UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

October 28, 2014 at 3:00 p.m.

---

1. 14-28101-E-13 SHERRI ARNOLD — MOTION TO DISGORGE FEES
DPC-3 James Andrews — 9-23-14 [36]

Final Ruling: No appearance at the October 28, 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, Debtor's Attorney, and Office of the United States Trustee on September 23, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Disgorge Fees is granted.

The Chapter 13 Trustee moves the court for an order disgorging attorney fees in this case pursuant to 11 U.S.C. § 329, as the fees received exceed the reasonable value of such services. **The Trustee argues that the Debtor paid counsel $2,000.00 prior to filing according to the Disclosure of Compensation of Attorney for Debtor filed on July 25, 2014.** Dckt. 1, pg. 37. The Trustee alleges that in return for payment, counsel has prepared and filed the wrong plan for the Eastern District, failed to provide the Chapter 13 Trustee with the required § 521 documents, and failed to appear at the 341 meeting held on September 11, 2014

OPPOSITION

No opposition has been filed by the Debtor's or Debtor's counsel.

DISCUSSION

This court has the authority, and responsibility, to consider

attorneys' fees obtained or to be paid prior to or during a bankruptcy case. 11 U.S.C. § 329, 330, 331. Fees in excess of the reasonable value of such services may be ordered repaid. The application of 11 U.S.C. § 329 and Federal Rule of Bankruptcy Procedure, may seem harsh, but are necessary to not only protect vulnerable consumers and business owners, but to protect the integrity of the federal judicial process. *See Neben & Starrett v. Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. Cal. 1995). Debtor's counsel must lay bare all its dealings regarding compensation and must be direct and comprehensive. *See In re Bob's Supermarket's, Inc.*, 146 Bankr. 20, 25 (Bankr. D. Mont. 1992) *aff'd in part and rev'd in part*, 165 Bankr. 339 (Bankr. 9th Cir. 1993). The burden is on the person to be employed to come forward and make full, candid, and complete disclosure. *In re B.E.S. Concrete Products, Inc.*, 93 B.R. 228 (E.D. Cal. 1988). The federal courts are not mere devices to be used to generate fees for attorneys irrespective of any bona fide rights to be adjudicated.

A review of the Disclosure of Compensation of Attorney for Debtor, Mr. Andrews agreed to render legal services for all aspects of the bankruptcy case, including:

1. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy

2. Preparation and filing of any petition, schedules, statement of affairs, and plan which may be required;

3. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;

4. Negotiations with secured creditors to reduce market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 U.S.C. § 522(f)(2)(A) for avoidance of liens on household goods.

Dckt. 1, pg. 37.

The Disclosure does exclude "Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding," from services. Dckt. 1, pg. 37.

At this point in the case, Mr. Andrews has failed to file a confirmable plan, failed to attend the meeting of creditors, failed to file necessary documents with the Chapter 13 Trustee. It appears that Mr. Andrews filed the necessary documents, particularly the Debtor's Certification of Employment Income Pursuant to 11 U.S.C. § 521(a)(1)(B)(iv) (Dckt. 6), only after the court issued a Notice of Incomplete Filing and Notice of Intent to Dismiss Case (Dckt. 5). It appears that Mr. Andrews has acted to represent the Debtor when a threat of dismissal is imminent.

In fact, on October 15, 2014, the court granted the Chapter 13 Trustee's Motion to Dismiss for Failure to Make Plan Payments and to Provide Tax Documents. Dckt. 32. The fact that the case has been dismissed for the Debtor and Debtor's counsel from abiding by the requirements of the Bankruptcy

Code raises serious doubts that Mr. Andrews provided the services agreed upon in the Disclosure.

Most importantly, Counsel has not provided detailed time records in order for the court to properly determine if the time spent is reasonable. In fact, Mr. Andrews has not filed any opposition nor documentation to rebut the Trustee's allegations that Mr. Andrews has been compensated more than the reasonable value of such services. Without any opposition, which is construed as nonopposition when the motion is served under Local Rule 9014-1(f)(1)(ii), the court is left to review the history of the case. At this juncture, the court is inclined to agree with the Trustee that Mr. Andrews has not performed any services that would justify the $2,000.00 paid by Debtor prior to filing.

Further, Local Bankruptcy Rule 2016-1(c)(4) provides that in a Chapter 13 case if the plan is not confirmed, counsel for the debtor may not be paid more than 50% of the fees which were contracted for to prosecute the case, absent further order of the court. No such further order of the court has been issued in this case. The Disclosure of Compensation states that counsel agreed to accept $3,500.00 for the fees in this case, getting the Debtor through confirmation and entry of discharge. Dckt. 1 at 37.

The court finds, based on the evidence in the docket and the Trustee's motion, that the $2,000.00 paid by the Debtor prior to filing to Mr. Andrews for services is more than the reasonable value of the services provided by Mr. Andrews. The court grants the Motion and Mr. Andrews shall pay the $2,000.00 to the Chapter 13 Trustee on or before November 30, 2014. The Chapter 13 Trustee shall disburse the $2,000.00 directly to the debtors.

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 Disgorge Fees 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 Debtor's Counsel James Andrews is ordered to disgorge $2,000.00 of attorney fees in this case. James Andrews shall pay the $2,000.00 to the chapter 13 Trustee on or before November 30, 2014. The Chapter 13 Trustee shall disburse the $2,000.00 directly to the Debtor.

2. 14-28302-E-13 SHEILA RAY — **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 Mohammad M. Mokarram — **9-24-14 [21]**

Final Ruling: No appearance at the October 28, 2014 hearing is required.

The Chapter 13 Trustee having filed a Withdrawal of the Objection to Confirmation of Plan, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Objection to Confirmation of Plan the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

3. 10-32304-E-13 FAYE ISIDRO — **MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.**
SAC-1 Mikalah R. Liviakis — **10-11-14 [32]**

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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 Wells Fargo 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 Faye Isidro ("Debtor") to value the secured claim of Wells Fargo Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 6 Amber Leaf Court, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of $125,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on July, 19 2010. Dckt. 15. The fair market value the Debtor seeks is based on the original Motion and the value at the time of its filing. Debtor has filed the current motion to ensure that Wells Fargo Bank, N.A. is properly served and has proper opportunity to be heard. Debtor listed Wells Fargo Bank, N.A. as the creditor in the prior motion as well. Dckt. 5.

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a

balance of approximately $136,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $48,500.00. 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 Faye Isidro, "Debtor," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 6 Amber Leaf Court, Sacramento, 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 $125,000.00 and is encumbered by senior liens securing claims in the amount of $136,000.00, which exceed the value of the Property which is subject to Creditor's lien.

4. 14-21319-E-13 MARK/SARAH ANN HANSEN — MOTION TO CONFIRM PLAN
BB-4 Bonnie Baker — 9-12-14 [49]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 15, 2014. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

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

Mark and Sarah Hansen ("Debtors") filed the instant Motion to Confirm Second Amended Plan on September 12, 2014. Dckt. 49. Debtors seek to amend their plan to address the Trustee's concerns regarding the arrears alleged in a claim failed by America's Servicing Company and regarding the infeasibility of a $10,000.00 payment in September of each year. Debtors amended their plan to provide payment of Class 1 arrears in the claimed amount, $88,443.09. Debtors have also proposed a two-step plan in which Debtors will pay $3,908.62 per month through February 2015 to pay the Class 1 ongoing mortgage payment and Trustee's fees. Debtors would then pay $5,540 per month beginning in March 2015 and for the remaining 48 months of the plan. Debtors believe that their disposable income will stabilize and be sufficient to support the $5,540.00 per month payment in March 2015. Debtors also believe that the extraordinary expenses related to their paralyzed son will decrease in frequency by that time due to pending legal claims.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to this Motion on October 14, 2014. Dckt. 59. The Trustee objects on the basis that:

1. Debtors' Exhibit to the Motion (Dckt. 53) states that Amended Schedule J is attached as Exhibit B. However, it does not appear that this amended Schedule J has been filed with the court.

2. The Additional Provisions of Debtors' plan are incorrect. The Additional Provisions state that Debtors have paid $23,540.00 through August 2014, paying the ongoing Class 1 mortgage payments, attorney's fees, and Trustee's fees. They further state that commencing July 2014, Debtors will pay the Trustee $3,908.62 through February 2015, paying ongoing Class 1 mortgage and Trustee fees. The plan payments of $3,908.62 should commence on September 2014, not July 2014.

3. Debtors have not disclosed their income and expenses. Debtors' original Schedule I states that since filing, Mr. Hansen received an additional $3,000.00 in income for his care of his paralyzed adult child. Amended Schedule I filed March 10, 2014 and September 12, 2014 do not reflect this income. Additional expenses for this child, as stated in Debtors' Declaration in support of this Motion, have not been reflected in an amended Schedule J. Debtors have failed to provide any proof of Mr. Hansen's income and expenses.

4. It appears that Debtors cannot make the payments required under 11 U.S.C. § 1325(a)(6) Debtor's amended Schedule I filed on September 12, 2014 shows a monthly net income of $6,564.12. The original Schedule J filed March 10, 2014 reflects expenses of $4,361.00, leaving the projected disposable monthly income at $2,203.12. Debtors are proposing to make plan payments of $3,908.62 beginning July 2014.

5. Debtors' Declaration in support of this Motion states that Mr. Hansen is now employed by All Phase Construction, Inc. as an engineer and as their sole payroll service. Debtors have failed to provide the information on amended Schedule I filed September 12, 2014.

6. Debtors' Motion and Declaration were filed with the court on September 12, 2014. However, the documents were both signed three days later, on September 15, 2014.

7. The attorney's fees in the amended plan state that Debtors paid $2,500.00 prior to filing the case. However, the Rights and Responsibilities filed on March 10, 2014 state that Debtor paid only $2,000.00.

8. Debtor's amended plan proposes to pay Cornerstone Bank's claim on a 2008 Ford Truck in Class 4 of the plan, but based on the secured claim filed (Claim No. 2-2) that debt was incurred October 25, 2007 and will mature within the life of the 60 month plan. Debtors provide the value of the truck on Schedule

D at $6,885.00 and the claim amount of $16,234.25. It appears the truck should be valued and a motion to value has not been filed to date.

DISCUSSION

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

Here, the Trustee's objections are well-taken. While objections 2, 6, and 7 may be attributed to mere scrivener's error, the remaining objections raise numerous concerns on the viability of the plan. The Debtors have not filed an supplemental or amended schedules to reflect Debtor Mark Hansen's new position and the new income arising from the new position. Looking at the schedules filed by the Debtors, it appears that the plan is not feasible because the Debtors would be unable to make the plan payments under the proposed plan. Under the only schedule J on the docket and the supplemented Schedule I filed on September 14, 2014, the Debtors would only have $2,203.12 in disposable monthly income. The proposed plan states that monthly payments would be in the amount of $3,908.62.

While the court does see that attached to Debtors' Motion they provide exhibits reflecting the change in income and expenses, without the schedules being properly filed as supplemental schedules, they cannot be relied on as a basis to confirm the plan.

Additionally, the concern of the 2008 Ford Truck is valid since the debt on the truck would mature during the plan and the proposed plan, as it currently stands, does not properly provide for that maturity.

The Debtors also do not properly account for or list the additional monies and expenses they may incur from the care of Debtors' child. Without full disclosure on the real income and expenses of the Debtors, the court cannot confirm the plan based on partial disclosure and information.

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.

5. 14-27826-E-13 DPC-1 — ROLAND/IMELDA REGALA — W. Scott de Bie — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK

9-24-14 [18]

Final Ruling: No appearance at the October 28, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on September 24, 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.

A written opposition and proposed amendments were made by the Debtors.

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Plan may not be Debtors' best effort under 11 U.S.C. §1325(b). Debtors are above median income and the applicable commitment period is five (5) years.

DEBTORS' RESPONSE

On October 9, 2014, Debtors filed a response to this Objection. Dckt. 22. Debtors propose to amend their plan to be 60 months instead of the 36 months proposed in the current plan. Debtors seek to have their plan confirmed as a 60 month plan.

TRUSTEE'S REPLY

The Trustee filed a reply on October 22, 2014 stating that because the Debtor proposes to amend the plan to 60 months as a provision of the Order Confirming Plan, the Trustee's objection would be resolved if the court allows such amendment. Dckt. 24.

DISCUSSION

The court finds that the 36 month term in the plan is essentially a scrivener's error and will allow the plan to be confirmed, providing that the Debtors amend the plan to reflect a 60 month term before preparing an order to confirm the plan.

The Plan complies 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 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 31, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan after amending the plan to have a 60 month term, 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.

6. 11-44232-E-13 SANDRA TODD — MOTION TO MODIFY PLAN
CAH-2 C. Anthony Hughes — 9-5-14 [49]

Final Ruling: No appearance at the October 28, 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 September 5, 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 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 September 5, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

7. 10-33235-E-13 EILEEN GOMEZ — MOTION TO MODIFY PLAN
SS-1 Scott D. Shumaker — 9-17-14 [32]

Final Ruling: No appearance at the October 28, 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 September 17, 2014. 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 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 September 17, 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.

8. 10-33235-E-13 EILEEN GOMEZ
SS-2 Scott D. Shumaker

OBJECTION TO CLAIM OF WELLS FARGO FINANCIAL NATIONAL BANK, CLAIM NUMBER 1
9-22-14 [38]

Tentative Ruling: The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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.

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, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 22, 2014. By the court's calculation, 36 days' notice was provided. 30 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(2))

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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 Objection to Proof of Claim Number 1-1 of Wells Fargo Financial National Bank is overruled.

Eileen Gomez, the Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Wells Fargo Financial National Bank ("Creditor"), Proof of Claim No. 1-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $10,272.08. Objector asserts that the claim erroneously lists Wells Fargo Financial National Bank's claim as secured because there is no security agreement attached to the Proof of Claim. Objector asserts that the claim is a Visa account offered by Wells Fargo Financial National Bank and indicates an unsecured interest.

However, the Objection on its face identifies the creditor as being Wells Fargo Financial National Bank, which is a federally insured financial institution. Congress created a specific rule to provide for service of pleadings, including this contested matter, on federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(h), which provides

> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless–
>
> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Here, Debtors served Wells Fargo Financial National Bank at the address listed on the Proof of Claim, but failed to serve any of the addresses by certified mail to an officer as required by the Federal Rules of Bankruptcy Procedure. None of the exceptions in Federal Rule of Bankruptcy Procedure 7004(h) apply. Further, there is nothing to indicate that the address used to serve this Bank (which was taken from the proof of claim) is an address at which an officer is located. The FDIC lists the address of 4455 Spring Mountain Road, Las Vegas, Nevada 89102 as the address for Wells Fargo Financial National Bank.

Because of the failure to properly serve Wells Fargo Bank, N.A. and not providing sufficient notice, the Objection to the Proof of Claim is overruled.

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 Wells Fargo Financial National Bank, Creditor filed in this case by Eileen Gomez, 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 the objection to Proof of Claim Number 1-1 of Wells Fargo Financial National Bank is overruled.

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

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).

A review of the Proof of Claim 1-1 shows that Wells Fargo Financial National Bank filed a claim in the amount of $10,272.08. The basis of the claim is listed as a "Retail Install Contract." Under Item 4 for "Secured Claim," Wells Fargo Financial National Bank states that the "Nature of property or right of setoff" as "ITEMS PURCHASED FROM SYSTEMS PAVING INC." The amount of arrearage and other charges as of time case filed included in secured claim is $785.97 and the basis for perfection as "sales contract." Wells Fargo Financial National Bank states that the full $10,272.08 is a secured claim and $0.00 is unsecured. A review of the attached document to the Proof of Claim appears to be a billing statement from "Home Projects Visa" and states "Offered by Wells Fargo Financial National Bank." Nowhere on the billing statement is there any indication that the claim is secured nor as to what property it would be secured by. On the second page of the attached billing statement, the "Interest Charge Calculation" has the amount of the claim listed as "SPECIAL RATE Transaction Date: Jun 18, 2009" with the annual percentage rate at 9.90%. Again, there is no indication what this means or whether it is indicating a secured claim.

Without the sales contract in which Wells Fargo Financial National Bank argues perfects the claim as a secured claim, the court cannot determine the nature of the claim.

David Cusick, the Chapter 13 Trustee, filed a response on October 22, 2014. Dckt. 46. In the response, the Trustee states that he has no opposition to the objection. The Trustee responds to the assertion that a Notice of Filed Claims was not filed in this case. The Trustee states that a Notice of Filed Claims has now been filed.

Seeing as Wells Fargo Financial National Bank has not opposed the instant objection, no further evidence as to the nature of the claim filed, and a review of the Proof of Claim providing no evidence as to how or why the claim is secured, the Proof of Claim cannot stand as a secured claim.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety as a secured claim. 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 Wells Fargo Financial National Bank, Creditor filed in this case Eileen Gomez, 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 the objection to Proof of Claim Number 1-1 of Wells Fargo Financial National Bank is sustained and the claim is disallowed as a secured claim, with the claim stated in Proof of Claim No. 1-1 being an unsecured claim filed in this case.

9. 14-28439-E-13 DPC-1 TYRONE GLENN Stan E. Riddle — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 9-24-14 [17]

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 24, 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 sustain the Objection.

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

1. Debtor's Plan has several defects. Section 1.02 of Debtor's

Plan indicates that other payments will be made from "Employment and Wife's Employment." Dckt. 5. This section should be used for amounts in addition to the plan payments listed in Section 1.01. This section should list an additional sum to be paid, not a source of payment. Section 2.06 of the Plan indicates that $4,500.00 in attorney's fees are to be paid through the Plan, but Section 2.07 lists a $0.00 monthly dividend to be paid on approved attorney's fees. Finally, Debtor's Class 1 lists a mortgage with Quicken Loans with an ongoing payment of $2,462.22. The monthly plan payment of $880.00 is insufficient to pay this amount.

2. Debtor's Statement of Financial Affairs, Item 3 indicates that no payments have been made to creditors within 90 days of filing. Debtor testified at the First Meeting of Creditors on September 18, 2014 that he is current on his mortgage payment.

3. Debtor's Plan may not be the Debtor's best effort under 11 U.S.C. § 1325(b). Debtor lists his gross income at $6,660.00 per month. Pay stubs provided to the Trustee show that Debtor earns gross wages of $7,500.00 per month. The pay stubs also show that Debtor's medical deductions are $105.86 per month (Debtor listed $303.00 in Schedule I) and a 401K deduction is $900.00 per month, which was not listed on Schedule I. The most recent paystub indicates a year-to-date bonus of $10,193.41. This bonus was not listed on Schedule I. Debtor may have more disposable income than the Plan proposes to commit to the plan for the benefit of unsecured creditors. Further, Debtor lists his mortgage payment of $2,462.22 on line 4 in Schedule J. This mortgage is also listed in Class 1 of the Plan. Adjusting for this error leaves a net income of $3,342.50 per month, but Debtor proposes to pay $880.00.

The Trustee's objections are well-taken. The Debtor's defects in his plan and his failure to disclose all payments in his Statement of Financial Affairs and his failure to report his true income and pay deductions in Schedule I indicate that the proposed Plan is not Debtor's best effort. 11 U.S.C. § 1325(b). Furthermore, the Debtor's failure to properly prepare the proposed plan supports the court's conclusion that the plan is not Debtor's best efforts. This is grounds to sustain the objection and deny confirmation of the Plan.

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

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

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

10. 10-33842-E-13 PETER/SHAUNA GOWEN — MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.
SAC-2 Mikalah R. Liviakis — 10-11-14 [58]

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 Debtors, Debtors' Attorney, Chapter 13 Trustee, Bank of America, N.A., parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 $0.00.

The Motion to Value filed by Peter and Shauna Gowen ("Debtors") to value

the secured claim of Bank of America, N.A. ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 7688 Roberts Drive, Citrus Heights, California ("Property"). Debtors seek to value the Property at a fair market value of $250,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on July 22, 2010. Dckt. 26. Debtor has filed the current motion to ensure that Bank of America, N.A. is properly served. Debtor listed Wells Fargo Bank, N.A. as the creditor in the prior motion as well. Dckt. 5.

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $271,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $72,000.00. 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 Peter and Shauna Gowen ("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 7688 Roberts Drive, Citrus Heights, 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 $250,000.00 and is encumbered by a senior lien securing a claim in the amount of $271,000.00, which exceeds the value of the Property which is subject to Creditor's lien.

11. 10-52246-E-13 JUAN/BRENDA ORDAZ — MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
SAC-1 Mikalah R. Liviakis — 10-11-14 [45]

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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 Wells Fargo Bank, N.A. ("Creditor") is granted and Creditor's secured claims are determined to have a value of $0.00.

The Motion to Value filed by Juan and Brenda Ordaz ("Debtor") to value the secured claim of Wells Fargo Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 1075 Elk Hills Drive, Galt, California ("Property"). Debtor seeks to value the Property at a fair market value of $245,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut.*

Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on March 8, 2011. Dckt. 32. Debtor has filed the current motion to ensure that Wells Fargo Bank, N.A. is properly served. Debtor listed Wells Fargo Bank, N.A. as the creditor in the prior motion as well. Dckt. 5.

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $297,000.00. Creditor's second and third deed of trust secures a claim with a balance of approximately $108,000.00 and $63,000.00 respectively. Therefore, Creditor's claims secured by junior deeds of trust are completely under-collateralized. Creditor's secured claims are 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 Juan and Brenda Ordaz, "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 claims of Wells Fargo Bank, N.A., secured by a second and third in priority deed of trust recorded against the real property commonly known as 1075 Elk Hills Drive, Galt, California, are determined to be secured claims in the amount of $0.00, and the balance of the claims are general unsecured claims to be paid through the confirmed bankruptcy plan. The value of the Property is $245,000.00 and is encumbered by senior liens securing claims in the amount of $297,000.00, which exceed the value of the Property which is subject to Creditor's liens.

12. 14-28348-E-13 CAROLYN WILLIAMS
DPC-1 Mary Ellen Terranella

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-24-14 [33]

Final Ruling: No appearance at the October 28, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 24, 2014. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

David Cusick, the Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Plan relies on pending motions. Carolyn Williams ("Debtor") cannot afford to make plan payments or comply with the plan because her plan relies on the pending Motion to Value Collateral of Deutsche Bank National Trust Company, set for hearing on September 30, 2014, and the Motion to Value Collateral of HSBC Auto Finance, set for hearing on October 21, 2014. If the Motions are not granted, Debtor's plan does not have enough monies to pay the claims in full.

The court's review of the Docket shows that Debtor's Motion to Value Collateral of Deutsche Bank National Trust Company was granted on September 30, 2014. Dckt. 37. The Motion to Value Collateral of HSBC Auto Finance was granted

on October 21, 2014. Because the motions are no longer pending, the Trustee's concerns have been resolved. Therefore, the objection to confirmation is overruled.

The Plan complies 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 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 August 17, 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.

13. 14-28950-E-13 JANET LYTLE
MAC-1 Marc A. Caraska
FINAL HEARING RE: MOTION TO EXTEND AUTOMATIC STAY
9-17-14 [15]

Final Ruling: No appearance at the October 28, 2014 hearing is required.

Local Rule 9014-1(f)(3) Motion – Final Hearing.

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. No opposition was presented at the hearing.

The Motion to Extend the Automatic Stay is granted, with the stay extended for all persons and purposes, until terminated by operation of law or further order of the court.

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.

SEPTEMBER 30, 2014 INITIAL HEARING

At the September 30, 2014 hearing, the court granted the Motion, extending the stay through and including November 4, 2014, unless terminated earlier by operation of law or further order the court. Dckt. 32. Additionally, the court set the Motion for Final Hearing at 3:00 p.m. on October 26, 2014. Opposition to the Motion was to be filed and served on or before October 14, 2014 and replies, if any, to be filed and served on or before October 21, 2014.

DISCUSSION

No supplemental opposition or replies have been filed since the September 30, 2014 hearing.

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 in full force and effect for all persons and purposes in this case, until terminated by operation of law or further order of the court.

14. 10-34651-E-13 SAC-1 CHRISTOPHER/LEANNE RAE Mikalah R. Liviakis

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A. 10-11-14 [62]

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 Bank of America, N.A., Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 $0.00.

The Motion to Value filed by Christopher and Leanne Rae ("Debtors") to value the secured claim of Bank of America, N.A. ("Creditor") is accompanied by Debtors' declaration. Debtor is the owner of the subject real property commonly known as 2824 Kerria Way, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of $200,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut.*

Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on August 17, 2010. Dckt. 18. Debtor has filed the current motion to ensure that Bank of America, N.A. is properly served. Debtor served only Bank of America's agent, Green Tree Servicing, LLC.

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $240,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $60,000.00. 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 Christopher and Leanna Rae ("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 2824 Kerria Way, Sacramento, 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 $200,000.00 and is encumbered by a senior lien securing a claim in the amount of $240,000.00, which exceeds the value of the Property which is subject to Creditor's lien.

15. 13-29155-E-13 LBG-2 JERRY DESCHLER AND SALLY HUI-DESCHLER Lucas B. Garcia

MOTION TO CONFIRM PLAN 8-6-14 [68]

Final Ruling: No appearance at the October 28, 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 6, 2014. By the court's calculation, 83 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

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

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

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

16. 14-27755-E-13 RJ-1 — ANTHONY FURR, Richard L. Jare — MOTION TO VALUE COLLATERAL OF PENNYMAC HOLDING, LLC — 8-5-14 [12]

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 Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on August 5, 2014. By the court's calculation, 14 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.

The Evidentiary Hearing on the Motion to Value secured claim of PennyMac Holdings, LLC, "Creditor," shall be conducted at ----- xx.m. on ---------, 201x.

Debtor Anthony Furr ("Debtor") moves to value the secured claim of PennyMac Holdings, LLC ("Creditor"), the purported holder of the first deed of trust on the properly commonly known as 2822 H Street, Sacramento, California, a single family residence that is not Debtor's personal residence. Debtor

states that he disputes the $808,465.44 purportedly owed to Creditor but nevertheless, seeks to value the secured claim at $32,000.00.

Debtor makes several allegations in his Declaration;

1. That his opinion of the value of the collateral is no more than $32,000 (as defined and limited by section 506(a)(2));

2. The entire fee simple legal title to the property is in his name, but at the inception of the loan, the property was community property with legal title in Sara Stratton's name;

3. Via two interspousal deeds, the latest recorded July 25, 2014, legal title invested entirely in Debtor

4. The court may not value the first deed of trust at $0, as the professional appraisal from Scott Jura indicates, so his opinion of the value is $32,000.00.

Debtor also provided an unauthenticated appraisal report prepared by R. Scott Jura, SRA, dated August 24, 2012. Dckt. 15. The court does not not consider evidence presented that has not been properly authenticated as credible. Fed. R. Evid. 901.

Additionally, the court does not find the evidence provided by Debtor to be credible. Debtor mostly provides conclusions of law for the court to consider, rather than actual testimony from his personal knowledge. Debtor states the unauthenticated appraisal provides that the property is worthless, but since the court is may not be inclined to believe that, he believes the property is worth $32,000.00. No factual contentions have been provided to support a valuation of $32,000.00.

OPPOSITION

PennyMac Holding, LLC has filed an Opposition to the Motion. A portion of the Opposition discusses the prior bankruptcy cases and that the Debtor is not prosecuting this case in good faith. Additionally, this Creditor disputes the Debtor's $32,000.00 opinion as to value and requests that the court allow it time to obtain an appraisal (conduct discovery in this Contested Matter).

At this point, the only evidence presented to the court is the Debtor's conclusion that the property has a value of $32,000.00. While the owner of the property may express an opinion as to the value, much in the same manner as an expert witness, such opinion does not dictate that result to the finder of fact.

Given that Debtor's opinion is that this Property has a nominal value to secure an asserted claim of $840,465.44 (which Debtor states that he disputes in its entirety) and Creditor asserts a substantially higher value, providing time for discovery is proper.

AUGUST 19, 2014 HEARING

At the August 19, 2014 hearing, the court continued the Motion to 3:00 p.m. on October 28, 2014. The court further ordered that on or before October

14, 2014, Debtor and Creditor, respectively, shall file and serve properly authenticated appraisals or other evidence upon which they base their respected assertions of value for the Property. At the October 28, 2014 Setting Conference. The court will determine whether there is a dispute which must be set for an evidentiary hearing. If so, the parties may proceed with discovery in this contested matter.

PENNYMAC HOLDINGS, LLC'S APPRAISAL

On October 14, 2014, PennyMac Holdings, LLC filed the declaration of Dennis Costello with an attached appraisal of the Property. Dckt. 80 and 81. Dennis Costello states that he is a licensed Residential Real Estate Appraiser in California and employed by Findlay & Costello Appraisal Group. Mr. Costello states that he has been a certified California Residential Real Estate Appraiser since 1996, license no. AR014766.

Mr. Costello states that on October 4, 2014 he inspected the Property. After physical inspection of the Property and researching real estate sales of similar properties using the Multiple Listing Sale and other public records, Mr. Costello determined that the Property has an approximate "as is" value of $475,000.00.

Attached to the declaration is a copy of Mr. Costello's resume as well as a detailed appraisal. Dckt. 81, Exhibits A & B.

DEBTOR'S APPRAISAL

On October 14, 2014, Debtor filed the declaration of Scott Jure with an attached appraisal of the Property. Dckt. 86, 87, & 88. Scott Jure states that he is an independent Real Estate Appraiser of commercial and residential appraisals, reviews, evaluations, and litigation support throughout northern California. Mr. Jure was a California Certified General Real Estate Appraiser through January 28, 2012.

Attached to Mr. Jura's first declaration, the attached appraisal which was dated August 24, 2012 states that Mr. Jure's final range of value is $0.00 to negative value. Dckt. 86. This appears to be a previous copy of Mr. Jura's appraisal from Case No. 14-22297.

Then, in Mr. Jura's second declaration, Mr. Jura states the value of the property on July 30, 2014 is $100,000.00. Dckt. 87. In the attached exhibit to the second declaration, Mr. Jura states that his "final range of value is $1,000 (one thousand dollars) to $115,000 (one hundred fifteen thousand dollars). Because of the preponderance of MLS sales, I conclude $100,000 (one hundred thousand dollars) fair market value to the subject." Dckt. 88. The date of the appraisal is October 14, 2014. Dckt. 88.

DISCUSSION

The court is presented with two experts whose values for the Properties vary greatly – $100,000.00 for the Debtor and $475,000.00 for the creditor. While differences in values are not unusual for valuation experts, an appraisal being an art as much as a science, this huge difference is quite unusual.

Debtor's appraiser has identified five comparable properties

("comparables") used in determining the $100,000.00 value. The actual sales prices for the comparables are: $325,000 (Comparable 1, 11/4/13 sale), $450,000 (Comparable 2, 09/19/14 sale), $282,000 (Comparable 3, 05/05/14 sale), $185,000 (Comparable 4, 02/21/14, with no listing price), and $380,000 (Comparable 5, 03/19/14 sale, no listing price). Exhibit Unnumbered, Dckt. 88. Debtor's appraisal makes significant downward adjustments in value in the amounts of ($200,000), ($300,000), ($200,000), ($150,000), and ($200,000) for condition. The Debtor's Property is described as being in "Poor-Fair Condition," with the comparables being described as being in a range of conditions from "V Good" to "Fair-Gutted." For the Fair-Gutted and Fair condition homes the Debtor's appraiser made value reductions of ($150,000) and ($200,000), respectively.

Debtor's appraiser further states in the appraisal, "Due to the constraints of time, no physical inspection of the comps was made. Confirmations are limited to public data." *Id.* at pg 10. However, attached to the Debtor's appraiser's declaration filed as Dckt. 86 is a copy of the "Memo of Assignment and Scope of Work" contract by which he was engaged by Debtor to provide an appraisal. That contract is dated May 23, 2012. The contract specifically provides that the intended use is "To estimate value of 2822 H Street, Sacramento, as is, for bankruptcy court...." It is not evident as to why Debtor's appraiser has not been able to physically inspect the comparables upon which he relies since having been engaged in 2012. Additionally, this Motion was filed on August 5, 2014. The Debtor the time prior to filing this case and then in the two following months for the appraiser to have time to investigate the comparable properties upon which he bases his expert opinion.

Creditor's appraiser has provided his opinion of value and appraisal report. Exhibit B, Dckt. 81. In his report, Creditor's appraiser stats that the Debtor's Property has been condemned due to "an extensive list of violations, legal actions, and health and safety issues." *Id.* at 6. Further, that the home is not considered habitable and "The home has function obsolescence with the lack of a bathroom on the lower level." *Id.* In addition, Creditor's appraiser states,

> "The exterior the home has wood siding in fair condition. **The roof is composition but appears that sections have only felt underlayment with out shingles.** The home has original windows. Fireplace place has been removed per city due to [*sic*] The subject has extensive settlement and has been braced with large steel beams and railroad ties. **The foundation is not stable.** The forced air unit located in the crawl space is damage and is not operational. **The plumbing and electrical are dated and have been sited for unsafe issues and require updating to prevent a health and safety issue. Fireplace was removed since the condition of the bricks were unsafe.** The fireplace from ground level past the second floor were removed. **The bathroom on the lower level located at the rear of the home has removed based on building department enforcement. The home and Carriage House/Garage have a list of issues to include but not limited to dryrot throughout the structure, foundation issues, defective materials use in some repairs, lack of paint for raw wood.** The home has been tie up in litigation with the city for a decade. Numerous injunctions

have been issued to enforce the permanent injunction that was entered on August 7, 1996, for the owner at that time Ms. Stratton. The injunction provides that if the repairs and rehabilitation of the subject property are not completed within a certain time frame, the City has the option to petition the court for the appointment of a receiver pursuant to California Health and Safety Code Section 17980.7. **The owner has had several contractors that worked on the home. Most of the work was not completed or substandard.** The value of the home is based on the lot and midtown location considered very desirable since it is close to major employment centers. The home is located close to Interstate 80 and has road noise when outside. Cost to demo the property if possible would be a negative to that value. **The cost to bring the property up to current building code standards will cost in the hundreds of thousand dollars.** The actual cost breakdown would have to be determined by a licensed building Contractor that has experience in the midtown area familiar with the historic district and all the department related to the project. **Numerous fees and penalties that have been issued would also have to be addressed.** A package was provide with approximately 95 pages that addresses the cost, litigation, building department issues/requirements and contractors quotes. **It appears that the property needs a qualified project manager, contractor and architect to start all over if the property is to meet The City of Sacramento Building Departments Historical Requirements.** Per current owner the Carriage House/Garage has a newer Foundation. The home does have some value for existing features, boxed ceiling. wood flooring, built-ins, wood framing etc if reused. The home lacks a smoke detectors and carbon monoxide alarm. No closed sales were located with in the same distance of the freeway. No sales or listing were located in similar condition."

Id. at 9 (Emphasis Added).

In describing the comparables used by Creditor's appraiser, he states that: (1) they generally have been updated, some have been remodeled; (2)Comparable 2 has "gorgeous hardwood floors, wainscoting, designer touches, new electrical, plumbing and HVAC system; and (3) Comparable 3 kitchen has been upgraded and it has a tankless water heater upgrade. However, the net adjustments for the comparables consist of: Comparable 1, ($1,398); Comparable 2, ($16,542); and Comparable 3, ($34,264).

As the attorneys and experts are aware, expert witness testimony is provided for the purpose of assisting the finder of fact in making factual determination, not merely the finder of fact adopting one expert opinion over the other.

Rule 702.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of

an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

This finding of fact is not helped by an appraisal which identifies comparables which has significant remodeling and updating, and a subject property which needs hundreds of thousands of dollars of "fixes" just to meet the basic defects which have been identified by the City, and the appraisal does not appear to provide for such substantial deficiencies identified by the Creditor's appraiser.

At this point, based on the evidence presented, the court cannot issue even a tentative ruling as to a value, other than it is at least $100,000.00 in value based on Debtor's appraiser's testimony and methodology. Possibly it is worth more, but the court cannot purport to make such finding on the evidence presented.

Therefore, it is necessary for the court to conduct an evidentiary hearing on this Motion and make the necessary findings of fact to determine the value of Creditor's secured claim pursuant to 11 U.S.C. § 506(a).

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

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

B. On or before ----------, 201x,xxxxxxxxxxxx ("Movant") shall file and serve on ---------- ("Respondent") a list of witnesses which Debtor will present as their witnesses for their case in chief (excluding rebuttal witnesses).

C. On or before ----------, 201x, Respondent, shall file and serve on the Movant, a list of witnesses which Creditors will present as their witnesses for their case in chief (excluding rebuttal witnesses).

D. Movant, shall lodge with the court and serve their Testimony Statements and Exhibits on or before , 2014.

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

201x.

F. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 201x.

G. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before —----------, 201x.

H. The Evidentiary Hearing shall be conducted at -------.m. on ----------, 201x.

17. 13-32861-E-13 PGM-2 **JAMES/BETH FRY** **Peter G. Macaluso** **CONTINUED MOTION TO CONFIRM PLAN** **5-15-14 [66]**

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 - 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 May 15, 2014. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

The court's decision is to continue the hearing on the Motion to Confirm the Amended Plan to 3:00 p.m. on November 25, 2014.

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

The Chapter 13 Trustee opposes the motion on the basis that Class 4 of Debtors' plan indicates that Debtors are in a trial loan modification effective May 2014. Debtors have filed a Motion to Approve Loan Modification, but the plan does not contain any provisions for the mortgage in the event the trial modification does not become permanent. The motion does not indicate any alternative provision for the mortgage or indicate what the terms of the permanent modification would be.

Additionally, the Trustee argues that the Debtors' plan may not be the Debtors best effort. Trustee states the Debtors are below median income. The amended plan calls for payments of a total of $7,500 through April 2014 and then $850.00 per month for the remainder of the plan. The most recently filed Schedule J, Dckt. 77, indicates combined monthly income from Schedule I of $4,660.26 per month. Expenses on Schedule J total $3,809.75, leaving net income of $850.51 per month. Item #24 indicates that "Debtor wife has new single job ... ". Debtors Declaration in Support of the Motion to Confirm indicates that Debtors are employed by Sacramento City Unified School District and Hallmark Rehab Group but the Declaration does not indicate any changes to the Debtors income.

The most recently filed Schedule I, Dckt. 29, filed on December 2, 2013 indicates Beth Fry is employed by HCR Manor Care, her gross income is $4,742.05 and the net income on the Schedule is $5,627.48 (not $4,660.26 as indicated on the most recent Schedule J). The Trustee is not aware of any other amended Schedule I to date. Debtors may have more than the net income of $850.51 which may be paid into the plan for the benefit of unsecured creditors.

DEBTOR'S RESPONSE

Debtors respond, stating that additional time is needed to address the Trustee's concerns, to provide the Trustee with statements and the financial effect on the disposable income funding the plan.

TRUSTEE'S RESPONSE

On July 30, 2014, the Chapter 13 Trustee filed a supplemental declaration stating that no additional information had been provided to the Trustee. Nothing has been filed with the court as of the September 3, 2014, review for this hearing.

JULY 1, 2014 HEARING

At the July 1, 2014 hearing, based on the foregoing, the court continued the hearing to allow the Debtors to provide the Trustee with the requested documentation and for the Trustee to file additional opposition, if any.

AUGUST 5, 2014 HEARING

At the August 5, 2014 hearing, the court ordered that supplemental pleadings and proposed amendments be filed and served by August 15, 2014, and Reply pleadings, if any, on or before August 22, 2014. Civil Minutes, Dckt. No. 98.

SEPTEMBER 9, 2014 HEARING

At the September 9, 2014 hearing, the court continued the Motion to Confirm the Amended Plan to 3:00 p.m. on October 28, 2014.

Additionally, on this same hearing date, the court denied Debtors' Motion to Approve their Loan Modification, on the basis that the Motion does not identify the responding lender does not set forth the relief requested with the particularity required by Federal Rule of Bankruptcy Procedure 9013. The court has noted that it cannot grant relief against a respondent who is unidentified, or against a respondent whose identity is ambiguous. Fed. R. Bankr. P. 9013. In their Motion filed on August 12, 2014, the Debtors fail to identify the lender who has allegedly entered into an agreement to modify their home loan, rendering the court unable to issue an order affecting the rights of a specified party. The motion was also denied on the basis that 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). Motion to Approve Loan Modification, PGM-4.

OCTOBER 21, 2014 HEARING

At the October 21, 2014 hearing, the court heard Debtors' second Motion to Approve their Loan Modification. Dckt. 108. Once again, the court denied the motion on the basis that the Motion does not identify the responding lender does not set forth the relief requested with the particularity required by Federal Rule of Bankruptcy Procedure 9013. The court has noted that it cannot grant relief against a respondent who is unidentified, or against a respondent whose identity is ambiguous. Fed. R. Bankr. P. 9013. Further, the court noted that while the Debtors did name "Green Tree" as the lender, the court still cannot discern whether Green Tree is the actual creditor. Green Tree is a servicing company and no evidence was filed to show that Green Tree is, in fact, the creditor.

DISCUSSION

The Debtors not having provided the supplemental information in their income and expenses as requested by the Trustee, and their Motion to Approve the Loan Modification having been denied by the court on September 9, 2014 (Dckt. 105) and October 21, 2014, the proposed amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 and 1325(a).

However, the court has issued an order for Green Tree Servicing, LLC to appear and address its status in this bankruptcy case. Previously, this court has issued an order requiring Green Tree Servicing, LLC to properly identify the actual creditor, as that term is defined in 11 U.S.C. § 101(10) and (5), and not misidentify itself as the creditor. *In re Crane*, Case No. 11-27805; and *In re Jones*, Case No. 11-31713. The court issue an order to show cause as to why Green Tree Servicing, LLC should not be sanctioned for violations of the prior order and for filing notices of transfer of claims when it was not the creditor, but merely the servicing agent for the creditor. In those matters Green Tree Servicing, LLC confirmed that it was not the creditor, but the servicing agent for the creditor. For the subsequent notice of transfer Green Tree Servicing, LLC represented that the erroneous notice of transfer of claim was a mere mistake and that it had taken steps for that "error" to not be repeated.

Proof of Claim No. 5 states that Green Tree Servicing, LLC is the

creditor in this case for a $109,131.90 secured claim. No loan documents are attached to Proof of Claim No. 5. The "Analysis Statement" attached to Proof of Claim No. 5 does not provide any basis for this loan servicer to be elevated to the status of a creditor. While a loan servicer provides a valuable function as an agent for the actual creditor, it cannot misrepresent itself as the creditor and mislead the debtor, Chapter 13 Trustee, creditors, the U.S. Trustee, and the courts.

Proof of Claim No. 5 is signed by Nathan F. Smith, an attorney with the Malcolm ◆ Cisneros law firm. It is that law firm which has represented Green Tree Servicing, LLC in the prior matters, confirming for the court that it is a loan servicer, and not the creditor. Additionally, this court on several occasions has convinced the court that such misrepresentations were mere errors and sanctions were not necessary, Green Tree Servicing, LLC having taken the necessary steps to prevent such affirmative misrepresentations from prospectively occurring. In signing Proof of Claim No. 5 the Malcolm ◆ Cisneros law firm has not only provided its certification that the information is accurate, but represents to the court that is performed the necessary review for its attorneys to make this representation to the court. Proof of Claim No. 5 appears to have been prepared and filed, without any documentation showing the basis for the loan, in a manner carefully constructed to withhold such information from the court.

Malcolm ◆ Cisneros is the law firm representing Green Tree Servicing, LLC in the prior matters and advocated that such "misstatements" were mere "mistakes" and not part of a scheme to defraud debtors, creditors, trustees, and the courts as to the identity of the actual creditor. One of the attorneys with Malcolm ◆ Cisneros who made such representations and advanced such arguments in 2011 and early 2012 was Nathan F. Smith. Mr. Smith is the same attorney with Malcolm ◆ Cisneros who signed Proof of Claim No. 5 stating, under penalty of perjury, that Green Tree Servicing, LLC is the creditor with a secured claim in this case. Mr. Smith and Malcolm ◆ Cisneros made such statements under penalty of perjury on November 4, 2014 - more than a year after repeated representations that Green Tree Servicing, LLC was not a creditor and that such "misstatements" had been made by and for Green Tree Servicing, LLC only in "error."

The court continues this hearing, to be heard in conjunction with the motion to approve a loan modification "with" Green Tree Servicing, LLC. The court is ordering Green Tree Servicing, LLC to appear at the hearing and produce the original loan documents upon which it asserts its status as a creditor. The court also will order Nathan F. Smith and William Malcolm to appear at the hearing and address Proof of Claim No. 5, the basis for Malcolm ◆ Cisneros filing Proof of Claim No. 5 stating that Green Tree Servicing, LLC is the creditor, and the due diligence performed by the attorneys and staff of Malcolm ◆ Cisneros prior to executing Proof of Claim No. 5 and making all of the affirmative representations therein.

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 hearing on the Motion to Confirm the Plan is continued to 3:00 p.m. on November 25, 2014.

**18. 14-28961-E-13 MLA-3 | RODEL MAULINO AND MIMSY ABARA-MAULINO
Mitchell L. Abdallah | MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK NEVADA, N.A.
10-9-14 [37]**

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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October, 9 2014. By the court's calculation, 19 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 Wells Fargo Bank Nevada, 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 Rodel and Mimsy Maulino ("Debtor") to value the secured claim of Wells Fargo Bank Nevada, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 1513 Farmgate Circle, Roseville, California ("Property"). Debtor seeks to value the Property at a fair market value of $525,000.00 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 parties seeking relief from a federal court.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $532,418.00. Creditor's second deed of trust secures a claim with a balance of approximately $61,427.00. 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 Rodel and Mimsy Maulino ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C.

§ 506(a) is granted and the claim of Wells Fargo Bank, N.A., secured by a second in priority deed of trust recorded against the real property commonly known as 1513 Farmgate Circle, Roseville, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $525,000.00 and is encumbered by senior liens securing claims in the amount of $532,418.00, which exceed do not exceed the value of the Property which is subject to Creditor's lien.

19. 10-49062-E-13 JAMES/ANNA GARCIA — MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, N.A.
SAC-1 Mikalah R. Liviakis — 10-11-14 [34]

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 Debtors, Debtors' Attorney, Chapter 13 Trustee, JPMorgan Chase Bank, N.A., parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 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 James and Anna Garcia ("Debtors") to value the secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 6933 Southampton Way, Sacramento, California ("Property"). Debtors seek to value the Property at a fair market value of $135,000.00 as of the petition filing date. FN.1. As the owner, 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).

FN.1. A Motion to Value order was obtained for this claim on January 7, 2011. Dckt. 19. Debtors have filed the current motion to ensure that JPMorgan Chase Bank, N.A. is properly served. Debtors named Chase in their original Motion, but did not serve them via certified mail. Dckt. 5.

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance

of approximately $219,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $49,400.00. 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 James and Anna Garcia ("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 6933 Southampton Way, Sacramento, 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 $135,000.00 and is encumbered by a senior lien securing a claim in the amount of $219,000.00, which exceeds the value of the Property which is subject to Creditor's lien.

20. 14-23271-E-13 ROBERT/CINDY LANDINGHAM MOTION TO MODIFY PLAN
HLG-10 Kristy A. Hernandez 9-18-14 [111]

Final Ruling: No appearance at the October 28, 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 September 18, 2014. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on September 18, 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. 14-29671-E-13 DANNY RUE **MOTION TO EXTEND AUTOMATIC STAY**
DWR-1 Pro se **10-9-14 [14]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 9, 2014. By the court's calculation, 19 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)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Extend the Automatic Stay is denied without prejudice.

On September 29, 2014, Danny William Rue ("Debtor") filed the instant Chapter 13 Bankruptcy Case. On October 9, 2014, Debtor filed a Motion to Extend the Automatic Stay. Dckt. 14. In that Motion, Debtor alleges:

a. Debtor seeks to extend the Automatic Stay so that his mortgage lender cannot proceed with a foreclosure sale.

b. Debtor is trying his best to remain in his home so that he can

complete a Home Loan Modification.

c. Debtor states, "It has never been my intention to delay, hinder, or Defraud creditors through my Chapter 13 Bankruptcy filings." [Emphasis in original.]

d. Debtors last bankruptcy case filed April 23, 2014, No. 14-24181.

e. Debtor requests that the automatic stay be extended to allow him to continue the documentation process to modify his 8.975% variable interest rate loan to a 3% to 4% fixed rate mortgage.

f. Such a loan modification is a "working tool in process" for the successful prosecution of a Chapter 13 Plan.

g. "It has never been my intention to abuse the Bankruptcy Court rules or laws. Filing in Good faith has always been in the forefront. It has never been my intention to delay, hinder, or defraud creditors through multiple bankruptcy filing."

The Debtor provides his declaration in support of the Motion. Dckt. 17.

ORDER SHORTENING TIME

On October 9, 2014, Debtor filed a Motion for Order Shortening Time. Dckt. 16. The Motion states that pursuant to 11 U.S.C. § 362(c)(3) the automatic stay in this case will terminate on the 30th day after the September 29, 2014 commencement of this case because of the prior Chapter 13 Case Debtor filed on April 23, 2014, which was dismissed. October 28, 2014, is the only regular calendar date for the court for which the Motion to Extend the Automatic Stay can be set within the thirty-day period specified in 11 U.S.C. § 362(c)(3)(A).

The court granted the Motion to afford the Debtor the opportunity to seek relief.

DISCUSSION

Congress has mandated that no automatic stay goes into effect if there were two or more bankruptcy cases filed by or against an individual debtor which were pending and dismissed (with certain limited exceptions for 11 U.S.C. § 707(b) which are not applicable here) within the one-year period preceding the then current bankruptcy case, no automatic stay goes into effect in that then current case. 11 U.S.C. § 362(d)(4)(A). Upon motion of a party in interest and after notice and hearing within 30 days after filing of the later case, the court may order the provisions to take effect in the case if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(4)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor filed 2 or more previous cases in which the individual was a debtor were pending within 1-year period. 11 U.S.C. § 362(c)(4)(D)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(4)(D).

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)(4) 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.

In reviewing the file and the prior bankruptcy filings by Debtor, the court notes the following bankruptcy cases which were pending and dismissed in the one-year period prior to the September 29, 2014 filing of the Current Bankruptcy Case.

Case No. and Chapter	Date Filed	Date Dismissed
14-24181, Chapter 13	April 23, 2014 *Pro Se*	August 22, 2014
13-33851, Chapter 13	October 28, 2013 *Pro Se*	April 23, 2014
13-24737, Chapter 13	April 5, 2013 *Pro Se*	October 18, 2013

Other cases filed by Debtor and dismissed, more than one-year prior to the filing of the Current Case are:

Case No. and Chapter	Date Filed	Date Dismissed
13-21452 Chapter 13	February 1, 2013 *Pro Se*	May 20, 2013
12-29177 Chapter 13	May 11, 2012 *Pro Se*	October 24, 2012
11-43836 Chapter 13	October 3, 2011 *Pro Se*	April 23, 2012
10-25066 Chapter 13	March 2, 2010 *Pro Se*	March 8, 2011
08-39044 Chapter 13	December 23, 2008 Represented by Counsel	March 12, 2010

The Debtor filed a Chapter 7 Case (in *pro se*), No. 11-25228, on March 1, 2011, and received his discharge on September 27, 2011.

The three prior bankruptcy cases having been pending and dismissed within the one-year period preceding the September 29, 2014 filing of the Current Case implicate the provisions of 11 U.S.C. § 362(c)(4)(A).

Case No. 14-24181 was dismissed for failure to make plan payments. Case No. 14-24181, Dckt. 76. Case No. 13-33851 was dismissed for failure to make plan payments. Case No. 13-33851, Dckt. 83. Case No. 13-24737 was dismissed for failure to obtain confirmation of an amended plan. Case No. 13-24737, Dckt. 84.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as attempting to secure a home loan modification. While the court is sympathetic with the Debtor attempting to reduce his adjustable mortgage rate of 8.975 percent to 3 or 4%, the Debtor has failed to provide evidence that rebuts the presumption of bad faith by clear and convincing evidence. All the Debtor offers in support of his Motion is a declaration that reiterates the argument in the Motion. Debtor also inaccurately cites 11 U.S.C. § 362(c)(3). Because of the three previous cases pending and dismissed within the past year, under 11 U.S.C. § 362(c)(4)(A), no automatic stay was ever in effect at the time of filing the instant bankruptcy case. While the Debtor is able to move the court to put the automatic stay in effect under 11 U.S.C. § 362(c)(4)(B), the Debtor must show by clear and convincing evidence that the case was filed in good faith.

Here, the Debtor has not shown that the case was entered into good faith nor gave any justification on why the prior three bankruptcy cases were dismissed within the past year. The failure of the Debtor to provide plan payments and to get a plan confirmed raises concerns on Debtor's commitment to his bankruptcies. Without more, the court will not impose the automatic stay on the instant case.

The Debtor has not 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 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 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 denied without prejudice.

22. 14-23972-E-13 DPC-1 — THOMAS BURGESS AND PATRICIA VIRDEN — Eamonn Foster — CONTINUED AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 6-19-14 [26]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on June 19, 2014. By the court's calculation, 33 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.

The Chapter 13 Trustee opposes confirmation of the Plan on the following grounds:

1. Debtors' plan is not the Debtors' best effort under 11 U.S.C. § 1325(b). Debtors appear to be over the median income and propose plan payments of $845.00 for 60 months, with an 8% dividend to the unsecured claim holders.

   a. Income: Thomas Burgess's gross income listed on Schedule I reflects $3,160.67; however, his pay advices provided to the Trustee reflect a gross of $4,831.89 per month. Exhibit "A."
   b. Retirement Loan: Schedule I lists a payroll deduction on Line #5d in the amount of $333.25. Debtor admitted at the First Meeting of Creditors held on June 12, 2014, that the retirement loan will be paid in full in a year and a half. The loan will

mature within the life of the plan and the Debtors have not proposed to increase their plan payments once the loan is paid.

c. Not all Income Reported: Debtors received a tax refund of $3,202.00 for 2013 and a federal refund of $1,480.00 in 2012. The Trustee did not receive a copy of the Debtors' 2012 state return. No future tax refund income is projected on Schedule I. Debtors received $2,049.00 in federal tax refund based on their total tax payments of $5,025.00, where only $2,976.00 of tax was due.

Debtors also received a state refund from their 2013 return in the amount of $1,153.00. Of the $2,049.00 refund, $1,399 was from education credits, and $200 was from the Child Tax Credit, since Debtors' depends are reported on Schedule I as ages 8, 13, and 19. It appears that since Debtors are retaining their real property, their tax deductions in the future are likely to remain the same or similar. If Debtors included this income in their monthly income calculation, dividing their monthly income throughout the year, they would have at least $266.83 per month in additional income. Continued tax refunds appear likely, and Debtors' income should be adjusted to either reflect the tax refund income or a lower tax expense.

d. Retain Property: The Plan proposes to retain a 2013 Mahindra 3016 tractor purchased in June 2013. According to Schedule D, the Debtors owe $27,536.00 to Mahindra. Section 2.11 lists the monthly obligation in the amount of $372.25 per month. Schedule I, Line 8a lists Debtors' net income from their walnut orchard in the amount of $84.00 per month. Retaining the tractor appears to be to the detriment of creditors. The Debtors acquired the orchard when they purchased their residence.

Question No. 18 of the Statement of Financial Affairs states that the business started in 2002. It is not clear what the value of the walnut crop is, and the trustee believes that the Debtors may expect significant proceeds from their crop where they seek to retain a tractor at $372.25 per month. Debtor may have had these trees since 2002 based on the sale date of their property, and where Debtor admitted that when they bought the property it had the trees at that time.

e. Debtor's Occupation: Debtor admitted at the First Meeting of Creditors on June 12, 2014, that Patricia Virden has changed positions within Sierra Pacific Industries, and that her income has changed. No updated pay stubs or amended Schedule I has been provided to the Trustee or filed with the court, so it appears that Debtor's current income is not properly stated and they may not be able to make the payments called for under the plan under 11 U.S.C. § 1325(a)(4).

2. Debtors' Plan also relies on the Motion to Value the Secured Claim of E*Trade Bank, which is set for hearing on this same day. Debtors'

Plan does not currently have sufficient monies to pay the claim in full and confirmation will be denied on this basis.

JULY 22, 2014 HEARING

The court continued the Objection to Confirmation on this hearing date, and ordered the Debtors to file and serve their Opposition on or before August 14, 2014, and the Trustee to file and serve a reply, if so desired, and on or before August 20, 2014. Civil Minutes, Dckt. No. 31.

RESPONSE BY DEBTORS

Debtors Thomas Arthur Burgess and Patricia Chavonne Virden, respond to the Trustee's Objection to Confirmation of Plan. Dckt. No. 36.

1. a. Income. The Trustee states that Mr. Burgess's income on Schedule I is not supported by the pay stubs provided to the Trustee, and submitted as Exhibit A by the Trustee. By examining these pay stubs, the Trustee is able to calculate that the Debtor's income should be $4,831.89 per month.

Debtors state that they are unable to determine how Trustee derived this number. Trustee does not provide the means of calculating this number, and "has failed to respond to requests made by Debtors' attorney."

Debtors calculated Mr. Burgess' income by averaging the Year-To-Date Gross income stated on his March 21, 2014, paystub (included in Trustee's Exhibit A). The Year-To-Date Gross income is $9484.58. Since this is the last paycheck in March, Debtor divided this number by 3, to establish that his income in the most recent time prior to his filing as $3,160. That is the number in Schedule I, as stated in Trustee's Objection (page 2, line 3). Debtors argue that the Trustee has not provided any reasonable means for calculating the numbers in his objection.

1.b. Retirement loan. Debtors understand that their payment to the 401K loan will mature during the plan. They agree that upon maturity of the loan, either the plan payment will increase or documentation must be submitted to the Trustee to show that Debtors' situation has changed. This can be included in the order confirming the plan.

1.c. Not all income reported. Debtors state that they understand the Trustee's concern about future tax refunds. Debtors can provide the trustee with a copy of their tax returns each year and turn over any and all tax refunds received, unless there is some justifiable reason why the tax refunds need to be used by the debtors; for instance, if their vehicles, farm equipment, or home need major, unforeseen repairs. Debtors state that this can be included in the order confirming the plan.

1.d. Retain Property. The Debtors state that the Mahindra tractor is necessary for the Debtor's business and crops. Without it, the business and crops will fail; Debtors use the tractor to harvest and otherwise provide for their farming needs. The Trustee would rather

Debtors surrender the tractor so that their business, which makes a profit, will fail. Debtors state that they see no legal authority for requiring them to relinquish an asset to the secured creditor for the purpose of making their business fail. If they surrender it, then they will have to hire outside labor to take over, which will cost more than the Mahindra, and will eat into their "already meager profits." Debtors state that upon investigating the issue, the Debtors cannot afford to hire laborers in their small fields.

1.e. Debtor's Occupation. Debtors protest that Trustee's statement regarding the occupation of Debtor Patricia Virden (that Ms. Virden has changed positions within Sierra Pacific Industries, and that her income has changed) "is a fabrication." Debtors say that they did not state that Patricia Virden had changed positions, nor that her income had changed. She did mention that she would not be working as much overtime in the future.

2. Plan relies on Pending Motion. This motion was heard on July 22, 2014. The court granted the motion on July 22, 2014, Docket #33. This objection is now moot.

REPLY BY CHAPTER 13 TRUSTEE

The Chapter 13 Trustee responds to the Debtors' Response by stating the following:

1. (a.) Income. The Debtors' response states that they are unable to calculate how the Trustee derived the monthly net income of $4,831.89 as noted in his objection.

The Trustee's Exhibit A consists of four (4) bi-weekly earnings statements. They include: a paystub with the paydate of February 07, 2014, showing a gross income of $2,167.74; Paystub with Pay Date February 21, 2014, showing a gross income of $1,900.37; Paystub with Pay Date March 7, 2014, showing a gross income of $2,555.86; and a Paystub with Pay Date March 21, 2014, showing a gross income of $2,282.74. The gross pay of these four statements total $8,906.71 ($1,167.74+$1,900.37+$2,555.86+$2,282.74=$8,906,71), The average of these pay stubs equals $2,226.67 ($8,906.71 divided by four pay stubs = $2,226.67).

Since the Debtor is paid on a bi-weekly basis, there are approximately 2.17 pay periods per month (52 weeks/year/12 months/year=4.34 weeks/month, this is then divided by 2 because paychecks are received every two weeks which = 2.17 periods per month). Multiplying the average of the pay stubs, $2,226.67 by 2.17 pay periods per month equals $4,831.89. (Thus, the gross amount calculated by the Trustee.)

Debtors state that they used the year to date gross of $9,484.58, which is for the pay period ending in March 15, 2014. Debtors divided $9,484.58 by three to establish the income. Debtors' response states that this was the last payment in March. However, according to this paystub, the period ended on March 15, 2014. Adding 2 weeks or 14 days to the 15th shows that there would have been another paystub with

a pay period ending at or near March 29th.
It appears that if this was the appropriate calculation, which it is not, the division should have been by approximately 2.67, not 3, yielding a monthly gross income of approximately $3,552.28--not the $3,160.00 claimed on Schedule I.

(b.) Retirement Loan. The Trustee would have no objection with language being added to the order confirming the plan, stating that the plan payment will increase by $333.25 to $1,178.25 in approximately 1.5 years when the loan is paid off.

(c.) Tax Refunds. The Trustee would have no objection to the following language being added to the order confirming the plan:

> A. At the same time the Debtors file state and federal tax returns with the respective agencies, copies of said returns shall be served on the Chapter 13 Trustee. The Debtors shall file a certificate of service attesting to such timely service on the Chapter 13 Trustee.
>
> B. All federal and state tax refund checks during the term of the Plan shall immediately upon receipt be endorsed over to the Chapter 13 Trustee for deposit in the Trustee's Chapter 13 account. The Debtors shall not receive electronic payment of any tax refunds during the term of the Plan. The Trustee shall hold such funds for a period of 60 days from receipt for Debtor to file motion for disbursement of tax refund monies to Debtors instead of to creditors through the Chapter 13 Plan. If such motion is timely filed, the Trustee shall then hold such tax refund monies until otherwise ordered by the court.

(d.) Retain Property. The Trustee questioned the Debtors' retention of the 2013 Mahindra 3016 tractor, because based on the net income reported on Schedule I from the walnut orchard of $84.00, and the expense of $372.25 to retain a tractor at $372.25 per month. The Trustee also questioned the maturity of the walnut trees, in that they were on the property when the Debtors purchased it in 2002. The maturity of the trees is relevant to the capacity of the trees to produce a viable crop. Debtors state in their response that, "The Trustee would rather Debtors surrender the Tractor so that their business, which makes a profit, will fail."

The Trustee has not requested that the Debtors surrender their asset, or wish their business to fail. The Trustee simply posed a concern in keeping this asset, when the farming operation profits are so much smaller than the expense of the asset. Further, Debtors has still not addressed the Trustee's concerns regarding the walnut grove, and the potential or lack thereof of significant profits from the trees in the future.

11 U.S.C. § 521(f)(4)(B) states:

> in a case under chapter 13—annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before

> the anniversary of the confirmation of the plan; a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

The Trustee requests that this requirement be placed in the order confirming the plan to help alleviate its concerns regarding the viability of the walnut orchard.

(e.) Debtor's Occupation. The representations made by the Trustee's representative in the objection to confirmation were based on the testimony of the Debtor at the 341 Meeting of Creditors, which was held and concluded on June 12, 2014. Debtor states that no evidence have been filed in support of the Trustee's statements. However, the Debtors have not filed a copy of the transcript from the 341 Meeting of Creditors to support its assertion in the response (Chapter 13 Trustee states that he does not plan to file one).

2. Pending Motion. The parties are in agreement that the Plan no longer relies on a pending motion. The Trustee agrees that the Debtors' Motion to Value Collateral of E*Trade Bank was granted at the hearing on July 22, 2014, and that this portion of the objection is now moot.

SEPTEMBER 9, 2014 HEARING

The hearing was continued to October 28, 2014 to allow the parties to review pay stubs for Debtor 1.

As of October 22, 2014, no supplemental declarations or objections have been filed in this case.

DISCUSSION

The court addresses each of the issues raised in the Trustee's Objection, and responded to by Debtors, in turn:

1. **Income**: With respect to the Debtors' and Trustee's calculations of income, Trustee's computation of Debtors' monthly net income appears to be more accurate. The Trustee calculated net income by averaging four of Debtors' bi-weekly earnings statements, which came out to $2,226.67. Since Debtor is paid twice a month, there are approximately 2.17 pay periods per month, based on there being 4.34 weeks in a month. Multiplying the average of the pay stubs, $2,226.67 by 2.17 pay periods per month equals $4,831.89.

The Debtors, on the other hand, divided the year to date gross of $9,484.58 by 3 to establish income. Debtors state that this was the last payment in March; however, that particular paystub shows that the pay period ended on March 15, 201, leaving another paystub with a pay period that would have ended at or near March 29th.

The appropriate division would have been to divide the $9,484.58 by 3, yielding a gross monthly income of approximately $3,552.28--a higher amount than the $3,160.00 claimed on Schedule I.

2. **Retirement Loan**: The Trustee has no objection adopting Debtors' proposal that language be added to the order confirming the plan, stating that the plan payment will increase by $333.25, to $1,178.25 in approximately 1.5 years when the loan is paid off.

3. **Tax Refunds**: The Trustee has no objection to language providing for the turnover of all federal and state tax refund checks during the term of the Plan to the Trustee for deposit in the Trustee's Chapter 13 account. Retain Property: The Trustee has refuted Debtors' allegations that the Trustee request the Debtors surrender the 2013 Mahindra Tractor, or wishes their business to fail. Trustee merely expresses his concern in retaining an asset that presents expenses that are higher than the profits generated by the Debtors' farming operation.

   Further, Debtor has not addressed Trustee's concerns regarding the walnut grove, which may produce significant proceeds and has matured since Debtors purchased it in 2002. This part of the Trustee's objection has not been resolved. The Trustee requests that the requirements set out by 11 U.S.C. § 521(f)(4)B), mandating that Debtors file statements showing how income, expenditures, and monthly income are calculated, be added to the plan in order to alleviate the Trustee's concerns regarding the viability of the walnut orchard.

4. **Debtor's Occupation**: The representation made by the Trustee regarding Debtor Patricia Virden's occupation and income change were based on testimony made by the Debtor at the 11 U.S.C. § 341 Meeting of Creditors, which was held and concluded on June 12, 2014. The Debtors have not addressed the economic and career circumstances of Joint Debtor Patricia Virden, as represented to the Trustee at the Meeting of Creditors.

Because the Debtors have failed to address Trustee’s concerns regarding the viability of Debtors’ walnut grove, which may generate undisclosed profits as a mature crop, and on the lack of clarity regarding Joint Debtor Patricia Virden’s occupation and income change (no updated pay stubs or amended Schedule I have been provided to the Trustee or filed with the court, so that Debtors’ current income is not properly stated), the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

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

23. 10-34373-E-13 LISA PACKER
SAC-1 Mikalah R. Liviakis
MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON
10-11-14 [53]

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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 New York Mellon ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Lisa Packer ("Debtor") to value the secured claim of Bank of New York Mellon ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property

commonly known as 7715 Canova Way, Sacramento, California, "Property." Debtor seeks to value the Property at a fair market value of $113,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on September 11, 2010. Dckt. 26. Debtor has filed the current motion to ensure that The Bank of New York Mellon is properly served and has proper opportunity to be heard. Debtor erroneously listed Specialized Loan Servicing as the creditor in the prior motion. Dckt. 5.

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $197,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $115,000.00. 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 Lisa Packer ("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 The Bank of New York Mellon secured by a second in priority deed of trust recorded against the real property commonly known as 7715 Canova Way, Sacramento, 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 $113,000.00 and is encumbered by senior liens securing claims in the amount of $197,000.00, which exceed the value of the Property which is subject to Creditor's lien.

24. 14-20874-E-13 TARILYN ELLIOTT **MOTION TO MODIFY PLAN**
CA-2 Michael David Croddy **9-15-14 [20]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 15, 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.

Tarilyn Elliott ("Debtor") filed the instant Motion to Confirm Modified Plan on September 15, 2014. Dckt. 20. Debtors move to modify their Plan because Debtor has experienced financial difficulties over the last few months when her adult children and Debtor's grandchildren moved in with Debtor on a temporary/emergency basis. They did not contribute to the household income, but contributed significantly to household expenses. Debtor's children and their families are in the process of moving out and Debtor does not foresee this problem lasting into the future.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on October 14, 2014. Dckt. 27. The Trustee objects on the basis that:

1. Debtor is delinquent $1,123.00 under the proposed Plan. The proposed Plan states that Debtor's payment schedule is:

"$5,615.00 total paid in or before month 8 (8/25/2014); followed by 1,123.00 per month for 4 months (09/25/2014-1/25/2015); followed by 1,374.00 per month for 48 months (2/25/2015-end of plan)." The case was filed on January 31, 2014 and eight (8) payments have come due under the plan, and payments totaling $6,738.00 have become due under the proposed modified plan. Debtor has paid the Trustee $5,615.00 with the past payment of 1,123.00 posted August 8, 2014.

2. The amount of post-petition arrears due appears higher than in the Plan. The proposed modified plan lists post-petition arrears to be paid in Class 1 in the amount of $1,140.06. According to Trustee's records, the post-petition arrears amount to $1,440.06. Additionally, Section 2.08(b)(3) of the modified plan lists partial plan payments shall include any late charge. Debtor has failed to provide for late charges and does not address post-petition arrears in the additional provisions of the modified plan.

DISCUSSION

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

The Trustee's objections are well-taken. According to the Trustee's records, the Debtor is delinquent in plan payments under the proposed plan in the amount of $1,123.00. The court cannot confirm a proposed plan when the Debtor is delinquent even prior to confirmation. As to the Trustee's second objection, the plan does not appear to account for the total amount of post-petition arrears, including late charges. Because the plan fails to properly account for the full amount of post-petition arrears, the court cannot confirm the plan.

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

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

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

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

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

25. 14-25474-E-13 LEE SCIOCCHETTI MOTION TO CONFIRM PLAN
LBG-2 Lucas B. Garcia 9-15-14 [50]

Final Ruling: No appearance at the October 28, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 15, 2014. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

Lee Sciocchetti ("Debtor") filed the instant Motion to Confirm Plan on September 15, 2014. Dckt. 50. Debtor seeks confirmation of his Plan because the Debtor has provided more information about the values of the 2005 Ford F250 Super Duty Supercab, 2009 Premier Pontoon Boat, 2008 Lance Trailer, 1999 5'x8' load runner cargo trailer, 2006 7'x12' load runner cargo trailer, 2001 Carson landscape trailer, and 2008 Can Am Outlander ATV, as the Trustee requested. The Debtor is current on all payments to the Trustee pursuant to Plan provisions.

David Cusick, the Chapter 13 Trustee, filed non-opposition to this Motion on October 21, 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 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 May 23, 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.

26. 11-38977-E-13 JOSEPH/LISA TARANGO
CFH-4 Curt F. Hennecke
OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE
9-8-14 [54]

Final Ruling: No appearance at the October 28, 2014 hearing is required.

Local Rule 3007-1 Objection to Notice of Mortgage Payment Change - 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, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 8, 2014. By the court's calculation, 50 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 Notice of Mortgage Payment Change has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Notice of Mortgage Payment Change Filed by Creditor the Bank of New York Mellon and Bank of America, N.A. is granted. Debtors are awarded $1,680.00 in attorneys' fees.

Joseph and Lisa Tarango ("Debtors") filed the instant Objection to Notice of Mortgage Payment Change Filed by Creditor the Bank of New York Mellon and Bank of America, N.A. on September 8, 2014. Dckt. 54. The Bank of New York Mellon is the mortgage note holder and Bank of America, N.A. is the servicer (collectively known as "Claimant").

Debtors filed the instant Chapter 13 case on August 3, 2011. As of

September 2012, Debtors' plan payment is $2,908.48 per month and provides Claimant as a Class 1 Creditor with an ongoing monthly mortgage payment of $1,896.26. Claimant filed an amended secured claim on June 30, 2014 in the amount of $609,864.38 with arrearages in the amount of $32,208.92.

Debtors allege that the basis for the $1,896.26 monthly mortgage payment to Claimant is based upon a Notice of Mortgage Payment change filed by Claimant on August 1, 2013.

On August 6, 2014, Claimant filed another Notice of Mortgage Payment Change pursuant to Fed. R. Bankr. P. 3002.1(b). The new monthly mortgage payment was stated to change from $1,896.26 to $4,301.05 effective September 1, 2014. Debtors believe that this $2,404.79 increase is a mistake and unfounded since they have a fixed mortgage rate.

The August 2014 Notice states the reason for the increase of the mortgage payment is based upon an increase of escrow payment from $429.91 to $481.89, a $51.98 increase. Under Part 2 of the Notice, the Claimant states that the debtors' principal and interest payment will not change based on an adjustment to the interest rate in the debtors' variable rate note. Under Part 3 of the Notice, the Claimant states that there will be no change in Debtors' mortgage payment for a reason outside the escrow account payment adjustment.

Based on the information provided for in the Notice, the Debtor alleges that the new total monthly mortgage payment should be $1,948.24 and not $4,301.05 as stated in the Notice.

Debtors argue that since the Chapter 13 Trustee uses the amount claimed in the Notice for paying the conduit mortgage payment to Claimant, Debtor is now negatively affected by the alleged failure of the Claimant to file an accurate Notice pursuant to Fed. R. Bankr. P. 3002.1(b). Debtors allege that the negative effect of this alleged improper filing would result in an increase of approximately $2,500.00 to the plan payment.

The Debtor seeks for the Objection to be sustained, for the mortgage payment to be stated as $1,948.24 effective September 2014, and for attorney fees in the amount of at least $1,680.00.

The Claimant has not filed any opposition or supplemental pleadings in connection with this Objection.

APPLICABLE LAW

Fed. R. Bankr. P. 3002.1(b) states:

> (b) Notice of Payment Changes. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

The rule also states:

> (i) Failure to Notify. If the holder of a claim fails to

> provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
>
> (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
>
> (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

Fed. R. Bankr. P. 3002.1(i). Rule 3002.1(i) authorizes a court to impose sanctions for missing or defective information in the notice. *In re Susanek*, 12-23545-GLT, 2014 WL 4960885 (Bankr. W.D. Pa. Sept. 30, 2014).

DISCUSSION

Upon review of the information provided by the Debtors and the docket, the court is inclined to agree with the Debtors that the Notice does not accurately reflect the terms of the mortgage.

A comparison of the August 1, 2013 Notice and the August 6, 2014 Notice shows that the only increase was in the escrow payment amount from $429.91 to $481.89. This $51.98 increase does not translate nor justify why the new mortgage payment listed on the August 6, 2014 Notice as $4,301.05.

Furthermore, a review of the attached documents to each notice show a sudden increase in the principal and/or interest amount. On page 7 of the August 1, 2013 Notice, the principal and/or interest is listed as $1,466.35. On page 7 of the August 6, 2014 Notice, the principal and/or interest is listed as $3,819.16. Nothing in the attached documents for either show why there would be a sudden and unexplained increase in the principal and/or balance from 2013 to 2014. In fact, on page 7 of the August 6, 2014 Notice, there is a comparison of 2013 analysis with the 2014 analysis which shows not only that the principal and/or interest is incorrect but also that the escrow payment amount is different than what was listed on August 1, 2013 Notice.

This appears to be an error on the part of the Claimant. Without providing further evidence on why there are such discrepancies between the two filed Notices and the fact the calculations on the August 6, 2014 Notice do not accurately reflect the August 1, 2013 Notice, the court will sustain the objection and correct the amount of the new mortgage payment amount to $1,948.24 ($1,896.26 plus the $51.98 increase in escrow payment).

As to the request for attorneys fees, the court finds that the Claimant has provided defective information in the Notice. Pursuant to Fed. R. Bankr. P. 3002.1(i), the court will grant attorneys fees.

Attached to Debtors' Motion was Debtors' counsel time sheet in connection with the Motion. At a rate of $300.00 an hour, Debtors' counsel claims to have provided the following services:

Date	Description	Tim
9/3/2014	Research Bankruptcy Rule 3002.1 requirements and remedies upon failure to comply	.5 hour
9/3/2014	Preparation of notice of hearing for Objection to Notice of Mortgage Payment Change	.4 hour
9/4/2014	Preparation of Objection to Notice of Mortgage Payment Change; review factual and legal analysis	2.7 hours
9/5/2014	Preparation of Declaration of Joseph V. Tarango for Objection to Notice of Mortgage Payment Change	.6 hour
9/5/2014	Research service list for certificate of service; Preparation of Proof of Service of Objection to Notice of Mortgage Payment Change	.5 hour
9/5/2014	Preparation of Declaration of Curt F. Hennecke for Objection to Notice of Mortgage Payment Change	.7 hour
9/5/2014	Preparation of Exhibits for inclusion to Objection to Notice of Mortgage Payment Change	.2 hour
TOTAL		**5.7 hours**

At $300.00 an hour, the Debtors' counsel is requesting $1,680.00. In considering these fees, the court takes into account (1) this appears to be a "simple" scriveners error, (2) that Debtors' counsel had to review the notice, identify the error, prepare provide evidence, and file and serve the necessary Objection, (3) prosecute the Objection without any response from Bank of America, N.A. or Bank of New York Mellon, and (4) had to prepare to attend the hearing on the Objection. $1,680.00 is not an unreasonable amount for the presentation and prosecution of the Objection.

The court orders the Objection to the Notice of Payment Change is

sustained, and the post-petition monthly payment on the Bank of New York Mellon Claim, Proof of Claim No. 18, is $1,948.24 commencing with the September 1, 2014 payment.

The court further orders that Debtors are awarded $1,680.00 in attorneys' fees against Bank of America, N.A. and The Bank of New York Mellon FKA Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholder of the CWMBS Inc., CHL Mortgage Pass-Through Trust 2005-9, Mortgage Pass Through Certificates, Series 2005-9, jointly and severally.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Notice of Mortgage Payment Change filed by Joseph and Lisa Marie Tarango, 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 Notice of Mortgage Payment Change filed on August 6. 2014, is sustained, and based on said Objection and the Notice of Mortgage Payment Change the correct amount of the regular, post-petition monthly payment for the loan upon which Proof of Claim No. 18 is bases, is $1,948.24 effective September 1, 2014.
>
> **IT IS FURTHER ORDERED** that Joseph and Lisa Marie Tarango, Debtors are awarded $1,680.00 in attorneys' fees against Bank of American, N.A. and The Bank of New York Mellon FKA Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholder of the CWMBS Inc., CHL Mortgage Pass-Through Trust 2005-9, Mortgage Pass Through Certificates, Series 2005-9, jointly and severally. The $1,680.00 in attorneys' fees shall be deposited by Curt F. Hennecke, Debtors' counsel, into his client trust account, the receipt of the fees reported to the Chapter 13 Trustee, and after the expiration of ten calendar days from the notice being provided to the Chapter 13 Trustee, Debtor's counsel may disburse the $1,680.00 from his trust account to his firm in payment of these fees. The court, in granting these fees determines that they are additional attorneys' fees awarded Curt F. Hennecke in this case and reasonable pursuant to 11 U.S.C. § 330.
>
> This Order constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014).

27. 10-25678-E-13 ARTURO/ELIUTH AGUILAR
SAC-2 Mikalah R. Liviakis
MOTION TO VALUE COLLATERAL OF YOLO FEDERAL CREDIT UNION
10-11-14 [73]

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 Chapter 13 Trustee, Yolo Federal Credit Union, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 Yolo Federal Credit Union ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Arturo and Eliuth Aguilar ("Debtors") to value the secured claim of Yolo Federal Credit Union ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 1980 Hershey Drive, Woodland, California ("Property"). Debtors seek to value the Property at a fair market value of $200,000.00 as of the petition filing date. FN.1. As the owner, 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).

FN.1. A Motion to Value order was obtained for this claim on April 26, 2012. Dckt. 61. Debtors have filed the current motion to ensure that Yolo Federal Credit Union is properly served. Debtors previously served Yolo Federal Credit Union at a P.O. Box.

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $270,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $51,900.00. 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 Arturo and Eliuth Aguilar ("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 Yolo Federal Credit Union secured by a second in priority deed of trust recorded against the real property commonly known as 1980 Hershey Drive, Woodland, 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 $200,000.00 and is encumbered by a senior lien securing a claim in the amount of $270,000.00, which exceeds the value of the Property which is subject to Creditor's lien.

28. 10-43779-E-13 DAVID/JOANNE RICHERSON
SAC-1 Mikalah R. Liviakis

MOTION TO VALUE COLLATERAL OF PNC BANK, N.A.
10-11-14 [70]

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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 PNC 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 David and Joanne Richerson ("Debtor") to value the secured claim of PNC Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 4147 Third Street, Camino, California ("Property"). Debtor seeks to value the Property at a fair market value of $134,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on November 16, 2010. Dckt. 25. Debtor has filed the current motion to ensure that PNC Bank, N.A. is properly served and has proper opportunity to be heard. Debtor listed PNC Bank, N.A. as the creditor in the prior motion as well. Dckt. 5.

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $221,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $59,000.00. 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 David and Joanne Richerson, "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 PNC Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 4147 Third Street, Camino, 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 $134,000.00 and is encumbered by senior liens securing claims in the amount of $221,000.00, which exceed the value of the Property which is subject to Creditor's lien.

29. 14-28079-E-13 PPR-1 — ERNESTO/MILAGROS SANTOS — Mikalah R. Liviakis — OBJECTION TO CONFIRMATION OF PLAN BY WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES WMALT SERIES 2007-OA1 TRUST, U.S. BANK, N.A. — 9-24-14 [24]

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 24, 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.

Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OA1 Trust, U.S. Bank National Association, as Trustee, its assignees and/or successors in interests ("Creditor") opposes confirmation of the Plan on the basis that:

1. The Plan is not adequately funded under 11 U.S.C. § 1325(a)(5)(B)(ii). The Debtors' plan does not treat the pre-petition arrears owed to the Creditor. The actual arrearage amount will be disclosed in a timely-filed Proof of Claim. Accordingly, even if all payments are tendered pursuant to the plan, they will not be sufficient to satisfy Creditor's claim in full.

2. The Debtors' proposed plan fails to require the maintenance of the correct ongoing post-petition mortgage payment as required by 11 U.S.C. § 1322(b)(5). Debtors' plan states that the current monthly payment is $605.02. The correct monthly payment amount is $680.68. Proposing an incorrect post-petition amount is an impermissible modification of Creditor's claim.

The Creditor states that it holds a senior lien on the real property commonly known as 5641 Martin Luther King, Sacramento, California. The Creditor requests that the proposed plan be denied and for attorneys' fees and costs.

DEBTORS' OPPOSITION

On October 6, 2014, Debtors filed a response to the Objection. Dckt. 29. FN.1. As to Creditor's first objection, Debtors state that as of October 3, 2014, Creditor has not filed a claim. Debtors further argue that they have not missed a payment since they received a loan modification approximately one year ago.

As to the second objection, Debtors argue that the Debtors' mortgage statement lists $605.02 as the correct amount. Debtors attached a mortgage statement as an exhibit. Dckt. 31, Exhibit A.

DISCUSSION

Upon review of the Proof of Claims filed, the Creditor still has not filed a Proof of Claim, stating the amount of arrearages or any documentation in support of the claim of arrearages and the mortgage payment amount.

Debtors' exhibit shows a statement from Nationstar Mortgage listing the property address as 5641 Martin Luther King, Sacramento, California. The regular monthly payment is listed as $605.02.

A review of the Debtors' petition just shows one mortgage on the 5641 Martin Luther King, Sacramento, California property, naming Nationstar Mortgage, LLC as the creditor. The court was unable to find the Creditor listed anywhere on the Debtors' petition but since this is the only claim in relation to the

property, the court presumes that Nationstar Mortgage is the servicer of the loan held by the Creditor.

Without any evidence from Creditor concerning the modification, any arrearages, a proof of claim, or any documented evidence, the court cannot sustain the Objection. Without evidence, the court will not bar an otherwise viable plan for confirmation merely based on assertion by the Creditor.

The objection is overruled.

Furthermore, Creditor's request for attorney's fees is denied because Creditor did not state grounds in which would justify the court granting any fees for the Creditor.

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 Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OA1 Trust, U.S. Bank National Association, as Trustee, its assignees and/or successors in interests ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled. Debtor's Chapter 13 Plan filed on August 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.
>
> **IT IS FURTHER ORDERED** that Creditor's request for attorney's fees is denied.

30. 14-28079-E-13 ERNESTO/MILAGROS SANTOS
PPR-1 Mikalah R. Liviakis
OBJECTION TO CONFIRMATION OF PLAN BY THE BANK OF NEW YORK MELLON
9-23-14 [22]

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 (*pro se*), Debtor's Attorney, and Chapter 13 Trustee on September 23, 2014. By the court's calculation, 35 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 ovverule the Objection.

Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificate Holders of CWALT, Inc., Alternative Loan Trust 2006-oa11, Mortgage PassThrough Certificates, Series 2006-OA11 ("Creditor") opposes confirmation of the Plan on the basis that Ernesto and Milagros Santos ("Debtors") have a lack of funding to pay arrearages on Creditor's claim. Debtors' Plan must provide for the full payment of pre-petition arrearages owed to Creditor. Creditor is in the process of filing a Proof of Claim that will set forth the actual arrearage amount.

DEBTORS' RESPONSE

Debtors filed a response to Creditor's Objection to Confirmation on October 6, 2014. Dckt. 29. Debtors state that although the Proof of Claim filed by Creditor shows that Debtors owe $1,254.02 in arrears, Debtors have not missed a payment on Creditor's senior lien since they received a loan modification about two years ago.

CREDITOR'S SUPPLEMENTAL DECLARATION

On October 9, 2014, Creditor filed the Declaration of Peter Murphy in further support of Creditor's objection to confirmation. Dckt. 33. The Murphy Declaration states that the arrears amount ($1,254.02) in Creditor's Proof of Claim represents an escrow shortage as of August 8, 2014.

DISCUSSION

Creditor holds a deed of trust secured by Debtors' real property. The creditor has filed a proof of claim in which it asserts $1,254.02 in pre-petition arrearages. The declaration of Peter Murphy, an Assistant Vice President of Bank of America, N.A. states that there is a pre-petition arrearage of $1,254.02 which represents an "escrow shortage." He states that a "true and complete breakdown of the arrearages" is set forth in Exhibit A, the copy of Proof of Claim No. 4.

The court has reviewed Exhibit A and Proof of Claim No. 4 to ascertain what is asserted to constitute the $1,254.02 arrearage. The escrow arrearage is computed as follows by Creditor:

Escrow Arrearage	$1,254.02

Mortgage Proof of Claim Attachment, Part 2. Exhibit A, Dckt. 34; and attached to Proof of Claim No. 4.

Other than providing this gross amount, the court is unsure as to why and how Creditor asserts a pre-petition escrow arrearage. Presumably Creditor could provide simple testimony as to pre-petition escrow payments which were not made by Debtors.

Also attached to the Proof of Claim is a six page "Important Message About Your Home Loan" document which is titled on the third page "Escrow Account Review." Exhibit A at pgs. 12-14. From this Document provided to the Debtors (who for some purposes can be considered the hypothetical "less sophisticated consumers), the court has distilled the following information concerning the Debtors' escrow account (and presumably asserted shortage) for the loan which is the basis for Proof of Claim No. 4.

A. The escrow statement is being sent for informational purposes only. It is not to be construed as an attempt to collect a debt.

B. Part of the Debtors' loan payment goes into an "account" to pay the property taxes and insurance premiums.

C. During the year payments are made from this "account" for the insurance and property taxes.

D. In a step-by-step analysis the creditor determines the data shown in the report for the “new escrow payment.”

E. The escrow analysis was prepared as of the date of the bankruptcy filing.

F. Summary

1. Base amount payment.....$ 276.42
2. Shortage payment.....$ 0.00
3. Reserve requirement.....$ 0.00
4. New monthly escrow payment.....$ 276.42
5. New monthly loan payment.....$1,182.28

G. The Creditor calculates the escrow payment based on the following.

Escrow Item	Frequency in Months	Monthly Amount Needed	
County Taxes	12	$79.92	
County Taxes	12	$79.92	
Homeowners Insurance	12	$116.58	
Total monthly Base Payment Amount			$276.42

1. Then Determines the Lowest Projected Balance as follows.

Month	Escrow Deposit(s)	Tax Payment(s)	Insurance Payment(s)	MIP/PMI Payment(s)	Balance
Post Petition Beginning Balance					$1,103.42
September 2014	$276.42				$1,379.84
October 2014	$276.42				$1,656.26
November 2014	$276.42	$959.00			$973.68
December 2014	$276.42				$1,250.10
January 2015	$276.42				$1,526.52
February 2015	$276.42				$1,802.94

March 2015	$276.42	$959.00			$1,120.36
April 2015	$276.42				$1,396.78
May 2015	$276.42				$1,673.20
June 2015	$276.42		$1,399.00		$550.62
July 2015	$276.42				$827.04
August 2015	$276.42				$1,103.46
Post Petition Ending Balance					$1,103.46
Lowest Projected Balance					$550.62
Shortage Amount					$0.00

2. Then there is a determination of the reserve requirement, computes as follows.

   a. Lowest projected balance.....$550.62
   b. Total reserve requirement (16.6% of base amount).....$550.62
   c. Additional amounts required....$ .00
   d. Monthly reserve requirement....$ 0.00

H. The monthly payments and calculation of monthly escrow payment requires the further following analysis.

1. Base amount needed for taxes and insurance.....$276.42
2. Shortage payment.....$ .00
3. Reserve requirement.....$ .00
4. Total monthly escrow payment.....$276.42
5. Calculation of monthly home loan payment
   a. Principal and/or interest.....$905.86
   b. Total monthly escrow payment.....$276.42
   c. Total monthly home loan payment.....$1,182.27

I. The analysis continues with a section titled “Last Year in Review, Current analysis compared to previous.” The following information and calculation is provided. The first calculation consists of the following.

Current analysis compared to previous	Monthly Amount

Amount needed for Taxes and Insurance	Last Analysis	This Analysis
County Taxes	$79.92	$79.92
County Taxes	$79.92	$79.92
Homeowners insurance	$116.58	$116.58
Total base escrow payment	$276.43	$276.43
Shortage payment	$17.92	$0.00
Reserve requirement	$13.43	$0.00
Rounding amount	$0.00	$0.00
Monthly escrow payment	$307.77	$276.42
Principal and/or interest	$905.86	$905.86
Monthly escrow payment	$307.77	$276.42
Amount needed for taxes and insurance	$1,214.63	$1,182.28

J. The statement continues to provide a side-by-side projected escrow activity analysis. This analysis is to include any cure payments under the Chapter 13 Plan. The analysis is as follows.

Projected					Actual				
Date	Activity	Paid In	Paid Out	Balance	Date	Activity	Paid In	Paid Out	Balance
	Beginning Balance			($458.37)		Beginning Balance			($458.37)
8/1/14	Aug Payment	$307.77		($150.60)	8/7/14 * C	Aug Payment	$307.77		($150.60)
9/1/14	Sep Payment	$307.77		$157.17	8/8/14	Misc posting	$734.75		$584.15
10/1/14	Oct Payment	$307.77		$464.94	8/13/14 P	Misc Posting	$1,254.02		$1,838.17
11/1/14	Nov Payment	$307.77		$772.71		Ending Balance			$1,838.17
11/02/14	County Taxes		$959.00	($186.29)					

12/1/14	Dec Payment	$307.77		$121.48					
1/1/15	Jan Payment	$307.77		$429.25					
2/1/15	Feb Payment	$307.77		$737.02					
3/1/15	Mar Payment	$307.77		$1,044.79					
3/2/15	County Taxes		$959.00	$85.79					
4/1/15	Apr Payment	$307.77		$393.56					
5/1/15	May Payment	$307.77		$701.33					
6/1/15	June Payment	$307.77		$1,009.10					
6/2/15	Home-owners Insurance			($389.90)					
7/1/15	July Payment	$307.77		($82.13)					
	Ending Balance			($82.13)					
					"C" indicates that payments or disbursements were different than what was projected. "P" indicates that the payment or disbursement has not yet occurred but is estimated to occur as shown. "*" is the Lowest projected balance				
Summary of escrow payments and disbursements					Summary of escrow payments and disbursements				
Payments		$3,693.24			Payments		$307.77		C
County Taxes		$1,918.00			Misc postings		$1,988.77		
Homeowners insurance		$1,399.00							

Though there appears to be a lot of data in Proof of Claim No. 4, at no point does it say that "the escrow arrearage of $1,254.02 consists of the following....." Countering this bald assertion of a pre-petition escrow arrearage for which no missed escrow payments are alleged, nor any unprovided for escrow disbursements, the Debtors testify that they have not missed a loan payment (which includes the escrow payment) since receiving the loan

modification approximately one year ago. Declaration, Dckt. 30. This specific and direct testimony is sufficient to overcome the prima facie evidentiary value of Proof of Claim No. 4 and the non-specific, incorporating the Proof of Claim as explaining, testimony of Creditor's Assistant Vice President.

The court finds that there is no pre-petition escrow arrearage, and as such, the Objection of Bank of America, N.A. to confirmation is overruled.

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 Bank of New York Mellon 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 overruled. Debtor's Chapter 13 Plan filed on August 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.

31. 14-28480-E-13 JAVIER MACIEL
DPC-1 Peter G. Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-1-14 [15]

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 October 1, 2014 By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. The Plan is not Javier Maciel's ("Debtor") best effort. Debtor proposes a Plan that extends for only 48 months, although Debtor is over the median income and is paying less than 100% to unsecured creditors. Debtor's monthly gross income is $6,494.91 and over 12 months, this income totals $77,938.92. The applicable median family income for a household of three (3) is $67,594.00. Therefore, Debtor is over the median income and the Plan should have a term of 60 months. Additionally,

Debtor deducts "paycheck deductions" of $1,015.62 for his non-filing spouse to determine Debtor's current monthly income. Debtor does not explain what the deductions consist of and why Debtor should be allowed to deduct this expense in Form B22C.

2. Debtor has failed to list his year-to-date income and his non-filing spouse's income on the Statement of Financial Affairs.

DEBTOR'S RESPONSE

Debtor filed a response to the Trustee's Objection on October 14, 2014. Dckt. 19. Debtor responds to the Trustee's Objections, stating:

1. Debtor has amended his Statement of Financial Affairs and Form B22C.

2. Debtor is not over the median income pursuant to 11 U.S.C. § 1325(b)(3). Debtor is married filing individually with one child. Based on his actual income received, the Debtor averages monthly pay of $3,653.52 and $2,079.22, rather than the sum stated by the Trustee. The Trustee overlooked that Debtor did not receive his first paycheck for calendar year 2014 until March 1, 2014. After the normal deductions allowed by line 19, Debtor's "annualized current monthly income for 11 U.S.C. § 1325(b)(3)" is $56,021.76. With the applicable median family income at $67,594.00, Debtor is under the median income and a 60 month plan is not required.

DISCUSSION

A review of the docket shows that the Debtor has not filed any amended Statement of Financial Affairs and Form B22C. The court, therefore, must base its analysis on the forms filed. After reviewing the Statement of Financial Affairs and Form B22C, the court agrees with the Trustee that the Debtor appears to be an above-median Debtor and the Plan is not providing for 100% to unsecured creditors nor is the Plan for 60 months. Additionally, because the Debtor has not filed any amended forms, the Debtor has failed to provide the Trustee with necessary and required documents.

Additionally, while having his attorney allege various facts in opposition to the Trustee's Objection, the Debtor has failed to file any evidence to support this attorneys "fact arguments." The Debtor has not given his declaration or provided the declaration of anyone else who is a competent witness. That Debtor would choose to "argue the facts" and hide from providing any testimony is an indication that this case was not filed, and the plan not proposed, in good faith.

Finally, the determination of whether the Debtor is above or below median income is a simple mathematical calculation for income in the six months preceding the commencement of the bankruptcy case. 11 U.S.C. § 101(10A) and 1325(b)(4). It appears that Debtor's argument is that for his case, income he received during that six month period should be excluded because he believes that income received during the period should deemed outside that period. The fact that an employee is paid on the first of the month for work done in the prior month does not mean that income received in that month is excluded.

Therefore, because the Plan is not Debtor's best efforts and has failed to provide a completed Statement of Financial Affairs, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

32. 10-41082-E-13 MAC CREASMAN — MOTION TO VALUE COLLATERAL OF
SAC-1 Mikalah R. Liviakis — JPMORGAN CHASE BANK, N.A.
10-11-14 [39]

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 Chapter 13 Trustee, JPMorgan Chase Bank, N.A., and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 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 Mac Creasman ("Debtor") to value the secured claim of JPMorgan Chase Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 3600 Almanor Road, West Sacramento, California, ("Property"). Debtor seeks to value the Property at a fair market value of $550,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on November 1, 2010. Dckt. 16. Debtor has filed the current motion to ensure that JPMorgan Chase Bank, N.A. is properly served. Debtor failed to provide service to an officer via certified mail.

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $652,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $70,000.00. 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 Mac Creasman ("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 JPMorgan Chase Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 3600 Almanor Road, West Sacramento, 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 $550,000.00 and is encumbered by a senior lien securing a claim in the amount of $652,000.00, which exceeds the value of the Property which is subject to Creditor's lien.

33. 10-45982-E-13 JASON/KELLY CONLEY **MOTION TO VALUE COLLATERAL OF**
SAC-1 Mikalah R. Liviakis **FIRST TENNESSEE BANK, N.A.**
10-11-14 [52]

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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 First Tennessee 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 Jason and Kelly Conley ("Debtor") to value the secured claim of First Tennessee Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 4949 Cibola Way, Sacramento, California ("Property"). Debtor seeks to value the Property at a fair market value of $115,000.00 as of the petition filing date. FN.1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut.*

Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on January 23, 2011. Dckt. 36. Debtor has filed the current motion to ensure that First Tennessee Bank, N.A., is properly served and has proper opportunity to be heard. Debtor erroneously listed First Horizon as the creditor in the prior motion. Dckt. 5.

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

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

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

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

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $193,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $50,000.00. 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 Jason and Kelly Conley, "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 First Tennessee Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 4949 Cibola Way, Sacramento, 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 $115,000.00 and is encumbered by senior liens securing claims in the amount of $193,000.00, which exceed the value of the Property which is subject to Creditor's lien.

34. 10-34586-E-13 DAVID/TANYA HARO **MOTION TO VALUE COLLATERAL OF**
SAC-2 Mikalah R. Liviakis **CITIBANK, N.A.**
10-11-14 [56]

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 Chapter 13 Trustee, Citibank, N.A., parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 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 Citibank, 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 David and Tanya Haro ("Debtors") to value the secured claim of Citibank, N.A. ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 12746 Highland Court, Auburn, California ("Property"). Debtors seek to value the Property at a fair market value of $310,000.00 as of the petition filing date. FN. 1. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

FN.1. A Motion to Value order was obtained for this claim on September 10, 2010. Dckt. 34. Debtor has filed the current motion to ensure that Citibank, N.A. is properly served and has proper opportunity to be heard. Debtor failed to serve Citibank, N.A. on the earlier motion.

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $318,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $106,000.00. 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 David and Tanya Haro ("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 Citibank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 12746 Highland Court, Auburn, 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 $310,000.00 and is encumbered by a senior lien securing a claim in the amount of $318,000.00, which exceeds the value of the Property which is subject to Creditor's lien.

35. 14-28888-E-13 JAMES/JENNIFER CRUM
DPC-1 Gary D. Greule

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK
10-8-14 [16]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on October 8, 2014. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). James and Jennifer Crum's ("Debtors") non-exempt equity totals $72,477.40 and Debtors propose to pay unsecured creditors $37,640.88 over the life of the plan, based on a 28% dividend to unsecured creditors. Priority claims in the Plan total $19,998.46, which is insufficient to make the Debtors pass liquidation. While the Internal Revenue Service has filed a priority claim for $27,319.00 (Claim No. 1), the Plan provided for the claim with an estimated $8,815.23 and the Debtors have provided a copy of their 2012 tax return to the Trustee, which appears to support the Plan's treatment.

Debtors have not filed any opposition or responses to the Trustee's objection.

The Trustee's objection is well-taken. The Plan will pay unsecured creditors a total of $37,640.88, when under a hypothetical Chapter 7 liquidation, unsecured creditors would receive approximately $72,477.40 total. This does not meet the required liquidation analysis for plan confirmation. 11 U.S.C. § 1325(a)(4).

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

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

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

36. 11-40191-E-13 KEENAN ROSS **MOTION FOR APPROVAL OF**
PGM-1 Peter G. Macaluso **ASSIGNMENT OF ATTORNEY FEES**
9-29-14 [38]

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

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

Below is the court's tentative ruling.

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

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

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

The Motion for Approval of Assignment of Attorney Fees is denied without prejudice to Peter Macaluso seeking attorneys' fees and the court reducing the set fees of prior counsel in this case.

Peter Macaluso, Debtor's attorney of record, files the instant Motion for Approval of Assignment of Attorney Fees on September 29, 2014. Dckt. 38.

Mr. Macaluso states that Debtor hired the Law Firm of Jacoby & Meyers, L.L.P. to file his Chapter 13 bankruptcy. On or about January 31, 2014, the Law Firm went out of business. The last remaining attorney of record, Keith Wood, was employed as an associate attorney and was laid off when the Law Firm closed. Mr. Wood's name was listed as the Attorney of Record to facilitate the transfer of cases as he was the remaining local attorney. Mr. Wood did not have sufficient means to maintain the cases outside of the Law Firm and sought out

competent counsel that had the staff and resources to complete the cases. Mr. Wood contacted Mr. Macaluso, who agreed to take on all of the cases with the agreement that all remaining attorney fees would be assigned to him.

On April 27, 2014, Mr. Macaluso substituted into the instant case. Dckt. 35. On August 21, 2014, the assignment of attorney fees between principal attorney Deborah Rivas and Mr. Macaluso was filed with the court. Dckt. 37.

Mr. Macaluso argues that there is no threat to the client by the change nor by the assignment of attorney fees and does not create an adverse interest to the client.

David Cusick, the Chapter 13 Trustee, filed non-opposition to the motion on October 6, 2014. Dckt. 42. The Trustee states that the case was filed on August 19, 2011 and proposed a 36 month payment plan with a 0% dividend to the unsecured creditors. October 2014 is the 38th month of the plan. The only remaining debt to be paid is the attorney fees. The Trustee states that he has a balance on hand of $549.00 and the attorney fees remaining to be paid are $371.53. The Trustee requests that the Motion be granted.

DISCUSSION

Mr. Macaluso seeks to assign attorney's fees originally designated to the Law Firm of Jacoby & Meyers to himself. Mr. Macaluso correctly notes that clients, such as Debtor, have the absolute right to change attorneys as they see fit. *Kallen v. Delug*, 157 Cal. App. 3d 940, 950 (2d Dist. 1984). Debtor was notified that Mr. Macaluso would be substituted as attorney of record in this case and was given the opportunity to seek independent counsel. His lack of action indicates his acquiescence to Mr. Macaluso’s substitution.

Upon reviewing the motion, it appears that what Mr. Macaluso is really seeking is for the court to disallow Jacoby & Meyers, L.L.P. attorneys’ fees for failure to complete the representation and then to have the court allow Mr. Macaluso a portion of the no look fees.

Reviewing the representation history of the case, the attorney listed on the Disclosure of Compensation of Attorney for Debtor filed with Debtor’s petition lists Macey & Aleman dba Legal Helpers, PC as the attorney. Dckt. 1, pg. 33. The Disclosure was signed by Deborah M. Rivas. Id.

In the assignment attached with the Motion, the assignor is listed as Deborah M. Rivas. Dckt. 37, Exhibit B.

However, nowhere does Jacoby and Meyers L.L.P. appear to have been the attorney of record for the Debtor at any point in time. In the Motion, Mr. Macaluso states that it was Mr. Wood, the listed Attorney of record to facilitate the transfer of cases. Mr. Macaluso does not provide any evidence that Jacoby and Meyers L.L.P. were ever attorneys for the Debtor and, if they were, why the attorney listed on the Disclosure is Macey & Aleman dba Legal Helpers, PC. The court cannot discern from the Motion who, in fact, holds the right to the remaining attorney fees. No evidence has been offered to show the representation chain between Mr. Macaluso, Mr. Wood, or Ms. Rivas

Additionally, not all parties who have an interest in these attorneys’

fees were served. Here, the Motion was only served on the U.S. Trustee, the Chapter 13 Trustee, 1st Union Services Credit Union, and the Debtor. The Motion was not served on Ms. Rivas nor on Mr. Wood nor on Jacoby and Meyers L.L.P. With Mr. Macaluso looking for the court to grant an assignment of attorneys fees owed to another party, Mr. Macaluso should have served those parties since any sort of ruling has a direct impact on that parties interest. The court will not enter an order adverse to the interest of a party when that entity has not been served.

Furthermore, the court's authority when it comes to attorneys fees are limited to allowing, disallowing, or disgorging legal fees. See 11 U.S.C. §§ 329, 330. The court is not going to being ordering the "assignments" of legal fees, especially when the parties whose interests would be adversely effected are not properly served or noticed on the Motion.

While the Trustee has filed non-opposition, the court is still not willing to grant a motion for assignment when Mr. Macaluso merely cites to rules and case law that concern the substitution of counsel rather than assignment of attorneys' fees. The court does not that Fed. R. Bankr. P. 2016 does cover compensation for services, nowhere in the rule does it discuss the requirements concerning assignments. The court does not consider the rule as permitting the court to grant the transfer of "all rights, title and interest in and to the accounts receivable." Instead, Rule 2016(b), as cited by Mr. Macaluso, is meant as a disclosure requirement for sharing agreement – not an authorizing rule or statute on permitting the assignment of attorneys' fees.

Therefore, because Jacoby and Meyers, L.L.P. nor Ms. Rivas were served and the court is unsure who the Motion is seeking to have the assignment against or how that party is entitled to the remaining fees, 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 Approval of Assignment of Attorney Fees filed by Pete Macaluso, Debtor's counsel, 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 to Peter Macaluso seeking attorneys' fees and the court reducing the set fees of prior counsel in this case.

37. 14-30097-E-13 IRVIN/THERESA WHITE **MOTION TO VALUE COLLATERAL OF**
TLA-1 Thomas L. Amberg **NISSAN MOTOR ACCEPTANCE CORP.**
10-14-14 [8]

Tentative Ruling: The Motion to Value secured claim 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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required

The Motion to Value secured claim 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 Nissan Motor Acceptance Corp. ("Creditor") is granted and the secured claim is determined to have a value of $13,675.00.

The Motion filed by Irvin and Teresa White ("Debtor") to value the secured claim of Nissan Motor Acceptance Corp. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2007 Infiniti M35, ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $13,675.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in 2011, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $18,791.00. FN.1. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $13,675.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

FN.1. As of the filing of this motion the Creditor has filed a proof of claim in the amount of $16,719.16. However, Debtor believes the present balance owed to Creditor to be $18,791.00 as listed in Schedule D. Dckt. 11. Exhibit. A. In both instances the claim is under-collateralized with the replacement value of $13,675.00.

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 Irvin and Teresa White ("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 Nissan Motor Acceptance Corp. ("Creditor") secured by an asset described as 2007 Infiniti M35 ("Vehicle") is determined to be a secured claim in the amount of $13,675.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $13,675.00and is encumbered by liens securing claims which exceed the value of the asset.

38. 14-30097-E-13 IRVIN/THERESA WHITE — MOTION TO EXTEND AUTOMATIC STAY
TLA-2 Thomas L. Amberg — 10-14-14 [13]

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

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

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

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

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

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

The Motion to Extend the Automatic Stay is granted.

Debtors 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. 12-22208-E-13C) was dismissed on September 17, 2014, after Debtors' failure to make plan payments. *See* Order, Bankr. E.D. Cal. No. 12-22208, Dckt. 124, September 17, 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:

1. In the spring of 2014, Debtor Irvin White switch teams at Verizon to a more stable job, although one with fewer opportunities to earn commission. The sudden decrease in his earnings caused issues in regards to the maintenance of the prior plan. However, this has provided steadier paycheck and a better ability to budget his finances.

2. Various unexpected issues with the Debtors' house, from smaller repairs to a very expensive broken water heater, made the payment of the prior plan very difficult.

3. Debtor Teresa White was in a car accident in late 2013, causing the Debtors to lose the use of their vehicle and presents the need to purchase a new care

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 granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

39. 11-30546-E-13 WILLIAM/DENISE NISSEN — CONTINUED MOTION TO MODIFY PLAN
LC-6 Lorraine Crozier — 8-29-14 [95]

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 - 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 29, 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 Modify the Plan.

William and Denise Nissen ("Debtors") filed the instant Motion to Modify Chapter 13 Plan on August 29, 2014. Dckt. 95. Debtors state the purpose of the modified plan is to increase the plan payments and the percentage to be paid to unsecured creditors. The Debtors allege this increase is possible because the Debtors have been approved for a loan modification on their mortgage. The

proposed pan requires payments as: 37 month at $297.00 per month; 2 months at $600.00 per month; 1 payment of $961.80; and 20 months at $958.00 per month. The Debtors state that the plan properly provides for the secured and priority claims as well as proposing no less than a 34% payment of all unsecured claims. The Debtors provide detailed explanation of their food, clothing, and vehicle expenses.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed a limited objection to the instant Motion on October 6, 2014. Dckt. 102. The Trustee objections on the following grounds:

1. Debtors' proposed plan relies on a loan modification with Ocwen Loan Servicing, LLC that has yet to been approved. The proposed plan reflects the terms of the loan modification that was denied earlier by the court on July 1, 2014 because there was no credible evidence that Ocwen Loan Servicing, LLC is the creditor or that it is authorized as the named principal to modify the loan. Without the loan modification, Debtors' would not have the ability to afford an increased plan payment of $958.00 and Debtors' have not filed another Motion to Approve Loan Modification. The Trustee does note that the Debtors are current on the proposed plan, including the terms of the modification, and that the Trustee believes Ocwen will abide by the proposed modification pending court approval.

DEBTORS' RESPONSE

The Debtors filed a Reply to the Trustee's objection on October 14, 2014. Dckt. 105. The Debtors state that after futile attempts with contacting Ocwen, the Debtors contacted Houser Law who represented Ocwen in the past. The Debtors allege that House Law has agreed to assist Debtors' counsel in obtaining the necessary additional evidence as soon as the information is verified. FN.1.

FN.1. Debtors hold a very powerful tool when a loan servicing company stonewalls them and hides the identity of the creditor — a 2004 examination. Such can be conducted live, in the courtroom, if necessary. Further, written interrogatories can be sent, and if not responded to, sanctions imposed. In ruling on such sanctions or addressing such issues, the court has ordered the loan servicer and purported creditor (and senior officers of both, no telephonic appearances permitted) to attend such hearings.

As to why a motion for loan modification has not been filed as of yet, the Debtors state that Debtors' counsel had a family emergency in August as well as her own medical concerns this past month. However, the Debtors state that counsel has been diligent and that Debtors' counsel will not file another motion for loan modification until proper evidence is gathered.

Debtors conclude by arguing that:

> [T]he lack of court approval at this time is not a bar to the modification of their plan. Both parties to the loan modification are abiding by its terms and the debtors are performing the modified plan. The trustee has even acknowledged the likelihood that Ocwen

would abide by the loan modification agreement and he has raised no other objection to the modified plan.

Dckt. 105, pg. 3.

DISCUSSION

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

The Debtors appear to be asking the court to allow the Debtors to not follow the requirements of the Bankruptcy Code and allow them to proceed under an amended plan without following the proper steps to get the loan modification granted. Similar to the Debtors' Motion to Incur Debt (Dckt. 66 and 89) where the Debtors requested that the court approve debts that the Debtors incurred prior to getting court approval, the Debtors are asking the court to approve the plans under the assumption that the terms of the proposed loan modification will likely be granted. There is no motion to approve loan modification pending. There is no contract signed between the Debtors and Ocwen concerning the loan modification. There is no evidence that Ocwen is the servicer or holder of the debt. The Debtors are again asking the court to take their word that a future loan modification will be finalized and to ignore the requirements of the Bankruptcy Code. FN.2.

FN.1. It is surprising that Debtors, and Counsel, are asking the court to allow these Debtors to "bend the rules" in light of Debtors conduct in this case. The Debtors unilaterally obtained loans and created a situation where they "forced" the court to retroactively approve the loans to prevent further damage to the bankruptcy estate. The court would expect that such Debtors, if they actually obtained the loans in good faith and by "mistake," and their counsel in prosecuting a case in good faith, to not try and cut other corners. Apparently the court is mistaken in such belief as to these Debtors, and unfortunately their counsel.

The proposed plan also troubles the court with respect to the ability to find that this bankruptcy case is being prosecuted in good faith, that the plan has been proposed in good faith, and that the Debtors are seeking to confirm the plan in good faith. The Debtors started this case with their finances encumbered by loans from their retirement plans. This necessitated the Debtors paying themselves back (their retirement plans) ahead of other creditor to whom they owed money.

Now, these Debtors secretly borrowed more money from their retirement plans, reducing the income from which they have to fund a plan. (Reducing it, if the court approves the borrowing rather than denying it and allowing the Debtors to take an early distribution from their retirement plan. But if such a distribution is made, the Debtors may well be incurring taxes and penalties, which will further reduce distributions to other creditors.)

When Debtors filed this case they stated under penalty of perjury their gross income was $9,553.33 a month. From this they had to have deductions of $610.19 to repay pre-petition 401k loans (effectively repaying themselves) and chose to make an additional $392.00 a month further 401k contribution. Together, the Debtors were diverting $1,002.19 a month to themselves before computing their projected disposable income.

Debtors also list $2,128.00 in monthly withholding for taxes and social security. This is 22% of the gross monthly income. Such appears to be high and may be constructed to create an annual tax return for the Debtors. On Schedule J the Debtors list the following necessary expenses: ($800) food, ($425) medical and dental, and ($825) transportation.

On August 28, 2014, the Debtors filed Supplemental Schedules I and J. Dckt. 87. The information disclosed, as compared to the Original Schedules I and J, are as follows.

Income/Deduction	Supplemental Schedule I	Original Schedule I	Increase/(Decrease) Over Original
William Nissen			
Gross	$5,143.00	$4,380.00	$763.00
Tax, Medicare, Social Security	($1,183.00)	($1,000.00)	$183.00
Insurance	($259.07)	($420.00)	$160.93
401k Voluntary Contribution	($103.00)	($225.00)	($122.00)
401k Loan Repayment	($467.50)	($448.56)	$18.94
Health Savings Account	($135.00)	($140.00)	($5.00)
Term Life Insurance	($25.35)	$0.00	$25.35
Denise Nissen			
Gross	$5,442.66	$5,178.33	$264.33
Tax, Medicare, Social Security	($1,251.11)	($1,128.00)	$123.11
Insurance	($24.61)	$0.00	$24.61
401k Voluntary Contribution	($109.00)	($167.00)	($58.00)
401k Loan Repayment	($440.87)	($161.63)	$279.24
Health Savings Account	($135.00)	$0.00	$135.00
Term Life Insurance	($25.35)	$0.00	$25.35

Expenses			Decrease in Mortgage Expense
Mortgage	($1,333.61)	($1,890.00)	($556.39)
Electricity/Gas	($200.00)	($175.00)	$25.00
Water/Sewer	($120.00)	($120.00)	$0.00
Telephone	$0.00	($200.00)	($200.00)
Cable	($222.00)	($100.00)	$122.00
Cell Phones	($250.00)	$0.00	$250.00
Home Maintenance	($308.00)	($100.00)	$208.00
Food/Housekeeping	($950.00)	($800.00)	$150.00
Pet Care	($110.00)	($110.00)	$0.00
Hair Cuts, Household Goods	($70.00)	($125.00)	($55.00)
Clothing		($100.00)	($100.00)
Laundry and Dry Cleaning		($50.00)	($50.00)
Clothing, Laundry, and Dry Cleaning	($170.00)		$170.00
Medical/Dental	($250.00)	($425.00)	($175.00)
Transportation	($931.00)	($825.00)	$106.00
Recreation	($180.00)	($125.00)	$55.00
Auto Insurance	($374.00)	($426.00)	($52.00)
			Net Increase/(Decrease) in Expenses
Total Expenses, Excluding Mortgage	($4,135.00)	($3,681.00)	$454.00

			Net Increase/Decrease in Expenses
Including Mortgage	($5,468.61)	($5,571.00)	($102.39)

This chart is telling with respect to the Debtors, the credibility of their testimony, and whether they are prosecuting this Chapter 13 case in good faith. Though their mortgage expense has been purportedly reduced by ($556.39), it has been "necessary" for the Debtors to increase their total expenses by $883.00 These increased expenses include an additional $208 for home maintenance, $50 for phone, $122 for cable and internet, $150 for food and housekeeping, and $106 for transportation (for a total of $931 a month). Debtors have some surprising expense reductions. These include: ($55) for haircuts and household goods, ($175) for medical/dental expenses, and ($52) for auto insurance (in light of the Debtors buying a new car, which is more expensive to insure).

Some of the expenses are problematic. On Original Schedule J Debtors attempted to justify an ($825) a month transportation expense because tires and repairs in the amount of $2,200 is necessary for Mr. Nissen's truck. However, the Debtors have unilaterally borrowed the money to pay that expense and are forcing the estate to repay it ahead of creditors by the unauthorized 401k loan they game themselves. See William Nissen's testimony under penalty of perjury in the Declaration in support of motion for retroactive approval of post-petition borrowing from 401k plan. Dckt. 91. Now on Supplemental Schedule J Debtors increase their transportation expense even more, piling on the money they are taking out of the estate.

Taken on its face, the Debtors are representing to the court that some of their prior stated expenses were significant overstated and that they have been paying significantly less a month on their mortgage for a number of months – thus misstating their projected disposable income by which the plan in this case was confirmed. Then, notwithstanding the overstated expenses being inaccurate, the Debtors now ask the court to believe that other expenses are actually higher, so it's a wash.

In the current proposed Second Modified Plan the Debtors purpose to fund it for the remaining twenty months at $968.00 per month. This would be sufficient to fund a 34% dividend to creditors holding general unsecured claims. Dckt. 100. This increases the dividend from the 10% provided for in the confirmed plan in this case. Dckt. 5.

While an increase, it appears to be premised on a faulty calculation and a bad faith prosecution of this case. The $968.00 a month plan payment appears to be based on the calculation of income and expenses from Supplemental Schedules I and J. Dckt. 87. Schedule J shows Monthly Net Income of $958.19. But this is reached not only after the substantial increases in transportation, food and other expenses (apparently increased solely for the purpose of offsetting the ($556.39) reduction in the mortgage, but also forcing creditors to pay back the unauthorized 401k loans the Debtors took out to buy a new car and other purchases they wanted to make – all without court authority.

These unauthorized loans increased the monthly 401k loan repayments which are required (apparently to prevent Debtors incurring even greater tax

penalties from a premature 401k withdrawal) to $908.37, an increase of $298.18 a month. In addition, the Debtors want to continue to contribute an additional to $212.00 a month into their 401k plans. In effect, Debtors are paying themselves $1,206.55 a month before determining what in good faith they should, and must, provide creditors.

The $908.37 which the Debtors have committed to be paid into their 401k plans without court authorization aside, it appears that the Debtors, if they were proceeding in good faith to rectify they wholesale violations of the Bankruptcy Code, could well have the additional monies to fund the plan:

Net Monthly Income From Supplemental Schedule J.....$958.19
Monies Not Diverted to 401k During 20 months.....$298.18
Reduction in Mortgage Payment.....$556.39

Monthly Plan Payment for Final 20 Months of Plan.....$1,812.76

The court could further address specific line items which are excessive, such as transportation, food, and other which have been increased in what appears to be a very thinly veiled attempt to divert monies from creditors, but dealing with the reduction in the mortgage payment and the 401k contribution should provide the Debtors with a minimally intrusive impact on their expenses – as based on what they stated under penalty of perjury previously in this case.

OCTOBER 21, 2014 HEARING

The court continued the hearing to afford the Debtors and their attorney to consider this tentative ruling and the Debtors' conduct in this case. Additionally, the court required that the Debtors and counsel appear at the continued hearing to address these issues and correct any error of the court or to schedule an evidentiary hearing if the Debtors want to proceed with the plan as presented so that they be afforded the opportunity to testify and present evidence which may show the court that they are proceeding in good faith and their current statements under penalty of perjury are credible.

This also afforded the Debtors the opportunity to seek and obtain a loan modification.

OCTOBER 28, 2014 HEARING

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 Motion is denied.

40. 14-27456-E-13 JENNIFER LINN-KIDWELL
WT-1 Scott Hughes

CONTINUED MOTION TO DISMISS CASE AND/OR OBJECTION TO CONFIRMATION OF PLAN BY JUNE LINN
9-11-14 [33]

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 Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 11, 2014 or October 2, 2014. Since proper service on all necessary parties was not done until October 2, 2014, the court will use that date to determine if proper service was given. By the court's calculation, 19 days' notice was provided. 14 days' notice is required for this Chapter 13 case under Local Rule 9014-1(f)(2).

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.

The hearing on the Motion to Dismiss is granted.

This Motion to Dismiss the Chapter 13 bankruptcy case of Jennifer Ann Linn-Kidwell ("Debtor") has been filed by June Linn ("Movant"), a creditor.

OCTOBER 21, 2014 HEARING

At the October 21, 2014 hearing, the court continued the hearing to 3:00 p.m. on October 28, 2014 due to calendar scheduling issues of the court. Dckt. 56.

MOTION

Movant argues that the Debtor's case should be dismissed because the amount of the Debtor's unsecured debt exceeds the debt limit set forth in 11 U.S.C. § 109(e). In support, the Movant asserts that the Debtor, Movant's daughter, misappropriated at least $370,167.00 by:

1. Writing checks to herself from Movant's account at Washington Mutual Bank and making unauthorized cash withdrawals using the automated ATM machines;

2. Making unauthorized credit card charges on her mother's American Express Gold account;

3. Making unauthorized charges on Movant's Bank of America Visa account ending in xxxx7208;

4. Making unauthorized charges on Movant's American Express "Blue Cash" account;

5. Making unauthorized charges on Movant's Bank of America Harrah's Total Rewards Visa;

6. Making unauthorized withdrawals from Movant's accounts at Downey Savings;

7. Making unauthorized withdrawals or liquidations of her mother's Certificates of Deposit and Downey Savings.

On September 11, 2014, the Movant filed a Proof of Claim No. 7 in the amount of $1,133,021.63. The Movant states that the principal among of the claim, $270,167.00, is based upon the Debtor's unauthorized use of Movant's cash, credit cards, and certificate of deposits. Double damages amounting to $740,334.00, and attorneys' fees of $22,520.63, pursuant to California Probate Code § 4231.5(c), were added.

DEBTOR'S OPPOSITION

Debtor file opposition to the instant motion on October 1, 2014. Dckt. 44. The Debtor argues that Movant's claim has never been liquidated and cannot be counted towards the Debtor's debt limits. In support of this conclusion, the Debtor argues that the claim is based on a complex state court lawsuit that has never been litigated. Debtor argues that non of the allegations in the state court action have been proven and that the Debtor has not had the opportunity to defend herself on those allegations. The Debtor argues that there are affirmative defenses that Debtor would raise in the state court action as well as that the standard to prove elder abuse must be proven by clear and convincing evidence. The Debtor argues that the there is a dispute on liability and amount. The Debtor denies that the transactions alleged in the claim were not authorized and that Debtor denies that she owes Movant anything. Debtor states that the liability of the Debtor and the alleged amounts owed are not subject to ready determination without a complex trial on the merits of the case. The Debtor also notes that the instant motion was not properly served, prior to the amended proof of service on October 2, 2014.

APPLICABLE LAW

Questions of 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....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

Pursuant to 11 U.S.C. § 109(e), an individual with regular income that owes, on the date of the filing of the petition, "noncontingent, liquidated, unsecured debts of less than $383,175" may be a debtor under Chapter 13.

The Ninth Circuit has held that a debt is liquidated for the purposes of calculating eligibility for relief under § 109(e) if the amount of the debt is readily determinable. *Slack v. Wilshire Ins. Co. (In re Slack)*, 187 F.3d 1070, 1073 (9th Cir. 1999). In *In re Fostvedt*, the Ninth Circuit Court of Appeals stated that the question of whether a debt is liquidated "turns on whether it is subject to 'ready determination and precision in computation of the amount due.'" 823 F.2d 305 (9th Cir. 1987) (quoting *Sylvester v. Dow Jones and Co., Inc. (In re Sylvester)*, 19 B.R. 671, 673 (B.A.P. 9th Cir. 1982)). Further, the Ninth Circuit Court of Appeals in *In re Wenberg* affirmed the reasoning in the Bankruptcy Appellate Panel opinion: "The definition of 'ready determination' turns on the distinction between a simple hearing to determine the amount of a certain debt, and an extensive and contested evidentiary hearing in which substantial evidence may be necessary to establish amounts or liability." *In re Wenberg*, 94 B.R. 631 (B.A.P. 9th Cir. 1988). The Ninth Circuit expanded on the *In re Wenberg* language in *In re Slack*, stating that "Whether the debt is subject to 'ready determination' will depend whether the amount is easily calculable or whether an extensive hearing will be needed to determine the amount of the debt, *or the liability of the debtor*." *In re Slack*, 187 F.3d 1070, 1074 (9th Cir. 1999); *accord In re Ho*, 274 B.R. 867, 874-75 (B.A.P. 9th Cir. 2002).

DISCUSSION

Here, the $1,133,021.63 claim was being litigated in state court at the time this bankruptcy case was filed. At this time, the automatic stay has

prevented Creditor from prosecuting that state court case. The movant has not sought relief from the automatic stay to prosecute that state court litigation.

The court's analysis begins with what Creditor is asserting as a claim. Proof of Claim No. 7 states the Claim as follows:

A. Amount of Claim.....$1,133,021.63.

B. Basis of Claim.....Damages Arising From Elder Abuse.

C. Dollar Damages as of Filing.....$ 370,167.00.

D. Cal. Probate Code § 4231.5(c) Damages.....$ 740,334.00.

E. Cal. Probate Code § 4231.5(c) Atty Fees...$ 22,520.63.

A copy of the State Court Complaint (Because it is in connection with a proceeding in the Probate Court the Complaint is titled a "Petition." For clarity of discussion, the court will refer to it as a "Complaint.) is attached to Proof of Claim No. 7. The Complaint states the damages being asserted as,

A. Debtor charged at least $84,000.00 to Movant's credit cards and paid the unauthorized charges with Plaintiff's money.

B. Debtor, without authorization, $29,344.34 in monies from Movant's bank accounts (through checks written to Debtor). The checks are detailed in the Complaint.

C. Debtor withdrew, without authorization, $6,609.00, in monies through ATM transactions from Movant's bank accounts.

D. Debtor withdrew, without authorization, $250,000.00 from Movant's bank accounts at Downey Savings.

These dollar amounts are specifically identified and the amount of damages being asserted are "liquidated." The court has little more to do than add up the numbers for the various transactions which are specifically identified in the Complaint and Proof of Claim No. 7.

Movant also asserts the right to $740,334.00 of damages pursuant to California Probate Code § 4321.5(c). This code section provides,

> (c) If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property that belongs to a principal under a power of attorney, or has taken, concealed, or disposed of property that belongs to a principal under a power of attorney by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action to recover the property or for surcharge. In addition, except as otherwise required by law, including Section 15657.5 of the

> Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs to the prevailing party. The remedies provided in this section shall be in addition to any other remedies available in law to the principal or any successor in interest of the principal.

The damages under this section are simply computed as two-times the actual damages arising from the "elder abuse." The state provides for the additional damages to be twice the actual damages, and does not provide that such damages are in some amount, in the discretion of the trial court of up to twice the actual damages. Further, the status provides that the violating party "shall" (not may) be liable for the additional damages.

Again, the amount of the additional damages sought to be required can be readily determined by the court merely multiplying the action damages by two.

This Code section also provides that attorneys' fees may (not "shall"), but are not required, to be awarded to a party prevailing in a recover of damages. While the right to attorneys' fees (the same as the other damages) may be disputed, the amount claimed can be readily determined by the court. As with routine fee applications the court can look at the simple fee statements, add up the amounts which relate to the dispute, and state the number.

Opposition

The Debtor opposes the Motion asserting that the claim is (1) contingent, (2) disputed, and (3) not liquidated. While saying the word "contingent" in the Opposition, no clear contention is made as to why or how the obligation is contingent. No unfulfilled condition precedent is asserted which must be satisfied before Movant could assert the alleged rights. *Fostvedt v. Dow (In re Fostvedt)*, 823 F.2d 305, 306-307, (9th Cir. 1987). Rather, Debtor makes it clear that she disputes the obligation and that no court has "liquidated" the final amount which may be owed. What is clear is that Movant asserts that Debtor engaged in wrongful conduct in the past, that wrongful conduct has resulted in damages, and based on the wrongful conduct which occurred Debtor is obligated to Movant for a significant amount of money. All of the events have occurred by which Debtors liability or non-liability will be determined. The obligation, if any, is not contingent.

It is clear that Debtor "disputes" that Movant is entitled to relief. However, "disputed" is not a statutory element in making the 11 U.S.C. § 109(e) determination. See the plain language of 11 U.S.C. § 109(e).

The final element is whether the amount of the alleged debt is "liquidated." As discussed above, the Ninth Circuit Court of Appeals and other Courts of Appeals have address this issue in a pragmatic manner. The debt is liquidated, for 11 U.S.C. § 109(e) purposes,

> "if the amount of the creditor's claim at the time of the filing the petition is ascertainable with certainty, a dispute regarding liability will not necessarily render a debt unliquidated. Whether the debt is subject to "ready determination" will depend on whether the amount is easily

> calculable or whether an extensive hearing will be needed to determine the amount of the debt, or the liability of the debtor. See *In re Wenberg*, 94 B.R. at 634. Therefore, the mere assertion by the debtor that he is not liable for the claim will not render the debt unliquidated for the purposes of calculating eligibility under § 109(e).
>
> According to Black's Law Dictionary, a liquidated debt is one in which "it is certain what is due and how much is due." Black's Law Dictionary 930 (6th ed. 1990). "**Therefore, the concept of a liquidated debt relates to the amount of liability, not the existence of liability**." *Verdunn*, 89 F.3d at 802. Even if a debtor disputes the existence of liability, if the amount of the debt is calculable with certainty, then it is liquidated for the purposes [*1075] of § 109(e). See *In re Mazzeo*, 131 F.3d at 304; *Verdunn*, 89 F.3d at 802; *In re Knight*, 55 F.3d at 235."

Slack v. Wilshire Ins. Co., 187 F.3d at 1074. [Emphasis added.]

In *Slack* the Ninth Circuit Court of Appeals concluded that the debt was "liquidated" in light of the stipulation of the parties. The court rejected the debtor's contention that the prior Ninth Circuit Decision *In re Fostvedt* stands for the proposition that merely because a debtor "disputes" a debt, that renders the debt "unliquidated."

Some cases which have applied this standard include the following:

Sharp v. Brandman, 2006 U.S. Dist. LEXIS 89824 (N.D. Cal. 2006).

Creditor asserted the right to receive consequential damages for out of pocket expenses to finance a business based on an oral agreement to purchase a partnership interest for $125,000.00. Creditor asserted that the court could add up the receipts to determine the amount of damages at issue. For the claim at issue, the District Court concluded that the damages which could be claimed only to the extent "special or particular circumstances from which they arise were actually communicated to or known by the breaching party [citations omitted]." Further, that a party asserting a breach of contract claim must do everything reasonably possible to minimize his losses and reduce the damages. The District Court concluded that since a key element of the amount of any damages was whether the business would have succeeded, for which an extensive trial would be required.

Additionally, the District Court concluded that the creditor had not shown that the expenses were for the alleged business, but also could well have been for personal use.

United States v. Ahmed (In re Ahmed), 362 B.R. 445 (C.D. Cal. 2006).

In *Ahmed* the court addressed an asserted tax debt claimed by the Internal Revenue Service. Though no determination of the tax liability had been made and the debtor disputed both the liability and amount, "The calculation of the amount owed was explained in the notices of deficiency and readily ascertainable through calculations based on the fixed legal standards of the tax law. As previously discussed, a tax assessment is an established liability

with the force of a judgment in the amount of the assessment. Taxpayers owe assessments to the IRS unless and until they can prove otherwise." *Id.* at 450.

Sullivan v. Java Oil Ltd. (In re Sullivan), 2006 U.S. Dist. LEXIS 43734 (E.D. Cal.

Though the debtor asserted that the creditor's claim was based on a "complex tort theory," the District Court affirmed the Bankruptcy Court's determination that the debt was "liquidated" for 11 U.S.C. § 109(e) purposes. At issue were fees and costs being sought by the Plaintiff in the non-bankruptcy action which had not yet been awarded by the court. Civil Minutes, *In re. Sullivan*, Bankr. E.D. Cal. 05-30714, Dckt. 67. Attorneys' fees and costs are damages asserted which "are readily calculable by the court." The amount of fees and costs sought were in excess of $1,000,000.00, but were still "readily calculable by the court."

Braun v. Argi-Systems, 2005 U.S. Dist. LEXIS 37604, *18, (E.D. Cal. 2005).

Though the debtor asserted that the debt was "unliquidated," because it was subject to an asserted offset for defective products provided by the creditor, the Bankruptcy Court concluded and the District Court affirmed that such an offset did not render the debt "unliquidated." This was true even though an offset has the effect of reducing the creditor's debt.

The Readily Calculable Claim in This Case

Movant asserts, in substance, that Debtor stole $ 370,167.00. This was done in the context of the Debtor being Movant's daughter and having control over Movant's bank accounts and credit cards. Movant provides the court with a "punch list" of credit card changes, checks, and ATM withdrawals from the Movant's account which Movant states were not authorized. In addition, Movant claims statutory double additional damages and attorneys' fees and costs.

Debtor contends that the damages claimed are "based on a complex state court lawsuit which has never been litigated." Further, that Debtor has not yet been given the opportunity to defend herself in that suit. (Presumably, Debtor means that the trial has not occurred and not that because of this bankruptcy filing and the automatic stay Movant has been precluded from proceeding with that litigation and Debtor has been forced to present her defense in that action.)_

On its most basic level, the dispute is not what Movant asserts was taken, but whether Debtor was authorized to take the monies. Debtor has filed a pleading titled "Objection to Claim," which purports to "objection" to Movant's Proof of Claim No. 7. Dckt. 39. In it, Debtor states her "objections" as follows,

a. "The allegations of liability and amounts have never been proven."

b. "The debtor has never had her day [sic.] court to defend herself."

c. "The claim also includes double damages and attorney's fees that have never been litigated."

d. "Because the claim is based on complicated allegations of liability and amounts that have never been proven and because the causes of action in the complaint are subject to affirmative defenses, the claim is contingent, disputed and unliquidated."

e. "June Linn is not entitled to any of the amounts in the claim until she proves she is entitled to it. Debtor therefore requests that the claim be completely disallowed."

f. "The complaint is not based on a bill or a contract signed by the debtor. The liability and the amounts alleged to be owing in the complaint have never been proven in a court of law. Why should this creditor be allowed to file a claim, triple the amount allegedly owed, add attorney's fees and then expect the claim to be allowed when it has never gone to court?"

g. "If the claim were allowed, it could be not be paid in chapter 13 because of the debt limits. Because of that the claim should be completely disallowed."

h. "The alleged claim is also subject to multiple affirmative defenses that must be actually litigated before June Linn is automatically entitled to an allowed claim."

i. The plaintiff is the debtor's 88 year old mother and there are issues of competence that should also be litigated before any liability or amounts can be determined. June Linn should be forced to take the witness stand and prove up her case."

j. "However, June Linn is dead wrong when she alleges that the amount of her claim is subject to ready determination with certainty. She still has to prove the allegations before any liability or amounts can be determined."

Id.

While long on rhetoric, the Objection to Claim is short on several essential items. The first is legal authority for Debtor's contentions. The second is stating any actual "objection" to the claim. It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm),* 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The "Objection to Claim" appears merely to be a rehash of the opposition to the Motion to Dismiss – contending that the state law claim is so complex as to render it "unliquidated."

The $ 370,167.00 portion of the claim is "liquidated," as that term is used in 11 U.S.C. § 109(e). The court can simply determine what dollar amounts are being claimed, with the evidence, to the extent Debtor disputes the amount

being claimed, from third party records (bank statements, credit card statements) for which no significant hearing would be required.

It is further contended that Debtor "in bad faith, wrongfully took, concealed, and/or disposed of property [of Movant], and/or took, concealed and/or disposed of property by the use of undue influenced in bad faith and/or through the commission of elder financial abuse as defined in section 15610.30 of Welfare and Institutions Code, therefore justify an award of damages equal to twice the value of the property pursuant to Probate Code section 859, as wells as attorneys' fees and costs pursuant to Probate Code section 859." Complaint, Proof of Claim No. 7 attachment. The "elder abuse" provided for in California Welfare & Institutions Code § 15610.30 requires that the conduct be done for a "wrongful use or with intent to defraud," or by "undue influence" (defined in Cal. Wel. & Inst. Code § 15610.70 as being conduct which causes another person's free will to be overcome and creates an inequity).

While the $370,167.00 in damages are "liquidated," the additional damages and the right to attorneys' fees are limited to those which arise from conduct which was the "wrongful use [of the asset] or with intent to defraud," or by "undue influence" is a bit more complicated. These additional damages have a knowledge component, and some portions of the claim may have been with such knowledge and some may not have been with such knowledge. See *Teselle v. McLoughlin*, 173 Cal.App. 4th 156 (2009), reh'g denied 2009 Cal.App. LEXIS 796 (2009). The right to attorneys' fees flows form a finding of "elder financial abuse" under California Welfare & Institutions Code § 15610.30, which includes this intent component (as opposed to an unauthorized but mistaken taking). Cal. Wel. & Inst. § 15657.5.

Therefore, for purposes of 11 U.S.C. § 109(e) the double additional damages and attorneys' fees are "unliquidated."

On Amended Schedule F Debtors list $75,022.78 in general unsecured claims (excluding Movant). Dckt. 15. When added to Movant's "liquidated" unsecured claim of $370,167.00, the total non-contingent, "liquidated" unsecured claims for purposes of 11 U.S.C. § 109(e) is $445,189.78. This exceeds the $383,175.00 maximum proscribed by 11 U.S.C. § 109(e) for the Debtor to be eligible for relief under Chapter 13.

Debtor Not Left Without Bankruptcy Relief

Though the magnitude of Debtor's debt preclude relief under Chapter 13, the Debtor is not left out in the cold. She could proceed under Chapter 11. The court can well envision a good faith plan which affords Movant the opportunity to prosecute her claim in state court (or in this court) to determination and allows the Debtor to preserve and maximize her assets (which ultimately Movant would look to if she prevails).

Therefore, the Debtor being ineligible for relief under Chapter 13, the court grants the Motion and orders the case 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 is granted and the case is dismissed.