trustee is not certain that the Debtor can afford the payments, unless the Debtor's spouse is in agreement with the plan.

3. Trustee notes that the Debtors filed Dckt. No. 97 amended schedules of Income and Expense. These schedules increased the debtors' income by $1,210.18 and increased the debtors' expenses by $1,209.61. The

debtors did not provide any supporting documentation for the changes, and the Trustee notes major increases of $500.00 to food and housekeeping supplies, $400.00 to transportation, and $448.00 to entertainment since the petition date.

Where one of the Debtors has a new job, the Trustee expects that the food and transportation expense would increase, and that no recreation expense was present in the earlier Schedule J. The Trustee is not certain if the court will the increases reasonable without more of an explanation from the Debtor.

CONTINUANCE

At the August 26, 2014 hearing, the court continued the hearing on this matter to this hearing date. Civil Minutes, Dckt. No. 106.

On September 15, 2014, the Chapter 13 Trustee filed a Withdrawal of their Response to the Debtors' Motion to Confirm the Plan. The Trustee states that Debtors have submitted additional information which resolves the Trustee's response. Additionally, the Debtors have submitted a proposed order confirming modified plan which clarified plan payments to be: plan payments shall be a total of $45,781.00 paid in through March 2014. Debtors clarified that the payments for the remaining 20 months of the plan commencing April 2014 shall be $1,420.00 monthly. Dckt. No. 107.

The Trustee having filed a Withdrawal of his Opposition to the Debtors' Motion to Confirm, and indicating that all issues raised in the Opposition have been resolved by the Debtors, the modified Plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329. The Motion is granted and the Plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on June 27, 2014, is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

45. 14-21465-E-13 THOMAS/DEBORAH LUPTON
PGM-3 Peter G. Macaluso

CONTINUED MOTION TO VALUE COLLATERAL OF CHASE HOME FINANCE/JPMORGAN CHASE BANK, N.A.
6-27-14 [35]

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 Debtors, Chase Home Finance, LLC and JPMorgan Chase Bank, N.A., Chapter 13 Trustee, and Office of the United States Trustee on June 27, 2014. By the court's calculation, 53 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 Creditor is denied without prejudice.

CONTINUANCE

On August 19, 2014, the court continued this matter to this hearing date. Civil Minutes, Dckt. No. 79. Nothing further has been filed on the docket, however, identifying the creditor holding the claim Debtors wish to be valued.

REVIEW OF MOTION

Debtors, Thomas B. Lupton and Deborah A. Lupton ("Debtors") move to value the secured claim of an entity identified in the Motion as "Chase Home Finance/JPMorgan Chase Bank, N.A."

Both Debtors' Motion and Declaration assert that the creditor holding the second deed of trust against their property, commonly known as 19965 W. Mitchell Mine Road, Pine Grove, California, as "Chase Home Finance/JPMorgan Chase Bank, N.A." Dckt. Nos. 35 and 37. No Proof of Claim has been filed by a "Chase Home Finance/JPMorgan Chase Bank, N.A."

The court reviewed the California Secretary's of State website and could not identify any entity named "Chase Home Finance/JPMorgan Chase Bank, N.A." registered to do business in California. http://kepler.sos.ca.gov/. Additionally, the court cannot identify any such entity after searching the FDIC website for federal insured financial institutions, the Comptroller of the Currency website for national banks, or the California Secretary of State website for corporations, limited liability companies, and limited partnerships. FN.1.

FN.1. Given the months, and years, that this court has required both creditors and debtors to accurate identify the creditor, there is no excuse for failing to identify the creditor. Further, for an experienced attorney who regularly appears in Departments C and E of this court, to make up the name of a "creditor" such as "Chase Home Finance/JPMorgan Chase Bank, N.A. can only show that there is no intention to properly identify the creditor and meet the minimum constitutional real party in interest case or controversy requirement so Article III, Section 2 of the United States Constitution. This court will not issue orders purportedly against "generic name creditors" and hope that nobody will ever question whether the orders are effective.

The Court cannot determine from Debtor's pleadings the correct owner of the deed of trust. The Proof of Service accompanying the Motion shows Debtor served JPMorgan Chase Bank, N.A., and Chase Home Finance, LLC, indicating that Debtor is not sure which entity actually owns the deed of trust on the Property. Debtors fail to identify the lender on the subject loan, rendering the court unable to issue an order affecting the rights of a specified party.

A motion that does not identify clearly the responding party does not comply with Rule 9014(a) because a motion that is ambiguous about the respondent cannot give reasonable notice and opportunity for hearing to the party against whom relief is sought. Fed. R. Bankr. P. 9014(a). The court will not issue an order purporting to have an binding effect on a person or entity that the court does not have a good faith belief exists.

Misidentification of creditors for purposes of § 506(a) motions is automatically fatal to a debtor's attempts to value a secured claim. Obtaining an order valuing the "claim" of an unidentified creditor is not effective. In most cases where Debtors have filed a Motion to Value naming an incorrectly identified party as a creditor on a claim, no motions are filed seeking to value the claim of the actual creditor, no service is attempted on the actual creditor, and no effort is made to afford the actual creditor any due process rights. In these situations, all orders issued by the court would be void as to the actual creditor. These circumstances would prove highly inconvenient to the moving debtors as well. After performing under a plan for 3 to 5 years, the debtor would then have a rude awakening that their still remains a creditor,

having a debt secured by a second deed of trust (in this case) which has never been valued and for no lien-strip may be possible.

The Motion is therefore denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Thomas Lupton and Deborah Lupton, "Debtors," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is denied without prejudice.

46. 14-21465-E-13 THOMAS/DEBORAH LUPTON — CONTINUED MOTION TO CONFIRM PLAN
PGM-5 Peter G. Macaluso — 7-1-14 [55]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(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 the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 1, 2014. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

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

CONTINUANCE

On August 19, 2014, the court continued this matter to this hearing date. Civil Minutes, Dckt. No. 82.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of the plan on the basis that the Plan relies on two pending motions. Trustee states that the Debtors cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6).

The Trustee states that Debtors' plan relies on the Motion to Value the Secured Claim of "Chase Home Finance/JPMorgan Chase Bank, N.A.," and the Motion for Order Approving Trial Loan Modification. If the motions approving the

valuation and trial loan modification are not granted, Debtors' plan does not have sufficient monies to pay the claims in full.

The court is denying both the continued Motion to Value the Secured Claim of Chase Home Finance/JPMorgan Chase Bank, N.A., PGM-3, the Motion for Order Approving the Loan Modification, PGM-2 was denied on August 19, 2014. Dckt. No. 84.

The Debtors brought a new Motion to Approve the Loan Modification with the generically named "Wells Fargo Home Mortgage" on September 10, 2014, and a Motion to Approve the Loan Modification with "Wells Fargo Bank, N.A." on September 24, 2014, Dckt. Nos. 87 and 92. Both motions are set to be heard on October 21, 2014. Thus, Debtors' plan is currently not sufficiently funded to satisfy the claims.

OPPOSITION BY CREDITOR

Wells Fargo Bank, N.A., which identifies itself as the creditor of Thomas B Lupton and Deborah A Lupton ("Debtors"), objects to the Chapter 13 Plan filed by Debtors on the basis that it fails to properly provide for Creditor's claim pending the finalization of a loan modification. FN.1.

FN.1. It appears that Wells Fargo Bank, N.A. has assisted the Debtors in the denial of the present Motion. The Bank has not provided the Debtors with an actual loan modification agreement which could be presented to the court. Second, in the loan modification proposal letter, Wells Fargo Bank, N.A. did not identify itself as the creditor, but used the *nom de plume* "Wells Fargo Home Mortgage," a generic name which is not readily identifiable, except possibly to a limited liability company which is not the Bank.

Creditor's claim is evidenced by a promissory note executed by Debtors Deborah A. Lupton and Thomas B. Lupton, and dated October 19, 2005, in the original principal sum of $350,000.00. The Note is secured by a Deed of Trust encumbering the real property commonly known as 19965 West Mitchell Mine Road, Pine Grove, California 95665.

The Creditor argues that the Debtors' Plan fails to provide for the cure of Creditor's pre-petition arrears and reduces the ongoing post-petition payment pursuant to the terms of a trial loan modification to begin on July 1, 2014. While the Creditor does not oppose the inclusion of the trial loan modification's terms in Debtors' Plan, Creditor states that the Plan does not include any provisions should the Debtors fail to make the payments under the terms of the loan modification and modification be denied.

Creditor states that the Debtors' Plan does not indicate if the Debtors will amend their Plan to provide Creditor's pre-petition arrears and full post-petition payments, or surrender the property should the modification be denied. Thus, Creditor believes that the Debtors' Plan should not be confirmed as proposed because it fails to properly provide for the cure Creditor's pre-petition arrears and full ongoing post-petition payment should the Debtors default under the terms of the trial loan modification, failing to satisfy 11 U.S.C. § 1325(a)(5)(B)(ii).

DISCUSSION

A simple fix to address Creditor's and the Trustee's concerns regarding the proposed plan would be to incorporate the commonly termed "Ensminger [for the consumer attorney who had the laboring oar] Additional Plan Modification Negotiation Provisions" into the Additional Provisions of the Plan. These provisions relate to prospective modification agreements, and make it clear that the court is not modifying a claim secured only by the Debtors' residence and states that if the loan modification is not approved, that this denial be communicated to all interested parties.

The Provisions also cover the contingencies of modifications that do does not provide for any pre-petition arrearage cure payments to be made during the life of the Plan, and for loan modification which require arrearage cure payments to be made during the plan term. The provisions address events of default, a failure to modify the plan upon rejection of a modification, and a failure to prosecute the loan modification application. These provisions supply a mechanism for addressing the granting or denial of a loan modification.

Debtor should consider using such terms in order to properly provide for the secured claim of Wells Fargo Bank, N.A. The current plan does not provide for the possible rejection of the modification, or the possibly inability of Debtors to make all of the trial loan payments. While one judge in the Sacramento Division will not confirm a plan which incorporates loan modifications, at least two of the other four, and most likely all four, would include such a provision which clearly provides that the plan does not modify the loan secured only by the debtor's residence. This judge has confirmed many such plan, with the provisions having been refined through the combined efforts of debtor and creditor attorneys. This language has been repeated by the court in tentative rulings, as well as consumer attorneys advised of its existence in open court.

Currently, 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.

47. 14-27366-E-13 JESSE WILLIAMS
PD-1 Helga A. White

OBJECTION TO CONFIRMATION OF PLAN BY NATIONSTAR MORTGAGE, LLC
9-3-14 [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, Debtor's Attorney, and Chapter 13 Trustee, on September 3, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Nationstar Mortgage LLC, ("Creditor"), objects to the Chapter 13 Plan filed by Debtor Jesse Williams ("Debtor"). Creditor requests that the Court deny confirmation of the Debtor's Chapter 13 Plan on the basis that the Plan fails to properly provide for Creditor's claim because it is not feasible. Specifically, Debtor's Plan does not adequately provide for a cure of Creditor's pre-petition claim in full, and the Debtor lacks adequate disposable income to fund the Chapter 13 Plan proposed.

Creditor states that its claim is evidenced by a promissory note executed by Debtor Jesse J. Williams, dated February 28, 2006, in the original principal sum of $179,000.00 (the "Note"). The Note is secured by a Recorded Deed of Trust (the Subject Loan"2 ") encumbering the real property commonly known as 14425 Arrowhead Mine Road, Grass Valley, CA 95945 (the "Subject Property").

11 U.S.C. Section 1325(a)(5)(B)(ii) requires a debtor's Chapter 13 Plan to distribute at least the allowed amount of a creditor's secured claim. See 11 U.S.C. § 1325(a)(5)(B)(ii). Furthermore, the requirement that a debtor provide for the full value of a creditor's secured claim is mandatory for plan confirmation. *See Barnes v. Barnes* (*In re Barnes*), 32 F.3d 405, 407 (9th Cir. 1994); *see also In re Lucas*, 3 B.R. 252, 253 (Bankr. S.D. Cal. 1980)("In order to confirm any Chapter 13 Plan, the court must be satisfied…that the plan meets all the requirements of § 1325(a)."). The Creditor advances several arguments regarding its assertion that the proposed plan does not meet the requirements of 11 U.S.C. § 1325.

First, the Creditor argues that Debtor's Plan cannot be confirmed as proposed because it fails to properly provide for the cure Creditor's pre-petition arrears,. Creditor's claim for pre-petition arrears is in the total amount of $9,902.50. However, the Debtor's Chapter 13 Plan fails to provide for Creditor's pre-petition arrears under the assumption that the Debtor will sell the Subject Property in six months from confirmation of the Chapter 13 Plan or alternatively the Debtor will acquire employment and pay the pre-petition arrears through the Plan. The proposed sale of the Subject Property is premised on the grounds that the sale of the property is sufficient to pay Creditor's claim in full, yet no evidence has been submitted of that the value of the home is sufficient to pay Creditor's claim in full or that the property is even currently listed for sale.

Creditor asserts that the provision that the Debtor will obtain employment in the future that is sufficient to pay Creditor's pre-petition arrears is purely speculative. As the Debtor's Plan fails to provide for a prompt cure of Creditor's pre-petition arrears it fails to satisfy 11 U.S.C. ' 1325(a)(5)(B)(ii) and cannot be confirmed as proposed.

Second, Creditor states that the Debtor's Chapter 13 Plan cannot be confirmed because it is not feasible. 11 U.S.C. § 1325(a)(6) requires that debtors be able to make all plan payments and to comply with the terms set forth in the plan. A reviewing court should confirm a plan only if it appears under all circumstances that the plan has a reasonable likelihood of success. *In re Craig*, 112 B.R. 224, 225 (Bankr. N.D. Ohio 1990) (citing *In re Anderson*, 28 B.R. 628, 630 (Bankr. S.D. Ohio 1982).

Creditor argues that the Debtor has not provided sufficient evidence that his Chapter 13 Plan is feasible. Debtor's Schedule J indicates that the Debtor has disposable income of $230.00 per month. However, the Debtor proposes pay ongoing post-petition payments to Creditor in the amount of $1,079.01. per month. As the Debtor Plan payment exceeds his monthly disposable income, the Debtor lacks sufficient monthly disposable income with which to fund the Plan.

In addition, in order to cure Creditor's pre-petition arrears, the Debtor will be required to apply an additional $165.42 per month to the Chapter 13 Plan in order to provide for a prompt cure of the pre-petition arrears owed to Creditor in sixty months as required by 11 U.S.C. section 1322(b)(5). As the monthly plan payment sufficient to cure Creditor's pre-petition arrears exceeds the Debtor's monthly disposable income, the Debtor lacks sufficient monthly disposable income with which to fund the Plan.

Third, Creditor argues that Debtor's Chapter 13 Plan should not be confirmed because it attempts to modify the Creditor's claim. 11 U.S.C. § 1322(b)(2) provides that the plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ." Creditor questions whether a plan that proposes the sale of the residence at an unspecified time, with no periodic payments made to the secured creditor pending sale, impermissibly modifies the rights of the secured creditor.

11 U.S.C. § 1322(b)(2) precludes confirmation of a plan that modifies the rights of certain creditors. A plan that creates a default modifies the rights of creditors. The Supreme Court has pointed out that a creditor's rights "are reflected in the relevant mortgage instruments, which are enforceable under [state] law. They include the right to repayment of the principal in monthly payments over a fixed term at specified adjustable rates of interest . . . " *Nobleman v. American Savings Bank*, 508 US 324, 329 (1993). The Court noted that, although the Bankruptcy Code itself affects the creditor's contractual rights, particularly its power to enforce its rights, the statutory limits are independent of the Chapter 13 plan. 508 US at 330. the plan from affecting the secured creditor's rights, including the right to monthly payments as provided in the contract.

The possibility of a sale of Debtors' residence appearing to be too speculative in generating funds that will sufficiently fund the Plan, the Debtor appearing to lack sufficiently monthly disposable income to make the proposed monthly plan payments, and the Debtor having attempted to impermissibly modify the claim of the Secured Creditor in this matter, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). Debtor offers no objective benchmarks for the prompt sale of the Property, does not provide information that the property is listed for sale, or evidence that a real estate agent provide his or her expert opinion that the property is listed at a reasonable price to sell within the projected period of time.

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 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 Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

48. 14-23271-E-13 ROBERT/CINDY LANDINGHAM MOTION TO MODIFY PLAN
HLG-9 Kristy A. Hernandez 8-20-14 [99]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> A Motion to Dismiss the Bankruptcy Case having been filed by the Debtors, the Debtors having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Second Modified Chapter 13 Plan is dismissed without prejudice.

49. 13-30273-E-13 ELIAS ORTIZ — MOTION TO MODIFY PLAN
SJS-2 Scott J. Sagaria — 8-18-14 [45]

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 21, 2014. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of the proposed plan for two reasons.

First, the Plan is not Debtor's best effort under 11 U.S.C. § 1325(b). Debtor is proposing the following plan payments: $1,880.00 total paid in through August 2014, then $410.00 per month beginning on September 25, 2014, for the remainder of the plan. Debtor is under median income and proposes to reduce the commitment period from 38 to 36 months. The Plan proposes to surrender Debtor's vehicle, a 2006 Nissan 350Z. Debtor's Declaration filed on August 21, 2014, Dckt. No. 49 states "I have moved the secured creditor AutoVille from Class 2A to Class 3 as I will be surrendering the vehicle.

Debtor's Schedule B filed on August 18, 2014, as Exhibit B, Dckt. No. 47, includes on vehicle, a 2006 Nissan 350Z. While Debtor's modified plan

proposes to surrender the vehicle, Debtor's Amended Schedule J continues to budget $222.00 per month for auto insurance, and increases transportation costs from $200 to $290.00. Debtor may have additional disposable income to contribute into the Plan.

Second, Debtor filed an Amended Schedule J reflecting an increase in food expenses from $358.16 to $450.00. The last Schedule I filed by Debtor on August 2, 2013, Dckt. No. 1, reflected an average monthly income from nursing of $2,765.16, no dependents, and a monthly payroll deduction of $25.30 for meals. The national standard for allowable food expenses for one person is $315.00. The $450.00 budgeted appears excessive.

Additionally, Debtor's Amended Schedule J was not filed using Official Form B 6J, which became effective December, 2013.

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.

50. 14-25376-E-13 KEVIN/BREE SEARS
AJP-2 Douglas B. Jacobs

MOTION TO DISMISS CASE AND/OR MOTION FOR INJUNCTION BARRING REFILING
9-9-14 [55]

Tentative Ruling: The Motion to Dismiss 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, all creditors, and Office of the United States Trustee on September 10, 2014. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The court's decision is to grant the Motion to Dismiss and dismiss the case.

Creditor Cory Adams ("Creditor") moves the court to dismiss this Chapter 13 case. Creditor states that he believes that cause to dismiss the case exists as stated in this Court's Findings of Facts and Conclusions of Law set forth in the Civil Minutes of the court entered on August 19, 2014 (Dckt. Nos. 49 and 51).

The Creditor states that the findings below indicate that cause to dismiss exists in this case.

The Creditor objected to confirmation stating the Debtors' report of income, business expenses and other expenses in both the prior Chapter 13 case and this Chapter 13 case are unreliable. Many different statements of each were made by the Debtors without adequate explanation. The Debtor-Husband's report of gross income from his law practice varied greatly over the course of the two Chapter 13 cases. Creditor argues that Joint Debtor Kevin Sears' business expenses were reported to be $2,163 in the prior Chapter 13 case, but became $6,575 in the current Chapter 13 case without adequate explanation.

In the prior Chapter 13 case, Creditor states that Joint Debtor Kevin Sears failed to report the fact he had undertaken a contract to provide Public Defender services to the County of Butte as of February 1, 2013, some four months prior to the first bankruptcy filing. This was not corrected until his amendments to his Schedule I and J were filed October 21, 2013 (Docket No. 63 in Case No. 13-27044, the prior Chapter 13 case).

Creditor also states that the Debtor-Spouse, Bree Lynn Sears, initially reported income from wages or salaries commencing in January 2013. However, the Debtor-Spouse was an independent contractor commencing in early 2013. Creditor states that this fact was not reported nor was the existence of any business reported in the Debtors' Statement of Financial Affairs (Dckt. No. 1).

In this Chapter 13 case, the Debtors filed an amendment to Schedule I 22 and J on August 7, 2014 (Docket No. 48). The figures in the amendment represented a significant departure from the figures included in the schedules filed with the petition.

Creditor states that in their prior Chapter 13 case, Debtors proposed inadequate monthly payments to taxing authorities for estimated income tax. Debtors failed to pay estimated taxes during 2013 or 2014. As a result, the IRS filed a priority tax claim in this case in the amount of $41,918 (Claim No. 3). Of this amount, $27,810.00 was attributable to taxes accruing in 2013. Creditor states that it is unclear whether Debtors have made any estimated tax payments this year, on 2014. Creditor has previously asserted in his objections that Debtors have not demonstrated good faith under 11 U.S.C. § 1325(a)(3).

The court has also previously made findings that Debtors have not accurately reported their income and expenses for their business, provided explanations of the changes being made to their income and expenses, have not provided sufficient tax withholdings or explain the basis for the proposed tax withholding payments, have not produced evidence in support of their responses to objections to their plans. Civil Minutes, Dckt. No. 49.

Additional Facts

The Creditor includes "additional facts" that support its previous objections and contention that the Debtors have not filed this case in good faith. The Creditor claims that the Debtors own a 2007 328(I) BMW automobile, and states that there is minimal equity in the vehicle, if any. The Debtors have two additional unencumbered vehicles which would meet their transportation needs. In the prior Chapter 13, this Court found that the Debtors' choice to retain the BMW and continue making payments does not automatically make keeping

the two other free and clear vehicles the good faith prosecution of a Chapter 13 Plan (Docket No. 95).

Specifically, the court stated the following in its ruling on Debtor's Motion to Confirm Plan filed in his prior Chapter 13 case:

> Under the Second Amended Plan the Debtors choose to pay $4,056.40 a month for their home mortgage (not including property taxes and insurance), and $213.62 a month for their BMW. In addition to the 2007 BMW 328i for which the payment is to be made, the Debtors also own a 2004 Jeep Grand Cherokee and a 2006 Honda Civic, for a family with only two drivers. The Debtors own the Jeep and Honda free and clear of any liens or encumbrances.
>
> The Debtors have not provided the court with the 11 U.S.C. § 707(b)(2)(A) and (B) analysis of how their expenses projected are within the limitations of 11 U.S.C. § 707(b)(2)(A) and (B), nor that they are reasonable projections of their expenses.
>
> This Chapter 13 Plan appears to be driven around one basic principle – justify the Debtors paying monthly mortgage payments of $4,056.40 (current plus arrearage payment), with the additional required $428 property taxes and $107 homeowners insurance – a $4,591.40 monthly housing expense. While the Debtors can choose to make that payment, it does not automatically render the plan feasible.

Civil Minutes, Bankr. E.D. Cal. No. 13-27044, Dckt. No. 95, April 8, 2014. The Creditor continues to assert that the surrender of the BMW would make the monthly payment of $213 available for an additional 17% return to the unsecured creditor class.

In the proposed Plan of Debtor's prior Chapter 13 case, the Debtors proposed to relinquish the BMW automobile. In the newly filed Chapter 13 case, the Debtors proposed to retain it and the other two vehicles. The Creditor states that the Debtors were slow to supply requested information to Creditor regarding both the Debtor-Husband and the Debtor-Spouse's business activity. In discovery requests in the prior case, Creditor claims that the Debtors did not supply copies of their 2013 Federal Income Tax returns.

In this Chapter 13 case, the Creditor renewed his request for such returns as well as the Debtors' business records and bank statements for the past six months. Some, but not all, bank statements were supplied. No business records were supplied. The Debtors responded to discovery requests in the prior Chapter 13 case only after a demand was made by the Creditor. Creditor describes the discovery responses as incomplete.

The Chapter 13 Trustee in the prior case filed his Final Report and Account ii with the Court on August 15, 2014 (Docket No. 126). The report indicates the sum of $15,427.88 was refunded to the Debtors; however, the Debtors' schedules filed at the commencement of this Chapter 13 case did not list any refund or right to receive a refund nor do the Debtors' amended

schedules filed August 7, 2013 (Docket No. 48) disclose a refund or the right to receive the refund.

DISCUSSION

The court has previously discussed the arguments that Creditor raises as grounds in favor of dismissal, pursuant to 11 U.S.C. § 1307(c)(1), of the present case. On August 19, 2014, the court heard and considered the objections to confirmation of the Debtors' first proposed Plan, filed on May 21, 2014, and addressed the deficiencies raised in the objections brought forth by Creditor Cory Adams and the Chapter 13 Trustee to the Debtors' plan. Dckt. Nos. 49 and 31.

In considering the evidence and issues presented by the Trustee and Creditor, the court noted that Debtors' replies to the concerns raised were unsubstantiated by testimony and evidence filed by the debtors, and discrepancies arising from Debtors' schedules, reporting of business income and expenses, Debtors' tax liabilities, and the secured claims filed by the Creditor and the Internal Revenue Service in this case. As a result of the myriad of issues presented, and the Debtors' prolonged inability to resolve these issues in the context of their previous and current case, the court questioned Debtors' good faith effort in the prosecuting a plan of reorganization based on the totality of circumstances of Debtors' case.

In the court's ruling on the objection filed by Creditor to Debtors' first proposed plan in Debtors' current case, the court noted the following:

> Second, a review of the docket shows that Debtors filed amended Schedules I and J on August 8, 2014. Dckt. 48. No explanation has been provided as to why these amendments have been made so soon after the filing of the original schedules, especially in light of the fact that Debtors are repeat filers (E.D. Cal. Bankr. Case No. 13-27044 filed May 23, 2013 and dismissed May 18, 2014 for failure to confirm a plan) and that Debtor Kevin Sears is a highly educated professional (lawyer).
>
> Third, a review of Schedule I, as amended, states that both debtors receive wages and salary. Kevin Sears lists monthly gross wages, salary and commissions from Kevin Sears Attorney at Law in the amount of $11,527.00 per month and Bree Sears lists $2,846.00 per month from IT Support/Web Design (self employed). See Dckt. 48. Debtors have not disclosed a business for Debtor Bree Spears as required by Question 10 of the Statement of Financial Affairs. Furthermore, it does not appear either debtor has provided for withholdings.
>
> Furthermore, it appears that both debtors are self-employed, and therefore not receiving "wages or salary." See Dckt. 48, Part 1. The court notes that on the amended Schedule I, income from real property or operation of business for Debtor Kevin Sears jumps to $3,835 from the original Schedule I amount of -$2,740. See Original Schedule I, Dckt. 1; Amended Schedule I, Dckt. 48. No explanation has been provided as to the nature of this drastic change. The court

> cannot reconcile the changes in expenses reported on the prior Schedule J and the amended Schedule J without an explanation from the Debtors.
>
> Fourth, the court has computed a rough tax estimate as to Debtors, based on the figures provided in their schedules, starting with the Debtor's net income (subtracting business expenses) of $149,524. Without deducting for interest payments, property taxes or exemptions, the federal income tax would be approximately $29,000.00 and state income tax would be approximately $11,000.00. As Debtors are both self-employed, self-employment taxes (Social Security) and other applicable programs (such as disability) would also have to be accounted for. The court estimates that approximately $18,000 would be appropriate for self-employment tax. Debtors have only set aside $1,600 a month for taxes for a total of $19,200 per year. See Dckt. 48. The court computes that the Debtors would have to reduce their taxable income roughly by $50,000 for income taxes to total approximately $20,000 (the amount Debtors have accounted for). Furthermore, even if Debtors have $50,000 in deductions and exemptions, they are still short approximately $20,000 for the estimated self-employment tax.
>
> The IRS priority claims for 2011 taxes in the amount of $5,822, for 2012 taxes in the amount of $7,286, and for 2013 taxes in the amount of $27,810 for a total priority debt of $41,918. Thus, it appears that just the federal taxes for the Debtors are running approximately $27,000.00 a year (which is higher than the court's snapshot) based on the 2013 taxes. There is no basis shown that a $1,600.00 set aside per month for taxes is credible.

Civil Minutes, Dckt. No. 49. The concerns outlined by the court in its previous rulings, regarding Debtors' schedules, calculation of tax liabilities, disclosure of business expenses and income, and more, have not been addressed by the Debtors in their failure to amend their schedules in accordance with the court's orders.

The court previously ruled, when ruling on the objections filed by Trustee and the Creditor in opposition to the confirmation of Debtors' previously proposed plan, that Debtors have proposed plans in bad faith as measured by the factors set forth in In Re *Warren*, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))).

The court has noted Debtors' repeated failures in accurately reporting their income and expense for their respective businesses, providing an explanation of the drastic changes made to their budgets and schedules, to provide sufficient tax withholdings or explain the figure provided for in the schedules, or provide any evidence in support of their responses to the objections of the Chapter 13 Trustee and creditors.

AMENDED CHAPTER 13 PLAN AND MOTION TO CONFIRM

In reviewing the Docket the court finds a First Amended Chapter 13 Plan having been filed by the Debtors on September 23, 2014. Dckt. 75. This appears to have coincided with the current Motion to Dismiss and the Motion to Dismiss filed by the Chapter 13 Trustee on September 17, 2014.

The proposed First Amended Plan provides for the plan to be funded with $24,348.00 through September 2014, and then for monthly plan payments of $5,916.56 a month for the remaining 56 months of the Plan. The Plan payments shall be used to pay (1) Debtors' counsel $6,000.00 in fees, (2) the Chapter 13 Trustee fees, (3) $3,255.02 current monthly mortgage payment on the Debtors' residence, (4) $850.61 arrearage payment ($51,037.00 total arrearage) on the loan secured by the Debtors' residence, (5) $181.43 payment for the Debtors' 2008 BMW 328i, (6) $41,919.00 priority claim owed to the Internal Revenue Service, (7) $6,7858.07 priority claim owed to the California Franchise Tax Board, and (8) a 10% dividend on general unsecured claims (stated to be $75,957.00).

Schedule E filed by the Debtors states that the Federal and State priority tax claims are for the 2011, 2012, and 2013 tax years. While the Proof of Claim filed by the Franchise Tax Board (Proof of Claim No. 6) indicates that the tax obligation is spread over the three tax year period, the Internal Revenue Service Claim (Proof of Claim No. 3) discloses that over 66% of the tax debt, $27,810.00, is for the 2013 tax year. The Debtors failed to pay the 2013 taxes while they were enjoying the benefits of being in their prior bankruptcy case (13-27044, filed on May 23, 2013 and dismissed May 18, 2014).

Kevin Sears, the Debtor, has filed his declaration in support of the Motion to Confirm the First Amended Plan. Dckt. 74. In it he states under penalty of perjury that the prior bankruptcy case was filed so that they could "catch up" on their delinquent house payments. Further, that the prior case failed because they miscalculated the amount of the arrearage.

He further testifies that in 2013 he obtained a contract with butte County to handle some public defender matters. He did not have a "good handle" on these finances when the Debtors filed their first bankruptcy case. In the first bankruptcy case the Debtors schedules were inaccurate because the Debtors did not have "a good handle" on what Mr. Sears would net from his private practice legal work.

When the First Meeting of Creditors was filed in the current case, Mr. Sears testifies that "the trustee noticed that the original filed schedule 'b' failed to include a couple of my business accounts for my law practice." Mr. Sears further testifies that this failure to disclose the assets was "purely an oversight," and when the Trustee advised the Debtors of this deficiency they immediately amended the Schedules.

Mr. Sears further testifies that "in our haste to get this case filed and a plan prepared, we neglected to accurately reflect my wife's business on the Statement of Financial Affairs."

The Debtor's recollection as to why the first Chapter 13 Case was dismissed is inaccurate, or incomplete at the least. The court expressly found that the Debtors were not prosecuting the first Chapter 13 case in good faith.

> "From reviewing the opposition to the Motion to Dismiss, the court concludes that this case is not being actively prosecuted in good faith. Rather, it appears that the Debtors have not come to grips with the reality
> of being a debtor. The plan being proposed consists mainly of the Debtors maintaining their current lifestyle and not paying creditors (other than $4,056.40 to live in their current home and $269.00 to pay their non-dischargeable delinquent taxes). The inability to accurate state income and expenses is not credible, as a persons average expenses do not fluctuate with income. Rather, this testimony indicates that the Debtors made up the expense number to fit the plan they so desired to prevent the foreclosure on their home."

Civil Minutes, 13-27044 Dckt. 115. In ordering the case dismissed, the court noted that the dismissal of that case might be what was necessary for the Debtors to come to grips with economic reality and their duties as Chapter 13 Debtors. *Id.* From a review of the filing in this case, the continuing "misstatements" and "inaccurate statements" by the Debtors, which are corrected only when "caught" by the Trustee, reflect that the Debtors just don't understand (or are willing to understand) the minimal obligations of debtors – be honest, be truthful, and prosecute your case in good faith.

It is clear that Debtors have continued in their plan focused on keeping their house, irrespective of the cost, continuing to drive a BMW (irrespective of the two Debtors owning two other cars free and clear of any liens), while not explaining where all of the unpaid tax monies from 2013 have been diverted (in excess of $30,387 combined unpaid state and federal taxes, Proofs of Claims Nos. 3 and 6) while the Debtors were safely ensconced in the prior Chapter 13 case.

In the prior Chapter 13 case the Debtors stated under penalty of perjury that their monthly expenses, exclusive of the mortgage to be paid through the proposed Chapter 13 Plan, were $7,934.50 a month. Amended Schedule J, 13-27044 Dckt. 63. Debtor Kevin Sears now testifies under penalty of perjury that his income was $144,673.00 in 2013. Dckt. 74. Though not disclosed on the Statement of Financial Affairs, Amended Schedule I states that Co-Debtor Bree Sears has additional income of $34,152.00 a year Dckt. 48. Combined, the court projects that in 2013 Debtors had $178,825.00 in income, which averages $14,902.00 a month. After deducting the $7,934.50 in expenses (without regard as to whether they are reasonable), the Debtors had $6,097.50 in monies left over. This is greater than the $4,707.53 plan payment (original Plan, 13-27044 Dckt. 5), $4,781.60 plan payment (first amended plan, *Id.* Dckt. 25), $5,281.61 plan payment (third amended plan, *Id.* Dckt. 60) in 2013.

The unpaid tax monies have just "disappeared" from the bankruptcy estate in the prior case or in this case. Additionally, upon the closing of the prior bankruptcy case the Chapter 13 Trustee refunded $15,427.88 to the Debtor. Trustee's Final Report, 13-27044 Dckt. 126. The Debtor only paid $40,669.79 into their plan, *Id.*, which over 11 months of the plan averages only $3,697.25. This $15,427.88 does not appear to be accounted for in Schedule B either as monies received (in a bank account) or as an account receivable (if not yet disbursed by the Chapter 13 Trustee when this second bankruptcy case was filed three days after the prior case was ordered dismissed).

Rather than having learned from the failure of the prior case, Debtors continue to manifest the intention and belief that the bankruptcy laws exist so that they can maintain the lifestyle they want, pay only the claims they want, spend money as they want, not account for the monies of the estate, and avoid any "inconveniences" that accompany obtaining the extraordinary relief available under the bankruptcy laws.

Debtors have decided that it is important for them to make payments of $4,105.63 a month to maintain their residence lifestyle in a home in which there is a negative ($68,502.29) in equity. Schedule A, Dckt. 1, and Proof of Claim No. 8. While they may so do, it is not an excuse for failing to then properly provide for other claims and make the necessary adjustments in their other spending.

Even though they own two cars free and clear, the Debtors believe that they in good faith want to divert monies so that they can have and drive a third car, the BMV, for the two of them. Though they were protected in the prior bankruptcy case, the Debtors failed to pay $30,000.00 in income taxes and are unable to explain where that $30,000.00 was diverted to by the Debtors. Even though they had been in a prior bankruptcy case for a year, when filing the present case the financial information was rife with errors and material non-disclosures. Though receiving more than $15,000.00 back from the Chapter 13 Trustee from the prior case, those monies have just "disappeared."

Movant has thrown in a request that the court issue an injunction enjoining the Debtors from filing another case for an unspecified period of time. Such injunctive relief must be requested pursuant to an adversary proceeding. Fed. R. Bankr. P. 7001. Congress in some respects has addressed this issue in the provisions of 11 U.S.C. § 362(c)(3) and (4), as well as 11 U.S.C. § 109(g).

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

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

51. 13-32277-E-13 BROOKE O'ROURKE **MOTION TO MODIFY PLAN**
LC-4 Lorraine W. Crozier **8-13-14 [55]**

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 13, 2014. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

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

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

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

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

52. 10-35278-E-13 BSJ-3 — RODNEY/SHEILA BORGESON — Brandon Scott Johnston — CONTINUED MOTION TO REOPEN CHAPTER 13 BANKRUPTCY CASE — 7-25-14 [59]

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

Notice Provided: The Interim Order Reopening the Case for the Limited Purpose of Conducting a Hearing on Motion to Reopen was served by the Clerk of the Court through the Bankruptcy Noticing Center on the parties on July 29, 2014. 7 days notice of the hearing was provided. Dckt. 66.

The Motion to Reopen Case is granted.

On October 4, 2013, the Clerk of the Court filed the Order Closing this Chapter 13 case without the entry of a discharge. Dckt. 57. No discharge was entered due to Debtors Rodney James Borgeson and Sheila Anne Borgeson failing to file form EDC 3-190 (§ 1328 certificate). The Chapter 13 Trustee's final report was approved and the Trustee discharged in this case. September 23, 2013 filed Order, Dckt. 56.

On July 25, 2014, Debtor Rodney James Borgeson filed an *ex parte* motion to reopen this case to (1) allow "her" to file a § 1328 certificate and a Motion to Substitute Deceased Party. Dckt. 59. On July 25, 2014, counsel for Rodney James Borgeson and Sheila Anne Borgeson filed a "Suggestion of Death Upon the Record" asserting that Debtor Sheila Anne Borgeson had died on November 19, 2012.

A Motion to Substitute Rodney James Borgeson as the personal representative for Sheila Anne Borgeson was also filed on July 25, 2014. Dckt. 62. The Motion states that Sheila Anne Borgeson died on November 19, 2012 (almost one year before the Chapter 13 case was closed). That upon her death, $50,000.00 in life insurance proceeds were received. The Motion, signed by Debtors' Counsel, states,

a. Funeral Home and Crematory was paid "approximately" $9,000.00 for mortuary services and "merchandise" expenses.

b. "I" paid Calvary Catholic Cemetery $22,000.00 for a crypt.

c. "I" paid Sutter Hospital $1,500.00 for hospital bills.

d. "I" spent approximately $1,500.00 on food and expenses for people who paid their final respects at the mortuary and at "my" home.

Before this court determines by final order that this case should be reopened and whether the Trustee should be reappointed, the court has determined that an initial hearing on the Motion is necessary. On its face, while the Debtors were in this bankruptcy case, Rodney James Borgeson took $50,000.00 of insurance proceeds received by the estate (*see* 11 U.S.C. § 1306) and spent that money on a funeral. This included paying $22,000.00 for a crypt, $12,000.00 for other funeral expenses, and $16,000.00 unaccounted for by this Debtor.

The bankruptcy case having been closed for almost nine months, and all of the debts subject to the discharge predating the June 2010 filing, the court is unsure as to (1) whether the Debtor has determined that the reopening of this case is proper and (2) whether the Trustee must be reappointed to investigate the $50,000.00 in insurance proceeds.

CONTINUANCE

At the August 5, 2014 hearing, the Debtor and the Chapter 13 Trustee agreed to continue the hearing on the matter to afford the parties the opportunity to consider the proper resolution of this motion. Civil Minutes, Dckt. No. 71.

On August 12, 2014, the Trustee filed a statement of non-opposition to the Debtors' Motion to Reopen the Case. The Trustee describes the case being closed on October 4, 2013, without discharge as Debtors failed to file form EDC 3-190 and 191 11 U.S.C. § 1326 Certificates. It appears that the Debtors are seeking discharge in order to receive a reconveyance of a lien held by Citimortgage, Inc. for a second Deed of Trust that was valued as unsecured. Trustee states that it appears that it is necessary for the case to be reopened in order to file the certificates and obtain a discharge. Thus, the Trustee requests that the court grant the motion. Dckt. No. 74.

The remaining Debtor, James Borgeson, having filed a Motion to Reopen the Bankruptcy case pursuant to Federal Rule of Civil Procedure 5010 and 11 U.S.C. § 350(b) for the purpose of discharging an obligation held by CitiMortgage, Inc., that was determined to be entirely unsecured, the Motion is granted and the case is reopened.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Reopen the Bankruptcy Case filed by Rodney Borgeson, the surviving Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Reopen the Bankruptcy Case is granted and the case is reopened.

53. 13-35781-E-13 LORI ALVARADO — MOTION TO MODIFY PLAN
WW-2 Mark A. Wolff — 8-14-14 [34]

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 15, 2014. By the court's calculation, 45 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on August 14, 2014, is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

54. 10-38985-E-13 EDGARDO/DENCY MARQUEZ — MOTION TO INCUR DEBT
CAH-5 — C. Anthony Hughes — 8-25-14 [89]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors creditor, Chapter 13 Trustee parties requesting special notice, and Office of the United States Trustee on August 25, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The debtors, Edgardo Bernardo Marquez and Dency Nora Marquez ("Debtors"), seek an order allowing the debtor to incur debt and enter into a

loan modification with their mortgage lender OneWest Bank, FSB ("Creditor") pursuant to Federal Rule Of Bankruptcy procedure 4001(c).

Debtors state that they are seeking permission from the court to allow them to incur debt and enter into a loan modification with their mortgage company. The mortgage is secured by Debtors' primary residence, which is located at 4750 Pismo Beach Drive, Antelope, California.

The repayment term for their modified loan will be 427 months. The interest rate is 4.000% for the first 60 months and 4.250% for the remaining 367 months. The monthly payment (which includes taxes and insurance) is $2,109.29 per month. Debtors state that this amount may adjust periodically depending on the increase or decrease of property taxes. The total new principal balance is $390,044.49.

Debtors assert that the loan modification is reasonable and necessary for the debtors; the old mortgage payment was $2,657.65/month, after a notice of mortgage payment was filed by the lender, resulting in a reduction in monthly payments with the new loan modification. The Motion is supported by the Declaration of Edgardo Marquez and Dency Marquez. 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.

OPPOSITION BY TRUSTEE

The Chapter 13 Trustee opposes Debtors' Motion to Approve the Loan Modification on the basis that the Lender has been incorrectly named in Debtors' Motion. Debtors state in their Motion that "The debtors, Edgardo Bernardo Marquez and Dency Nora Marquez, by and through their attorney's at Hughes Financial Law, hereby applies to the court for an order allowing the debtor to incur debt and enter into a loan modification with their mortgage lender OneWest Bank, FSB."

Debtors' Declaration, Dckt. No. 91, page 2 at lines 6-8 states: We are now seeking permission from the court to allow us to incur debt and enter into a loan modification with our first mortgage company," and affirms Debtors' desire to obtain the loan modification and reiterates that the principal and interest payments are $2,109.29.

Debtor's file as Exhibit A, Dckt. No. 92, a copy of the Home Affordable Modification Agreement being offered by Ocwen Loan Servicing, LLC, as Servicer. This agreement provides for a new principal balance of $390,044.49, which includes all amounts and arrearages that will be past due. The interest rate is 4.000% for years 1 through 5, then 4.250% from year 6 through the maturity date, with the first monthly payment of $2,109.29, including escrow payments, due on August 1, 2014.

Proof of Claim

OneWest Bank FSB filed Proof of Claim No. 5 on August 23, 2010, asserting a claim for money loaned in the amount of $393,293.88. Attached to the claim is a copy of the original Deed of Trust dated October 24, 2006, naming Indymac Bank, F.S.B. as the Lender, North American Title Insurance Company as the Trustee, and MERS (Mortgage Electronic Registration Systems,

Inc.) as the beneficiary under the Security Instrument. Also attached to the claim is an Assignment of Deed of Trust to OneWest Bank FSB. Amended claims were filed on November 2, 2010 (Court Claim No. 22), October 27, 2011 (Court Claim No. 24), and March 7, 2012 (Court Claim No. 25).

A Transfer of Claim Other than for Security was filed on October 10, 2013, Dckt. No. 84, transferring the claim from OneWest Bank, FSB, to OCwen Loan Servicing, LLC. The Transfer of Claim is signed by a Vanessa Mass, whose title is Contract Management Coordinator for the "Transferee/Transferee's Agent." While this notice has been filed, there are no documents executed by OneWest Bank, FSB transferring the claim to Ocwen Loan Servicing, LLC. There is no "evidence" provided of the transfer. (No copy of an assignment or negotiation of the note, no declaration and that Ocwen Loan Servicing, LLC is the "holder" of bearer paper or a note endorsed in blank and is exercising its rights as a "holder" of bearer paper notwithstanding the note not having been transferred to it).

DISCUSSION

Debtors represent that they are entering into a loan modification agreement with their mortgage lender, OneWest Bank, FSB, it does not appear that OneWest Bank, FSB, has entered into any modification agreement with the Debtors in this case. From appearances in other cases, in which Ocwen Loan Servicing, LLC has appeared as the loan servicer, not the actual creditor, Debtors are probably correct.

Debtors' file as Exhibit "A" in support of the Motion, Dckt. No. 92, a Home Affordable Modification Agreement that identifies the borrower as Joint Debtor Edgardo B. Marquez, and the servicer, the entity which is executing the subject agreement, "Ocwen Loan Servicing, LLC." It appears that the Borrower signed the agreement on August 10, 2014, entering into an agreement modifying the Note on Debtors' residential property and agreeing to a new principal balance of $390,044.49 on the lender's secured claim.

The Loan Modification Agreement itself clearly identifies Owen Loan Servicing, LLC as only the "servicer," not the actual creditor as that term is defined by the Bankruptcy Code. 11 U.S.C. § 101(10) and (5). Exhibit A, Dckt. 92. The Loan Modification Agreement contains an abnormality in which the signature block at the end provides for the "Servicer" signature to be provided by Mortgage Electronic Registration Systems, Inc., as the nominee for Servicer. The court is unaware of what legal rights that MERS, merely as a "nominee," would have to exercise rights of the Servicer who was exercising agency authority granted to it by the creditor. Additionally, from the Deed of Trust filed with the OneWest Bank, FSB Proof of Claim (No. 24, with no copies of any documents attached to Proof of Claim No. 25-1 filed by Ocwen Loan Servicing, LLC for OneWest Bank, FSB) the authority granted to MERS. is carefully circumscribed and does not appear to grant it authority to reduce or modify the obligation owning on the Note secured by the Deed of Trust.

The Motion is granted and the Debtors are authorized to enter into the Loan Modification on the terms as stated in the Loan Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 92. The court shall order that if Ocwen Loan Servicing, LLC is executing the Loan Modification Agreement,

it clearly disclose that it is doing so in an agency capacity and name its principal.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Incur Debt is granted and Edgardo and Dency Marquez, the Chapter 13 Debtors are authorized to enter into the Loan Modification Agreement which as been filed as Exhibit A, Dckt. 92, in support of the Motion.
>
> **IT IS FURTHER ORDERED** that if the Loan Modification Agreement is executed by Ocwen Loan Servicing, LLC, that it expressly identify in the signature block that it is doing so pursuant to a power of attorney or agency authorization by the creditor and name the creditor on whose behalf it is acting.

55. 14-23685-E-13 **PAUL LUDOVINA** **MOTION TO VALUE COLLATERAL OF ADVANCED RESTAURANT FINANCE, LLC**
LBG-4 **Lucas B. Garcia** **8-20-14 [61]**

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 the respondent Creditor, the Chapter 13 Trustee, and Office of the United States Trustee on August 20, 2014. By the court's calculation, 40 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 Advanced Restaurant Finance, LLC, "Creditor," is denied.

Paul Ludovina, the Debtor in this case ("Debtor") seeks to value the secured the secured claim of Advanced Restaurant Finance, LLC, "Creditor." The motion is accompanied by Debtor's declaration.

The Debtor first attests to his interest in money loaned for the following improvements of Ludy's BBQ (hereinafter, the "ASSET"):

a. $15,000.00 was used toward making the men's restroom wheelchair accessible. The Doors were widened, materials, labor, legal fees, fines and settlement with complainant.

b. $5,000.00 was used to make counter's wheelchair accessible. The Debtor states that he installed a second fold away attached counter top.

c. $10,000.00 was used to upgrade dish room area. There was a water leak that caused damaged and required a remodel of the dish room, plumbing needed to be fixed and new dish washing machine with a current value of $750.00 after wear and tear.

d. $5,000.00 was used to purchase new equipment (Reach-In and Freezer) along with some miscellaneous small appliances. The Reach-In has a current value of $2,000.00 after "wear and tear." The Freezer has a current value of $2,000.00 after wear and tear.

e. $3,000.00 per month for 24 months total of $72,000.00 was used towards marketing and mailings for both the restaurant and catering department. The advertising efforts included direct mailings, menu creation, website creation and post card campaign for previous clients.

f. $10,000.00 was used to purchase new catering equipment (warmers & chaffers) and miscellaneous small wares. The Debtor purchased 20 warmers, 20 chaffers, flatware, wine glasses, china, goblet and coffee maker. After wear and tear total, the value of these assets are $3,250.00.

¶ 3, Declaration of Paul Ludovina, Dckt. No. 63. Debtor states that much of what was secured by this loan is fixed tenant improvements and marking "which has no tangible value."

Therefore, Debtor states that the value presented in the Motion is based on the currently existing assets that were purchased.

Advanced Restaurant Finance, LLC., a California Limited Liability Company, assignee of Community Bank of the Bay has filed a claim with this Court (Claim No. 3), in the amount of $123,221.55, in relation to this motion.

The Debtor believes and asserts that the reasonable, fair-market value of the "ASSET" as of the petition filing date is $8,000.00. This appears to be the total value calculated for the following cookware and equipment presumably the only items of value that compromise the asset, Ludy's BBQ: Dishwasher-$750.00, reach-in-$2,000.00, freezer-$2,000.00, 20 chaffers, 20 warmers, flatware, china, wine glasses and goblets-$3,250.00.

The Debtor requests the Court to determine that the value of the secured claim of the claim filed by Advanced Restaurant Finance, LLC., a California Limited Liability Company, assignee of Community Bank of the Bay, in the Asset, Ludy's BBQ, be allowed at $8,000.00. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see*

also Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

DISCUSSION

Pursuant to 11 U.S.C. § 524(a), a discharge under Chapter 11 releases the debtor from personal liability for any debts. Section § 524, however, does not provide for the release of third parties from liability because § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors or guarantors. *Resorts Int'l, Inc. v. Lowenschuss* (*In re Lowenschuss*), 67 F.3d 1394, 1401 (9th Cir. 1995), cert. denied, 517 U.S. 1243 (1996). 11 U.S.C. § 524(e) provides: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985).

The Ninth Circuit Court of Appeals in *Underhill v. Royal* held that generally, discharge of the principal debtor in bankruptcy will not discharge the liabilities of co-debtors or guarantors. The Court also specifically held that bankruptcy court can affect only the relationships of debtors and creditor; this court has no power to affect the obligations of guarantors. *Id.* At 1432.

Creditor's lien secures a claim with a balance of approximately $123,221.55, as indicated in the Proof of Claim No. 3, filed on May 8, 2014, by Advance Restaurant Finance, LLC. The Proof of Claim asserts a claim for money owed on a loan, for an account possibly scheduled by Debtor as "Ludys

Main Street BBQ." The lien on the asset's title secures a loan incurred through a Merchant Agreement entered by Ludys, Inc., listed as the "Merchant," with a personal guarantee from the individual Debtor in this case, Paul B. Ludovina, and the Lender, "Community Bank of the Bay, A California State Bank," Proof of Claim No. 3 at 55.

Here, the Debtor in the instant Chapter 13 bankruptcy case, Paul Ludovina, is merely the guarantor of his Corporation, Ludy's BBQ". Debtor signs the subject Merchant Agreement as President of "Ludys, Inc" (Exhibit 2, Proof of Claim No. 3 at 11), and Debtor has signed a Guaranty stating that he is a Guarantor bound by the provisions of the Merchant Agreement, including the Term of Loan and the execution of the Guaranty. *Id.* at 12. Debtor's corporation, Ludy's BBQ, is the borrower with the assets that secures the subject debt. The Certificate of Borrower and Universal Credit Application filed as supporting documentation to Creditor's Proof of Claim clearly indicates that the borrower Merchant is "Ludys, Inc., doing business as Ludy's Main Street BBQ," a business located at 667 Main Street, Woodland, California, and not the Debtor himself.

The Debtor cannot value the secured claim of Ludy's BBQ, Debtor's corporation pursuant to 11 U.S.C. § 506(a), in his personal bankruptcy case. The claim of Advanced Restaurant Finance, LLC is secured by the business assets of the Merchant listed on the Agreement. On Debtor's Schedule B, Dckt. No. 1 at 11, Debtor lists his interest in Ludy's Inc. as a "100% Owner of Ludy's Inc." with assets totaling $15,825.83, and total liabilities and equity totaling $15,825.83. Debtor, however, lists the current value of his interest in the property as $0.00. Debtor describes himself as the President/CFO of the "Ludy's Inc" Corporation on Debtor's Schedule I, Dckt. No. 1 at 24. The individual Debtor, Paul Ludovina, not having an valued interest in the subject asset (which title secures the lien of Advanced Restaurant Finance, LLC) the Debtor cannot bring a valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) to modify the rights of creditor holding a claim in the assets of the corporation, Ludy's Inc. The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Paul Ludovina, "Debtor," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is denied.

56. 14-26385-E-13 PATRICIA SIMS **MOTION TO CONFIRM PLAN**
HAW-1 Helga A. White **8-8-14 [23]**

Final Ruling: No appearance at the September 30, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2014. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 Debtor has 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 August 4, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

57. 14-25986-E-13 TRUDY KUTZ — MOTION TO CONFIRM PLAN
SPB-1 Stanley P. Berman — 8-26-14 [37]

Final Ruling: No appearance at the September 30, 2014 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 Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

58. 14-20091-E-13 MARLENE MCCRARY MOTION TO MODIFY PLAN
DBJ-3 Douglas B. Jacobs 8-8-14 [40]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2014. By the court's calculation, 53 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of the proposed modified plan on the basis that Debtor is delinquent. It appears that Debtor cannot make the payments required under 11 U.S.C. § 1352(a)(6). The Debtor is delinquent $3,342.22 under the terms of the proposed modified plan. According to the plan, payments of $11,379.11 have become due. Debtor has paid a total of $8,036.89 to the Trustee with the last payments totaling $1,656.14 having posted on July 2, 2014.

DEBTOR'S REPLY

Debtor replies to the Objection of Trustee by stating that Debtor has now "caught up on this delinquency" and can continue to stay current under the modified plan.

The Declaration of Debtor Marlene McCrary, Dckt. No. 52, states that when the Proof of Claim was filed for Debtor's mortgage, Debtor discovered that she was further behind in her mortgage than she thought. She then filed a modified plan to make sure that everything owed on her mortgage was paid through her Chapter 13 Plan. In August, 2014, Debtor states that her payroll department unexpectedly took $2,000 out of payroll for health insurance. Debtor brought this to the attention of her employer and confirmed that this would not happen again. Debtor states that she has been able to borrow some money from her family members in order to catch up on past due payments. Debtor states that she is now current on her plan.

Though Debtor testifies that she is current, she provides no receipts, account statements, invoices, or other supporting documentation showing that she is current on her plan payments. Additionally, Debtor states that she has "borrower" money from family members, which connotes that she has to "pay back" the money she "borrowed." No evidence as been provided as to what has to be paid back and how she intends to pay back the monies.

Finally, no explanation is provided for how there was an "expected" $2,000.00 taken from her paycheck for health insurance. There is no explanation as to whether this is an annual deduction, whether the $2,000.00 will be returned to the estate, or whether her monthly insurance deduction will be increased by $166.66 a month to amortize the $2,000.00 amount over 12 months annually.

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.

59. 14-28195-E-13 MARK/KRISTI MERTEN
MMM-1 Mohammad M. Mokarram

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.
9-15-14 [17]

Tentative Ruling: The Motion to Value 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 the Chapter 13 Trustee, parties requesting special notice, respondent Creditor, and Office of the United States Trustee on September 15, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Value filed by Mark Merten and Kristi Merten, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 11262 Lower Circle Drive Grass Valley, California, "Property." Debtor seeks to value the Property at a fair market value of $369,000.00 as of the petition filing date.

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

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $432,297.00. Creditor's second deed of trust secures a claim with a balance of approximately $58,685.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Mark Merten and Kristi Merten, "Debtors," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Bank of America, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 11262 Lower Circle Drive Grass Valley, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $369,000.00 and is encumbered by senior liens securing claims in the amount of $432,297.00, which exceed the value of the Property which is subject to Creditor's lien.

60. 14-28195-E-13 MMM-2 | **MARK/KRISTI MERTEN** **Mohammad M. Mokarram** | **MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC** **9-15-14 [21]**

Tentative Ruling: The Motion to Avoid Judicial Lien 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 the respondent Creditor, parties requesting special notice, Chapter 13 Trustee, and Office of the United States Trustee on September 15, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Portfolio Associates Recovery, LLC ("Creditor") against property of Kristi and Mark Merten ("Debtors") commonly known as 11262 Lower Circle Drive Grass Valley, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $2,855.97. An abstract of judgment was recorded with Nevada County on March 24, 2014, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $369,000.00 as of the date of the petition. The unavoidable consensual liens total $490,982 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $1.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Portfolio Associates Recovery, LLC, Nevada Superior Court for Nevada City County Case No. CL13-080105, recorded on March 24, 2014, Document No. 2014005298 with the Nevada County Recorder, against the real property commonly known as 11262 Lower Circle Drive Grass Valley, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

61. 10-27399-E-13 DAN GOODLOW **CONTINUED MOTION TO MODIFY PLAN**
PGM-2 Peter G. Macaluso **4-11-12 [37]**

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

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

Below is the court's tentative ruling.

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

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2012. 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 Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

PRIOR HEARINGS

On January 9, 2013 the court continued the hearing to the date of the status conference in adversary proceeding number 12-2195.

On October 17, 2012 the court continued the hearing to allow the court to conduct a status conference. The Debtor is prosecuting an adversary proceeding which must be resolved or made part of the Chapter 13 Plan.

On April 25, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

On June 26, 2013 the court continued the hearing to follow the tentatively schedule June 14th BDRP date in adversary proceeding number 12-2195.

On November 5, 2013, counsel for Dorice Goodlow filed a motion to withdraw as her counsel in an adversary proceeding which must be resolved as part of a plan in this case.

At the March 25, 2014 hearing, the Trustee, Debtor, and Debtors counsel confirmed that upon the payment of an additional $5,227.72, the Debtors plan will be fully funded and the final disbursements to pay off the secured claim of EMC and the attorneys fees can be made in this case. Upon the final funding by the Debtor, counsel for the Debtor shall forward the order confirming the modified plan to the Trustee, which shall be lodged with the court when approved by the Trustee. Dckt. No. 85.

At the July 22, 2014 hearing, the court continued the Motion to Confirm to this hearing date, and ordered that supplemental pleadings in the case be filed and served on or before August 6, 2014. Civil Minutes, Dckt. No. 94.

Adversary Proceeding

The Debtor filed adversary proceeding number 12-02195 to determine the estate's interest in the Bald Creek Road Property and that of asserted co-owners. The proposed plan modification does not take that litigation into account and the consequences of a determination that the Debtor does not have any interest in the property. The court cannot identify what is asserted to be the "unknown transfers of title to [the Debtor's] property."

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor seeks to modify the plan because of a restraining order was entered against him, title to his property was allegedly transferred to others without his knowledge, and he has retained an attorney to defend him in an unidentified action. Debtor does not explain how these issues changed his ability to make plan payments; no expense related to any of these matters is listed on Schedules I or J. However, Schedule I states that Debtor is not residing in his home and is "in a fight over the home." Debtor does not budget for rent, but is proposing to maintain mortgage payments on the home he does not live in.

The Trustee challenges the feasibility of the proposed plan payment in light of the unknown costs associated with the attorney the Debtor has hired — who may be a professional of the estate — and the unknown costs associated with the Debtor's living arrangements outside of his home. These unknown costs impair the feasibility of the proposed plan payment and are cause to deny confirmation. 11 U.S.C. § 1325(a)(6).

Additionally, the Trustee suggests that payment on the claim secured by the loan may work unfair discrimination to holders of general unsecured claims. However, the court declines to reach this issue in light of the pending adversary proceeding the Debtor has commenced to determine his interest in the property and the independent cause to deny confirmation.

The court is further concerned that the proposed modification to the plan does not comport with the reality of this case. The Motion requesting the

modification does not state with particularity the grounds relating to a restraining order or possession on the residence being changed by an order of a non-bankruptcy court. The confirmed plan in this case provides that the property of the estate has not revested in the Debtor. (Dckt. 5). The Motion merely instructs the court to read the Debtor's declaration and choose whatever statements made therein the court thinks the Debtor should allege as the grounds for this Motion.

The declaration makes a reference to there being a domestic violence restraining order, an unknown transfer of title to the property (which is property of the bankruptcy estate), and that the Debtor now has to hire an attorney to represent him (presumably with respect to the restraining order and title issue). The Debtor testifies that he is $2,500.00 in arrears in the confirmed plan, and that he owes $6,552.67 on the obligation secured by his home (which is the subject of an unidentified title transfer). He further states that this claim, which is held by Acqua Loan Servicing, will be paid off during the term of the plan.

In support of the Motion the Debtor has provided current financial information using the Schedule I and J forms filed as Exhibits 1 and 2. Dckt. 40. These exhibits are not authenticated by the Debtor and he does not attest that the information provided therein is true and correct under penalty of perjury. The information provided therein raises significant questions.

First, the Debtor states that the total income for he and his wife is $1,084.00, consisting solely of his social security income. No income is shown for his wife, who is listed as retired. Though not stated by the Debtor, presumably there has been a separation and her income of $1,400 a month (as stated on Original Schedule I, Dckt. 1) is no longer available to the Debtor. The expense information, Exhibit 2, lists only $409 a month in expenses, which does not include any utilities, insurance, medical expenses, taxes or other amounts. It provides for a food expense of $150.00.

Second, the information concerning the Debtor's interest in real property is conflicting. On Schedule A the Debtor lists one property identified as 1148 Bald Rock Road, Berry Creek, California. Dckt. 1. It states that the Debtor's interest in the property is $184,500, and the property is subject to a secured claim in the amount of $129,000. Further on Schedule A the Debtor states that he has a 1/4 interest in this property and that 1/4 interest is worth $87,500.00.

Schedule D states that EMC Mortgage Corporation has a 1st Deed of Trust against an unidentified property in the amount of $42,600, with the collateral having a value of $148,000.00. (This appears to be a typographical error given that on Schedule A the Debtor states that the only real property he owns has a value of $184,000.) A second secured claim is listed in the amount of $20,000.00 secured by a judgment lien, with the Debtor stating that he asserts this obligation has been paid in full and is listed only as a precaution.

On Schedule C the Debtor states that he asserts a $150,000.00 homestead exemption. The Bald Creek Road Property is listed as the Debtor's address on his petition.

In the present Motion the Debtor asserts that the creditor having a deed of trust on the Bald Creek Road Property has a claim of only $6,552.67, not the $42,600 as listed on Schedule D.

On October 2, 2012 Debtor filed a supplemental declaration that is identical to the original declaration filed in support of the motion to modify. Debtor has not provided any additional evidence that would resolve Trustee's concerns regarding attorneys' fees for the adversary proceedings or the unknown costs associated with the Debtor's living arrangements outside of his home. Debtor still has not explained how these issues affect his ability to make plan payments.

Status of Adversary Proceeding

In addition to unresolved issues raised by the Chapter 13 Trustee, the Status Conference Statement filed on October 10, 2012 indicates that issues surrounding the ownership of the real property in the adversary case have not been resolved. (Adv. Proc. No. 12-02195, Dckt. 33).

The court's review of the docket in Adversary Proceeding Number 12-02195 indicates that the following has occurred since the court continued the hearing in bankruptcy case number 10-27399: the court entered an order allowing Wargo & French LLP to withdraw as counsel of record for EMC Mortgage Corp. and permitting McCarthy & Holthus LLP to substitute in as counsel of record. On October 17, 2012 the court continued the status conference in the adversary proceeding in order to allow the parties to negotiate the terms of a potential settlement since all parties are now represented by counsel. (Dckt. 39). The Status Conference Statement filed by Dorice Goodlow in Adversary Proceeding 12-2195 advises the court that the parties are proceeding with the Eastern District Bankruptcy Dispute Resolution Program (mediation), with the BDRP Conference set for June 14, 2013, with Russell Cunningham serving as the mediator. There is no indication that the parties have reached a settlement.

On July 22, 2013 the parties filed a status conference statement. The statement indicates that the parties made great progress towards resolving the dispute after the BDR conference. Plaintiff's counsel submitted a written proposal to Defendant and hopes for fair and equitable resolution of the matter. Defendant asserted that she has been in the hospital with pneumonia and has not conferred fully with counsel and is hopeful when she is released from the hospital the matter will be concluded shortly. Defendant was indicated to be receiving medical treatment, which impaired the ability of the parties to consummate a settlement in that Proceeding which would then allow for the confirmation of a plan. Civil Minutes, Dckt. No. 77,

The latest Status Conference Statement, filed by Plaintiff Debtor, indicates that Peter G. Macaluso, Counsel for Plaintiff Debtor, has filed a Motion to Withdraw as Attorney; in light of Plaintiff's expected lack of Counsel, Plaintiff Debtor requested and was granted an allowance of a few weeks to seek new counsel. The Status Conference was continued to this hearing date, and an Order to Show Cause was issued by the court to discern why the adversary case should not be dismissed without prejudice for lack of prosecution by all parties.

On February 18, 2014, the court issued an Order to Show Cause, ordering Plaintiff's attorney, Peter G. Macaluso, to show cause as to why the court should not dismiss Adversary Proceeding No. 12-2195 for the failure to prosecute. It was further ordered that any opposition to the issuance of the Order to Show Cause shall be in writing and filed with the court in compliance with Local Bankruptcy Rule 9014-1, and must be filed at least fourteen (14) days before the date of the hearing date. The court further ordered that Peter G. Macaluso appear in the hearing in person, and that no telephonic appearance is authorized for the order to show cause. Dckt. No. 82 in Adv. Proc. No. 12-02195.

On March 31, 2014, the court sustained an Order to Show Cause as to why the court should not dismiss Adversary Proceeding No. 12-2195 for the failure to prosecute. Dckt. No. 93. The Adversary Proceeding was dismissed without prejudice.

Debtor's Supplemental Declarations and Supplemental Motion to Modify

On February 27, 2014, Debtor filed a supplement to the Motion to Modify the Chapter 13 Plan. Dckt. No. 81. Debtor states that the intent of the First Modified Plan was to pay the Mortgage lender EMC Mortgage in full, over 36 months. Additionally the Plan purposes to pay attorney fees, remove a Judicial Lien, with general unsecured creditors 0% of their allowed claims. Debtor was to pay a minimum of $28,025 into the Plan over the 36 months, and has Debtor has paid a total of $26,585 and is in the 47th month of the Plan. Debtors last payment was in March of 2013.

The Trustee has $11,905.84 on hand to be disbursed, with the last disbursement on the case in November 2011. The balance on the case consists of the Class 1 Claim of EMC owed $6,552.67 plus interest and attorney fees of $9,465.00. With Trustee fees and interest it is estimated that the balance owed is $17,133.56 less monies on hand of -$11,905.84 the Debtor needs to contribute an additional $5,227.72 to end the plan.

Nothing further has been filed on the docket revealing that Debtors' plan has been fully funded, and the final disbursements to pay off the secured claim of EMC and the attorneys fees has been made in this case. With respect to the current Motion to Modify, the Debtor has not addressed the Trustee's or the court's concerns with regard to feasibility of the proposed plan. Debtor has not filed revised schedules, correcting the Schedules' reporting of Debtor's wife's income, and clarifying Debtor's interest in the property known as 1147 Bald Rock Road, and the property which secures the debt owed to the EMC Mortgage Corporation. Further, Debtor's potential ownership interest in the Bald Creek Road Property has not been resolved, and it appears that the adversary case which would adjudicate the issue of who has ownership of the title of the property, has been dismissed for lack of prosecution.

SUPPLEMENTAL OBJECTION BY TRUSTEE

On September 16, 2014, the Chapter 13 Trustee filed a Supplemental Objection to the Debtor's Motion, stating that the Trustee is still uncertain of the identity of the Class 1 Creditor and the amount owed on the claim. Debtor's plan confirmed on May 27, 2010, provided for creditor EMC Mortgage Corp. The creditor was to be paid a monthly contract installment of $619.40.

Pre-petition arrears were reported to be $9,000.00 with a monthly dividend of $210.00 starting in the 15th month.

A claim has not been filed by the creditor. The Debtor's attorney filed a proof of claim for creditor EMC Mortgage Corporation on January 18, 2011, indicating $9,000 in mortgage arrears. The First Modified Chapter 13 Plan filed on April 11, 2012, states in Class 1 the creditor is Acqura Loan/EMC.

The Monthly Contract Installment is reported to be $606.24. Pre-petition arrears are stated to be $903.59, arrears paid in full. Section 7.02 states that the principal owed to the Class 1 Mortgage Lender, Acura Loan Services, is $6,552.67 as of January 2010. Section 7.03 instructs the Trustee to disburse all funds on hand, less Trustee fees, to Class 1 Mortgage Lender, Acqura Loan Services. No address has been provided from them; Trustee notes that the Debtor filed with the court Dckt. No. 32, a letter with copies of emails from the Butte County Treasurer/ Tax Collector, indicating property tax information requested by Acqura Loan Services. No evidence, however, has been filed as to the actual Class 1 Creditor in this case.

Trustee states that the only information is Debtor's filed claim and the Notice of Change of Servicing Agent, Dckt. No. 87, filed by Counsel for EMC Mortgage Corporation on March 31, 2014, reporting the servicing agent to be Residential Credit Solutions. Debtor filed an adversary proceeding to determine the ownership and mortgage payee. The Adversary Proceeding, No. 02195, was dismissed on March 31, 2014 on the court's Order to Show Cause for failure to prosecute. Trustee states that he has made the following payments to the contract installment;

Date	Payee	Check	Amount
11/18/2011	EMC MORTGAGE CORPORATION	603759	($619.40)
9/30/2011	EMC MORTGAGE CORPORATION	603759	$619.40
8/31/2011	EMC MORTGAGE CORPORATION	600969	$619.40
7/29/2011	EMC MORTGAGE CORPORATION	572955	$619.40
6/30/2011	EMC MORTGAGE CORPORATION	570357	$619.40
5/31/2011	EMC MORTGAGE CORPORATION	567747	$619.40
4/29/2011	EMC MORTGAGE CORPORATION	565228	$619.40
3/31/2011	EMC MORTGAGE CORPORATION	562722	$619.40
2/28/2011	EMC MORTGAGE CORPORATION	560247	$619.40
1/31/2011	EMC MORTGAGE CORPORATION	557811	$1,238.80
1/14/2011	EMC MORTGAGE CORPORATION	548740	($619.40)
12/30/2010	EMC MORTGAGE CORPORATION	555443	$2,477.60
12/28/2011	EMC MORTGAGE CORPORATION	546626	($1,2380.80
11/30/2010	EMC MORTGAGE CORPORATION	553186	$619.40

11/29/2010	EMC MORTGAGE CORPORATION	544607	($619.40)
10/29/2010	EMC MORTGAGE CORPORATION	550956	$619.40
9/30/2010	EMC MORTGAGE CORPORATION	548740	$619.40
8/31/2010	EMC MORTGAGE CORPORATION	546626	$1,238.80
8/12/2010	EMC MORTGAGE CORPORATION	538079	($619.40)
7/30/2010	EMC MORTGAGE CORPORATION	544607	$619.40
6/30/2010	EMC MORTGAGE CORPORATION	542621	$1,238.80
4/30/2010	EMC MORTGAGE CORPORATION	538079	$619.40
			$10,529.80

The $10,529.80 represents 17 monthly contract installments made by the Trustee. The Trustee has made the following disbursements to the Pre-petition arrears claim:

Date	**Payee**	**Check**	**Amount**
11/18/2011	EMC MORTGAGE CORPORATION	603760	($1,573.61)
9/30/2011	EMC MORTGAGE CORPORATION	603760	$1,573.61
8/31/2011	EMC MORTGAGE CORPORATION	600970	$74.13
7/29/2011	EMC MORTGAGE CORPORATION	572956	$210.00
6/30/2011	EMC MORTGAGE CORPORATION	570358	$210.00
5/31/2011	EMC MORTGAGE CORPORATION	567748	$86.37
4/29/2011	EMC MORTGAGE CORPORATION	565229	$86.88
3/31/2011	EMC MORTGAGE CORPORATION	562723	$26.53
2/28/2011	EMC MORTGAGE CORPORATION	560248	$209.68
			$903.59

The Trustee placed reserves on the claims after a letter was filed with the court by the Debtor objecting to the claims, Dckt. No. 32. The modified plan calls for total payments to the Trustee of $27,485.00. Debtor has made, from April 30, 2010 to July 15, 2014, total payments of $31,812.72 to the Trustee. The Trustee has a current balance on hand of $17,133.56. This amount net of Trustee fees is $16,499.61, which is available for payment to creditors. The proposed plan directs the Trustee to pay $6,552.667 for principal owed to Class 1 mortgage lender, Acqura Loan Services. Additional attorney fees of $9,465.00 were granted on January 16, 2014.

Debtor filed a Supplement to Motion to Modify on August 6, 2014, which stated the last payment date and amount and stated the Trustee has sufficient funds to end the plan. Debtor requests that the Objection be denied, and the

plan be confirmed with additional verbiage to clarify the Plan terms. The Debtor does not, however, indicate what additional verbiage to be. Trustee does not believe that Debtor has addressed the issues raised in the court's ruling in the Civil Minutes, Dckt. No. 92, in the last hearing.

DEBTOR'S REPLY TO TRUSTEE'S SUPPLEMENTAL OBJECTION

The Debtor responds by reviewing the "undisputed" and "materially disputed" facts of the case.

"Undisputed Facts"

The Debtor's Reply states that these are the undisputed facts in this matter:

A. As of July 22, 2014, pursuant to representations made in Court and in pleadings the Debtor was to pay $5,227.72.

B. The Court continued the hearing to allow the Debtor to make said payment, which was allegedly told to the Debtor's adult children in open court.

C. On August 6, 2014, the Debtor made the payment requested of $5,227.72. Dckt. No. 95

D. The Reply states that it is "undisputed" that the Trustee represented to the court that they "would then have sufficient funds to end the plan."

E. The Debtor made the payment. The Reply states that the "Debtor has refused to cooperate with Counsel in any further matters."

"Materially Disputed Facts"

The Reply characterizes the following as the materially disputed facts in this case:

A. The Trustee claims there is a shortage in the plan, while the Debtor believes he has paid in full.

B. The Trustee's witness testified that "no evidence has been provided as to the class 1 creditor in the case"

C. The "Class 1 checklist," however, was provided prior to the meeting of creditors.

D. Debtor states that the Trustee cancelled payments on November 18, 2011, and refused to disburse to the mortgage company, and "any interest due is self inflicted."

E. If the Trustee fails to disburse, and fails to correct the issue nor bring it to the Debtor's attention so that it could be remedied timely, the Reply asserts that any increases in interest is not

caused by the Debtor, nor Debtor's counsel and should be remedied by the Trustee.

The Debtor in his Reply requests further briefings after having detailed the material and disputed facts of this case pursuant to Local Bankruptcy Rule 901401(f)(ii), and establishing a factual record regarding the value of the property at issue.

XXXXXXXXXX.

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 xxxxx and the proposed Chapter 13 Plan [is not] confirmed.

62. 13-23599-E-13 IVAN MONTELONGO **MOTION TO MODIFY PLAN**
PGM-6 Peter G. Macaluso **8-14-14 [107]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 14, 2014. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Here, the Chapter 13 Trustee opposes confirmation of the Debtor's proposed modified Chapter 13 Plan. Section 1.10 of Debtor's modified plan proposes a plan payment of $40,330.00 total paid in through August 2014 (month 17 where Debtor's petition was filed on March 18, 2013), then $2,800 for 43 months stating on September 2014.

Through August, the Debtor has actually paid a total of $43,130.00 with the last payments totaling $2,800 having posted on August 22, 2014. Additionally, Section 1.01 of the proposed modified Plan and Debtor's Motion, Dckt. No. 17, proposes a monthly plan payment beginning on September 2014 of $2,800.00, while Debtor's Declaration, Dckt. No. 109, proposes a monthly plan payment of $3,235.00 beginning on September 25, 2014.

The Trustee notes that Debtor filed Supplemental Schedules I and J (Dckt. No. 110), which support a plan payment of $2,800.00.

DEBTOR'S REPLY

Debtor responds by stating that he was delinquent at the time of the plan modification. Debtor wanted to ensure that he stayed ahead of the plan payments therefore the September 25th payment of $2,800 was paid on August 22, 2014 as he had it available. The reply states that Debtor's declaration had a scriber's error. Line 3 page 2 should have read remitting payments of $2,800.00 per month starting September 25, 2014.

Debtor requests that the corrections be addressed in the Order to Modify to not further delay disbursements to Creditors.

The modified Plan, with the correction that Debtor will be paying a monthly plan payment of $2,800 beginning on September 25, 2014, 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 14, 2014, amended to state that Debtor will be paying a monthly plan payment of $2,800 beginning on September 25, 2014, 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.

63. 14-28950-E-13 JANET LYTLE
MAC-1 Marc A. Caraska

MOTION TO EXTEND AUTOMATIC STAY
O.S.T.
9-17-14 [15]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 13, 2014. The court issued an Order Shortening Time on September 18, 2014 and setting the Motion for Extension of the Automatic Stay for hearing on September 30, 2014. By the court's calculation, 12 days' notice was provided.

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

The Motion to Extend the Automatic Stay is granted, with the stay extended through and including November 4, 2014, unless terminated earlier by operation of law or further order of the court. Final hearing on the Motion shall be conducted at 3:00 p.m. on October 28, 2014.

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors'

second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 13-24839) was dismissed without discharge on August 9, 2014, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 13-24839, Dckt. 59, August 8, 2014. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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

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

1. Why was the previous plan filed?

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

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

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as failing to make plan payments due to Debtor's inability to access her funds on deposit, or her direct deposits, due to an extended "freeze" placed on her account by her previous bank. Debtor argues that it was not due to willful inadvertence or negligence on the part of the Debtor but instead the inability to access her funds due to the "freeze."

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The motion is granted and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of

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

IT IS ORDERED that the Motion is **is granted**, with the stay extended through and including November 4, 2014, unless terminated earlier by operation of law or further order of the court.

IT IS FURTHER ORDERED that the Final Hearing on the Motion shall be conducted at 3:00 p.m. on October 28, 2014. Opposition to the Motion shall be filed and served on or before October 14, 2014, and Reply, if any, filed and served on or before October 21.

IT IS FURTHER ORDERED that Debtor shall, on or before November 2, 2014 file and serve a Notice of Final Hearing and deadlines for filing Opposition and Replies.