

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

November 5, 2013 at 3:00 p.m.

1. [12-37003-E-13](#) DOROTHY BROOKINS MOTION TO CONFIRM PLAN
PGM-5 Peter Macaluso 9-24-13 [[190](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 24, 2013. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

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

The court's tentative decision is to deny the Motion to Confirm the Amended Plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee objects on the basis that the proposed plan may not be the Debtor's best efforts. Debtor is above median income proposing a 60 months plan paying 0% to unsecured claims. Debtor has made drastic changes to her budget without any explanation of the changes and why they have occurred. The Third Amended Plan proposed to surrender her residential real property and proposed a rent expense on Schedule J of \$2,500.00, which is in excess for a household of 2. The current Local Housing and Utilities Standard allows for \$1,750.00 for mortgage/rent costs.

The Trustee also states Debtor has also increased her food costs from \$400 to \$600 and transportation from \$350 to \$406 per month without explaining why an increase is necessary. Debtor increased her business expenses from \$22,560 to \$26,260 (\$4000) without any indication of what expenses have changed in the operation of her care home and has not amended the business income and expense budget. Debtor had previously proposed a plan of \$7,500 per month and now is proposing \$1,430.00.

November 5, 2013 at 3:00 p.m.

DEBTOR'S LETTER

Debtor filed a handwritten letter to the court on October 17, 2013. Dckt. 119. The letter appears to state that Debtor has made payments every month, was advised not to make payments by her counsel, but wanted to make payments while she could find someone to do a modification. Debtor states she was late one payment because she was levied for \$14,000 but that she has paid over \$30,000 and does not know where the money went. Debtor states she feels she has been misrepresented.

COUNSEL'S RESPONSE

Counsel for Debtor replies that he substituted into the case after the debtor was abandoned by her original bankruptcy attorney. Counsel states Debtor owed significantly more on her home than the value, was behind a significant amount and the budget prepared did not make sense.

Counsel states that Debtor still wants to keep her home but it does not make financial sense given the significant tax liability and given the payments would need to be in excess of \$7,500.00 per month.

Counsel files a response that Debtor is not able to obtain a loan modification as stated in open court by the creditor, but that she is continuing to be solicited by persons claiming that they can force the loan modification.

DISCUSSION

This bankruptcy case was commenced by the Debtor on September 20, 2012. See filed the bankruptcy case and attempted to prosecute her case in *pro se*. Petition, Dckt. 1. The Statement of Financial Affairs listed the Debtor as having income from employment or operation of a business in the amount of \$76,628 in 2010 and \$64,470 in 2011. No information was provided for her income for the first eight months of 2012. *Id.* at 6. All other questions on the Statement of Financial Affairs are answered "None."

On October 19, 2012, the Debtor filed her Chapter 13 Statement of Current Income and Calculation of Commitment Period (Form 22C). Dckt. 20. The Debtor states that she had gross average monthly wages, salary, tips, and bonuses of \$7,400.00 for the six months preceding the commencement of her bankruptcy case. Non income or expenses are listed for the operation of a business. No other information is provided and the computation of the applicable commitment period was not made by the Debtor. The Form 22C was not signed by the Debtor.

The Debtor also filed her Schedules on October 19, 2012. Dckt. 21. On Schedule A the Debtor states that she owns the 7309 Pocket Road property, asserts her interest as "wife" (Statement of Financial Affairs Question 1, Dckt. 1 at 11, states that "none" in response to the name of a current or former spouse), does not state a value for the property, and does not list any claims secured by the property. *Id.* at 3. On Schedule B the Debtor lists having personal property having a value of \$9,000.00. *Id.* at 4-6. The personal property consists of "household goods" with a value of \$5,000.00; "wearing apparel" with a value of \$1,000.00, and "jewelry" with a

value of \$3,000.00. The Debtor claimed this personal property as exempt on Schedule C, but did not claim an exemption in the Pocket Road Property. *Id.* at 7.

On Schedule D the Debtor did not list the name of a creditor, but list "7309 Pocket Road" as a creditor, having a lien on property with a value of \$350,000, and having a secured claim in the amount of \$350,000. *Id.* at 8. The Debtor listed no Schedule E unsecured priority claims and no Schedule F general unsecured claims.

For income, the Debtor lists \$7,500.00 in wages, salary, and commissions a month on Schedule I. *Id.* at 17. No deductions are made for income, self-employment, Social Security, or any other items. On Schedule J the Debtor lists one expense, \$7,400.00 a month for rent or mortgage, real estate taxes, and property insurance. *Id.* at 18.

The Debtor filed a Chapter 13 Plan on October 19, 2013. Dckt. 19. The proposed Chapter 13 Plan did not specify a monthly plan payment to be made by the Debtor, did not set a plan term, and made no provision for payment of administrative expenses. The Debtor listed one Class 1 Claim, identifying the creditor as "BSI Financial," to whom she owed an arrearage of \$66,986.65. The collateral for this creditor is not identified, and the Class 1 treatment does not specify an arrearage dividend or the currently monthly payment to be made through the Chapter 13 Plan for this claim. *Id.* at 2.

No other creditors are provided for in any other classes of claim and no provision is made for the holders of general unsecured claims. The Class 7 treatment portion of the Chapter 13 Plan is blank. *Id.* at 4.

The Claims filed in this bankruptcy case do not comport with the Schedules filed by the Debtor. The Claims filed include the following.

Creditor	Amount of Claim	Arrearage	Collateral Priority
BSI Financial, Inc. Claim No. 5	\$657,934.51	\$110,509.90	7309 Pocket Road Property
Internal Revenue Service Claim No. 6	\$727,844.01	Claim for Tax Years 1999, 2000, 2001, 2002, 2003, 2004, 2006, 2009, 2010, and 2011. Income Taxes.	\$27,924 Secured Tax Lien \$21,156.18 Priority
			\$678,763.83 Unsecured
Franchise Tax Board Claim No. 7	\$110,775.27	Claim for Tax Years 2001, 2002, 2003, and 2004. Personal Income Tax.	Tax Lien

Employment Development Department Claim No. 9	\$7,523.28		\$5,633.16 Priority
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On December 12, 2012, the Chapter 13 Trustee filed a Motion to Dismiss the bankruptcy case. Dckt. 27. The grounds stated were that (1) the Debtor had failed to commence making Chapter 13 Plan payments, (2) Debtor failed to file and serve a motion to confirm the proposed Chapter 13 Plan, (3) the Debtor failed to attend the First Meeting of Creditors, (4) the Debtor failed to provide payroll advices for her income, and (5) the Debtor failed to provide copies of tax returns. On December 19, 2013, the Debtor (in *pro se*) filed an opposition to the Motion to Dismiss. Her objection states the following:

- A. The Debtor's son was in a motorcycle accident several weeks after the bankruptcy case was commenced;
- B. The Debtor had to attend to the medical needs of her son, which hampered her ability to address the bankruptcy case matters;
- C. Until reading the Trustee's Motion to Dismiss, the Debtor did not understand that she had to also file a motion to confirm a plan;
- D. The Debtor did not attend the First Meeting of Creditors because she was ill and also unaware that she had an obligation to appear at the First Meeting of Creditors.

On December 17, 2012, the Debtor filed amended Schedules and Statement of Financial Affairs. Dckt. 39. Amended Schedule A lists the Pocket Road Property having a value of \$245,000.00 and being subject to secured claims in the amount of \$657,934.00. *Id.* at 1. Schedule B is amended to state that the Debtor has no personal property assets (all line items of Amended Schedule B marked "None"). *Id.* at 2-5. Amended Schedule C lists no property claimed as exempt. *Id.* at 6.

For Amended Schedule D, Points West Financial Group, LLC is listed as having a \$657,934.00 claim, which is secured by unidentified property having a value of \$245,000.00. T.D. Auto Finance is listed as having an unknown claim secured by an unidentified vehicle (no vehicle listed on the original or Amended Schedule B). *Id.* at 7. Amended Schedule E lists no priority unsecured claims. *Id.* at 8. On Amended Schedule F the Debtor lists the Internal Revenue Service having general unsecured claims totaling \$123,736.00. *Id.* at 9. No other unsecured claims are listed by the Debtor.

The information on Amended Schedule I changes dramatically as well. The Debtor lists monthly gross wages, salary, and commissions of only \$3,612.92. No deductions are made for income taxes, self-employment taxes, Social Security, or any other items. For Amended Schedule J the monthly mortgage payment, taxes, and insurance drops to \$1,500. *Id.* at 13. The Debtor now lists an additional \$1,800 in expenses for utilities, home maintenance, food (only \$150 a month), clothing (\$0.00), and medical and dental (\$0.00), transportation, charitable (\$300 a month).

The Amended Statement of Financial Affairs, Question 1, states only that the Debtor had income (for an unstated year) or \$20,677.00 from "Dorothy's Board and Care Home." All other questions on the Amended Statement of Financial Affairs are answered "None." *Id.* at 17-21.

On December 19, 2012, the Debtor (in *pro se*) filed a Motion to Value the Pocket Road Property and a Motion to confirm her Chapter 13 Plan. Dckts. 45, 47. No evidence was filed in support of either motion. The Proof of Service for the Motion to Value the secured claims was served only on the Chapter 13 Trustee, the U.S. Trustee, and a law firm identified as "Attorney for Points West Financial Group SPE, LLC." Dckt. 46. The Certificate of Service for the Motion to Confirm the Chapter 13 Plan, Dckt. 49, is a copy of the Certificate of Service for the Motion to Value.

At the hearing on the Chapter 13 Trustee's Motion to Dismiss, the Debtor advised the court that she had paid \$7,000.00 to various attorneys and petition preparers in connection with this case and her financial woes. Stephen Ruehmann appeared in court on the hearing date and confirmed that he had received \$3,500.00 from the Debtor, believing that the source of it was a gift to her from a third-party. The court ordered Mr. Ruehmann to turn the \$3,500.00 over to the Chapter 13 Trustee. Order, Dckt. 60; Civil Minutes, Dckt. 62. The court continued the hearing to allow for the payment of money from counsel and the Debtor an opportunity to obtain counsel.

On January 29, 2013, Debtor's current counsel substituted into this case. Dckt. 82. With counsel representing the Debtor, the court further continued the Trustee's Motion to Dismiss and the Motion for Relief From the Automatic Stay filed by Points West Financial Group, LLC.

On February 22, 2013, with the assistance of current counsel, the Debtor filed a second set of amended Schedules. Dckt. 99. Second Amended Schedule A lists the Pocket Road Property as having a value of \$300,000 and being subject to liens in the amount of \$664,428.90. *Id.* at 4. Second Amended Schedule B now lists personal property having a value of \$27,924.45. *Id.* at 5-7. Now disclosed is a bank account for "Dorothy's Board & Care Home, dba Brookings Care Home #1 & #2." The Debtor also lists an interest in "Brookings Board and Care Home." The Debtor also now lists owning three vehicles.

Second Amended C specifically exempts a number of assets. *Id.* at 8. Second Amended Schedule C now lists Point West Financial Group, LLC, the Internal Revenue Service, Franchise Tax Board, T.D. Auto Finance, and Sacramento County (real property taxes). *Id.* at 9-10. Second Amended Schedule E lists only the Internal Revenue Service as having a priority unsecured claim, which is listed in the amount of \$1.00. *Id.* at 12. (The court interprets this as an acknowledgment of some priority claim, but counsel not having been provided sufficient information from the Debtor as to the amount which could be stated by the Debtor under penalty of perjury.) Second Amended Schedule F lists general unsecured claims totaling \$7,030.67. *Id.* at 13.

On Second Amended Schedule I, now represented by counsel, the Debtors makes dramatically different statements as to her income. *Id.* at 16. She lists current wages, salary, and commission of \$1,715.00 (from which there is no withholding), business income of \$28,935.00, Social

Security Income of \$1,214.00, and \$2,000.00 of "Son's Help for Mom" a month. These amounts total \$33,864.00 a month.

For Second Amended Schedule I the Debtor now lists \$26,364.00 a month in expenses (excluding any rent, mortgage, property taxes, or real property insurance). *Id.* at 17. The information on Second Amended Schedule J bears little in common with the financial information provided in the prior schedules under penalty of perjury by the Debtor before she was represented by counsel. The business expenses include \$3,015.00 for rental of real property.

The Second Amended Statement of Financial Affairs also provides greatly different information than given by the Debtor, in pro se, making those statements under penalty of perjury. *Id.* at 21-26. The information now disclosed includes the following:

- I. Question 1, Income From Employment or Operation of Business, *Id.* at 21.
 - A. \$0.00 2012 gross income (filing year to date)
 - B. \$25,278 2011 gross income
 - C. \$0.00 2010 gross income

- II. Question 2, Income Other Than From Employment or Operation of Business, *Id.* at 21-22.
 - A. \$ 28,935 2012 Gross Income - Business
 - B. \$ 0.00 2012 tax refund (filing year to date)
 - C. \$ 0.00 2012 Social Security
 - D. \$ 0.00 2012 Social Security Grandson
 - E. \$ 16,020 2011 Social Security
 - F. \$ 0.00 2011 Social Security Grandson
 - G. \$24,1353 2011 Gross Income - Business
 - H. \$230,713 2010 Gross Income - Business

- III. Question 3, Payments to Creditors, *Id.* at 22
 - A. \$1,800 paid to TD Auto Finance for "car payments."

- IV. Question 18, Nature, Location, and Name of Business, *Id.* at 26.
 - A. Dorothy's Board and Care
 - 1. Board and Care Home
 - 2. 7309 Pocket Road
 - 3. 1979 to Present

 - B. Brookings Home #1
 - 1. Board and Care Home
 - 2. 7512 Handly Way
 - 3. 1979 to Present

 - C. Brookings Care #2
 - 1. Board and Care Home
 - 2. 7512 Handly Way
 - 3. 1984 to Present

With the assistance of counsel, the Debtor filed a First Amended Plan. Filed February 26, 2013, Dckt. 104. The First Amended Plan required the Debtor to make monthly plan payments of \$7,500.00. The Plan was premised on the Debtor obtaining a loan modification. The Trustee dismissed the then pending Motion to Dismiss (DCN: TSB-1). Dismissal, Dckt. 124.

Though not proceeding with a motion to dismiss at the time, the Chapter 13 Trustee objected to the First Amended Plan, as did Points West Financial Group SPE, LLC. The court sustained the objections and denied confirmation. Civil Minutes, Dckt. 135. As stated by the court, due to the massive debt payments required for the Points West Financial Group SPE, LLC claim, the Debtor could not make such payments. Though the Debtor wanted to obtain a loan modification from that creditor, the court could not force such a modification, and the creditor did not so agree. Those Civil Minutes review the priority unsecured claims in this case and the Debtor's failure to provide for them.

The court denied without prejudice the Points West Financial Group SPE, LLC motion for relief from the stay based on the court having ordered the Debtor to make \$5,000.00 a month adequate protection payments to this creditor. Civil Minutes, Dckt. 140.

The Debtor filed her Second Amended Chapter 13 Plan on May 3, 2013. Dckt. 142. Again, it requires \$7,500 a month plan payments. The Second Amended Plan again caught the objections of the Chapter 13 Trustee and Points West Financial Group SPE, LLC. Dckts. 151, 154. This creditor also filed a new Motion for Relief From the Automatic Stay, Dckt. 155. The court denied the Motion to Confirm the Second Amended Plan. Civil Minutes, Dckt. 169. Points West Financial Group SPE, LLC unequivocally states that it has denied the Debtor's request for a loan modification. The Debtor continued to be in default of the \$7,500 a month payments under the proposed Second Amended Plan.

The court continued the hearing on the second Motion for Relief From the Automatic Stay filed by Points West Financial Group SPE, LLC. Finally, on August 6, 2013, the court filed its order granting this creditor relief from the automatic stay. Order, Dckt. 187. The court could no longer delay the exercise of this creditor's rights in the face of the Debtor's inability to address the debt through a confirmable Chapter 13 Plan.

On September 24, 2013, the Debtor filed the current Chapter 13 Plan, which requires only \$1,430 a month plan payments. Dckt. 189. The Debtor is surrendering the Pocket Road Property.

Chapter 13 Trustee's Opposition

The Chapter 13 Trustee opposes confirmation based on the Debtor failing to provide an explanation for the dramatic changes in her expenses (since she is no longer attempting to pay the debt to retain the Pocket Road Property), and that her proposed rent of \$2,500 a month is unreasonable and unsupported by the evidence. This includes the Debtor increasing her business expenses from \$22,560 a month to \$26,260 a month, without explanation. (The court also questions how the expenses would increase in

the face of surrendering the Pocket Road Property which is listed as one of her business addresses, as well as her residence.)

To this, the Debtor provided her personal letter. Dckt. 199. In this letter the Debtor states that she desperately wants a loan modification, that she could have paid the claim, and that she stopped paying only because her attorney told her to stop paying. Such is clearly not supported by the evidence in this case. Further, it demonstrates that the Debtor does not, or does not want to understand, that Points West Financial Group SPE, LLC does not and will not give her a modification of the loan secured by the Pocket Road Property. The Debtor cannot afford to retain that property.

The court recalls this case very well. It is clearly different from the vast majority of the Chapter 13 cases before this court. The Debtor materially misstated the information on her original and First Amended Schedules and Statements of Financial Affairs. She has failed to pay income and other taxes for many years, apparently choosing to ignore those financial operations to subsidize her businesses. The Debtor failed to disclose her businesses in this case.

In January 2012 the court was prepared to dismiss this Chapter 13 case due to the substantial lack of disclosure and apparent inability of the Debtor to prosecute the Chapter 13 case. Only because her current counsel, after meeting with the Debtor, stepped up to advance her case. The court held Points West Financial Group SPE, LLC at bay, conditioned on the Debtor making \$5,000.00 a month adequate protection payments which she determined if a loan modification could be negotiated. During this time the Debtor continued to operate all of her businesses, and continued to use this creditor's collateral to generate income.

The Debtor states that she is not happy with her current counsel and believes that he should do something so she can keep her residence. This would require her counsel to force Points West Financial Group SPE, LLC to modify the loan. He cannot, and the court cannot force that occur. While the Debtor appears to take exception to some of the advice provided by the attorney, such as "[Attorney] told [Debtor] you [judge] were not going to allow me to keep my home he said he knows you," such appears to be an accurate statement as to what the court may approve as part of a plan. It sounds as though what the attorney was saying was something like, 'I know this judge, he will follow the law and we cannot get him to confirm a plan which is not permitted under the Bankruptcy Code.'

Counsel has filed a Response which addresses several points. Dckt. 205. First, he addresses the financial underpinnings of this case concerning the Debtor's budget. As the court has noted, the original and Amended Schedules J filed by the Debtor did not make economic sense. Second, the Debtor is being solicited by persons who are selling services to obtain a loan modification. The Debtor, focused on keeping this home, continues to desire a plan which allows her to keep her home.

At the end of the day, the Third Amended Plan before the court does not comply with 11 U.S.C. §§ 1322 and 1325. The declaration in support of the Motion to Confirm the Third Amended Plan does not provide the court with sufficient information as to the current finances, this case now being more

than a year old. The Debtor has not explained the substantial increase in business expenses. Additionally, the Debtor has an excessive expense for rent, with no evidence to show that (1) it is an actual expense and (2) that it is a reasonable expense.

Even more importantly, the Debtor has stated that she does not want this plan but wants a Chapter 13 Plan which allows her to keep her home. Though represented by knowledgeable, experienced, aggressive consumer counsel, the Debtor does not accept his advice and counsel, instead stating that she blames him for not confirming (an unconfirmable) plan. Based on the statements in the Response, it appears that the Debtor is continuing to fall prey to persons who are appealing to her all consuming desire to keep her home by forcing Points West Financial Group SPE, LLC to modify her loan.

This court deflected the Chapter 13 Trustee's Motion to Dismiss and the creditor's Motion for Relief From the Automatic Stay to afford the Debtor time to address a loan modification, if one was possible. When Points West Financial Group SPE, LLC unequivocally stated that it would not agree to a loan modification, the Debtor has been given additional time to confirm a plan which is not built on a legally impossible basis. The Debtor has equally unequivocally stated in her recent communication to the court that she does not want to proceed with any plan that does not include retaining her home

The choice is the Debtors, as the court does not force an individual to perform any plan they do not wish to confirm.

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

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

2. [13-27106-E-13](#) MARK RUBENDALL
DEF-1 David Foyil

MOTION TO CONFIRM PLAN
9-18-13 [[28](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 18, 2013. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

The court's tentative decision is to deny the Motion to Confirm the Amended Plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

The Chapter 13 Trustee objects to confirmation, stating that not all issues have been resolved from his Objection to Confirmation, including that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). The Debtor's Plan proposes to surrender his real property located at 6826 Greenbay Road, Arbuckle, California, but the Debtor admitted at the First Meeting of Creditors held on June 27, 2013 that he is still living in the real property, in a trial loan modification and keeping the real property.

The Plan proposes to pay \$220.00 for 60 months with a 7.30% dividend to unsecured creditors, which totals \$9,284.80. The Debtor's Schedule J reflects \$500.00 for rent and the Debtor admitted at the First Meeting of Creditors that the trial loan modification payment was \$957.00 per month. It does not appear that the Debtor can afford the \$220.00 plan payment, while paying \$957.00 for the loan modification.

The Debtor's Schedule I reflects 5 dependents and income in the amount of \$2,477.92. The Debtor's budget is not sufficient for the maintenance and support of the Debtor or the Debtor's dependents. The Debtor lists the following expenses on Schedule J for a household of 6 people for 5 years:

\$0.00 Home Maintenance

\$550.00 Food
\$25.00 Clothing
\$15.00 Laundry
\$10.00 Medical and Dental
\$250.00 Transportation
\$25.00 Recreation

The Trustee also states that the amended plan filed September 18, 2013 appears to mirror his original plan and the residence continues to be classified in Class 3. The Declaration states that the loan modification on the first deed of trust is final but that he has not started a trial loan modification on the second deed of trust.

Additionally, the Trustee argues that the debtor offers no explanation in his declaration about the amended income. The debtor now lists his income as \$4,137.50 per month. Mark's Handyman business income was increased by \$1,116.50 per month, his wife's support income was increased by \$277.08 and her EDD/SSI income was increased by \$266.00 per month. His income has been increased by a total of \$1,659.58 per month. The debtor offers no explanation in his declaration.

Updated Income and Expense Statements, filed as Exhibit D in support of the Motion (Dckt. 32), provide conflicting information. The Debtor states in his declaration that his annualized currently monthly income from Form B22 is \$29,735. Declaration, Dckt. 31. This averages \$2,478 a month. On the Updated Income Schedule, the Debtor increases his monthly business income to \$2,982. The Debtor offers no explanation as to how this is a correct number and the actual six month average on Form B22 is incorrect.

The Updated Expense Statement filed as Exhibit D increases expenses by \$1,660 a month from Schedule J (Dckt. 1 at 20). This includes increasing the mortgage payment to \$968 from the rent of \$500 listed on Schedule J, increasing food to \$750 from the food expense of \$550 on Schedule J, and increasing business expenses to \$1,041 from the \$50 stated on Schedule J.

The Debtor offers no explanation as to how he could have truthfully and honestly stating under penalty of perjury, the lower expenses on Schedule J. Interestingly, the expenses stated on Schedule J were the amount necessary to generate "Monthly Net Income" of \$217 - the amount necessary for the proposed Chapter 13 Plan of \$220 under the original Chapter 13 Plan.

Now, in seeking confirmation of a the Amended Chapter 13 Plan with a monthly payment of \$220, the Debtor has raised his income exactly the amount necessary to account for the increased expenses so that there is still "Monthly Net Income" of \$217.

A review of Form B22 discloses that the Debtor purported to have \$1,865 a month in gross receipts from his business. No expenses are shown on this business on Form B22. Dckt. 1 at 34. To this, the Debtor added \$613 of for the non-debtor spouse. The Debtor testifies that his monthly expenses are \$3,921, therefore he has exactly the same monthly disposable income of \$217. Dckt. 31 at 5.

The court does not find the Debtor's testimony as to income and expenses to be credible. Rather, it appears to be classic "MAI" testimony - Made as Instructed to achieve a pre-planned result. The Debtor offers no testimony as to why or how he thought, in good faith and under penalty of perjury, that the financial information provided on Schedules I and J were accurate. No explanation is given as to how business expenses have ballooned from \$50 a month to \$1,041. There are two conclusions which can be drawn:

- a. The Debtor lied on Schedules I and J in an attempt to have the court confirm a plan which was based on false financial information, or
- b. The Debtor is lying in Declaration and on the Updated Expense Statement to exhaust the additional income which was hidden from the court.

Neither is in good faith.

Based on the foregoing, the amended Plan does not comply with 11 U.S.C. §§ 1322 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.

3. [13-31622-E-13](#) TIMOTHY/VIKI HERNANDEZ MOTION TO VALUE COLLATERAL OF
SJD-3 Susan J. Dodds BENEFICIAL FINANCIAL I, INC.
10-4-13 [[29](#)]

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, respondent creditor, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 8735 El Chapul Way, Fair Oaks, California. The Debtor seeks to value the property at a fair market value of \$220,000.00 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).

Sacramento County Utilities holds a utility lien of \$1,286.00. The first deed of trust secures a loan with a balance of approximately \$223,631.00. Creditor Beneficial Financial I INC's second deed of trust secures a loan with a balance of approximately \$29,225.19. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The 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 Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Beneficial Financial I INC secured by a second deed of trust recorded against the real property commonly known as 8735 El Chapul Way, Fair Oaks, 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 \$220,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

4. [12-39728](#)-E-13 MARK/TIFFANY WOLFGRAM MOTION TO VALUE COLLATERAL OF
WSS-8 W. Steven Shumway FIRST FEDERAL LEASING
9-18-13 [[106](#)]

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, respondent creditor, and Office of the United States Trustee on September 17, 2013. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and creditor's secured claim is determined to be \$4,500.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of personal properties consisting of 1 CHAM2-8-4 Chameleon Manual Press, 8 CHAM-CLAMP side clamps, 1 PRIMUS 11001 workhorse manual flash cure, 1 RDCR36-6-3 Radicure Electric 36" dryer (3 phase), 1 Option

RDCR36-ARP 4th Radiant Panel, and 6 Option AC-RDCR-36 36" wide belt conveyor (the "personal property"). The Debtor seeks to value the personal property at a replacement value of \$4,500.00 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 July 10, 2005, more than one year prior to filing of the petition, with a balance of approximately \$19,978.89. Therefore, the respondent 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 \$4,500.00. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of First Federal Leasing secured by an asset described as 1 CHAM2-8-4 Chameleon Manual Press, 8 CHAM-CLAMP side clamps, 1 PRIMUS 11001 workhorse manual flash cure, 1 RDCR36-6-3 Radicure Electric 36" dryer (3 phase), 1 Option RDCR36-ARP 4th Radiant Panel, and 6 Option AC-RDCR-36 36" wide belt conveyor is determined to be a secured claim in the amount of \$4,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the asset is \$4,500.00 and is encumbered by liens securing claims which exceed the value of the asset.

5. [12-39728-E-13](#) MARK/TIFFANY WOLFGRAM MOTION TO CONFIRM PLAN
WSS-9 W. Steven Shumway 9-18-13 [[117](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 18, 2013. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

Final Ruling: 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 court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The court's decision is to grant the Motion to Confirm the Amended Plan. No appearance at the November 5, 2013 hearing required.

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 grounds that the plan relies on a pending Motion to Value Collateral of First Federal Leasing. The court having granted the motion, the Trustee's objection is overruled.

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 September 18, 2013 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.

6. [13-31228-E-13](#) JOHN PAUL/KRISTINE LEE
MDP-1 Scott A. CoBen

OBJECTION TO CONFIRMATION OF
PLAN BY CATERPILLAR FINANCIAL
SERVICES CORPORATION
10-10-13 [[18](#)]

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 10, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

Tentative Ruling: 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to set a discovery schedule and continue the hearing to 3:00 p.m. on December 17, 2013. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Caterpillar Financial Services Corporation ("Caterpillar") objects to the Chapter 13 Plan filed by Debtors. Movant asserts it holds a valid, perfected, first priority security interest in one (1) Caterpillar model 420D Backhoe Loader, Serial No. FDP26385 pursuant to an Installment Sale Contract dated May 2, 2006, and Modification Agreement dated December 29, 2006. Movant perfected its purchase money security interest in the subject property by filing a UCC-1 Financing Statement with the California Secretary of State's office on May 4, 2006. On October 10, 2013, Movant filed its proof of claim fully secured in the amount of \$21,215.08.

Caterpillar does not accept the proposed treatment provided for its claim in the plan. Movant asserts Debtors are in default under the agreement and that the plan provides for the payment of \$9,000.00 to Movant over the commitment period of 36 months, with a monthly dividend of \$238.00. Movant states this understates the amount of the secured claim and does not pay their claim in full.

DEBTOR'S RESPONSE

Debtors respond stating that the court should continue the hearing on this matter to give Debtors an opportunity to review the attorney fee documentation from Caterpillar and if the billing is not reasonable file an objection to claim and have the court determine the amount owed. Otherwise, if the Debtors contend the fees are reasonable, the plan can be confirmed with the order providing for a 60 month commitment period.

Therefore, it appears the current form of the plan cannot be confirmed. The Debtors will either accept the Caterpillar's claim and modify the plan or have to object to the proof of claim which may require an evidentiary hearing and then a modification of the plan to correctly provide for the claim (if any).

In Proof of Claim Number 5-1 Caterpillar does not offer any information as to the source of the Legal Fees and Costs in the amount of \$11,322.16 (which are stated to be the amount as of the commencement of this case). While Stacy Black provides testimony authenticating the documents and the amount of the claim, she does not state the basis for the legal fees. She testifies that the Debtors have been in default since July 2010, but does not indicate in the proof of claim what legal services were provided. From the Debtors' Reply, it appears that Caterpillar has not made the basis for, or possibly the existence of, the legal fees known to the Debtors. FN.1.

FN.1. Counsel for Caterpillar should review Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Pleadings in this District. A motion, points and authorities/opposition, each declaration, and an exhibits document are filed as separate electronic documents. Here, Ms. Black's declaration has appended to it a series of exhibits. This renders it more difficult for the court to consider the testimony and review the exhibit being referenced. While counsel may say, "it's only a sixteen page declaration and exhibits, how hard can it be for the court to read this pleading," the Rules are not selectively enforced. Attorneys and parties are not left to guess whether a less than 20 page combination of pleadings is ok, but a 21 page combination of pleadings is not. It quickly became obviously to this court that the Rules needed to be fairly and uniformly applied when some attorneys applied the above "logic" to a 150+ page multi-pleading electronic document.

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 the hearing on the Objection to Confirmation the Plan is continued to 3:00 p.m. on December 17, 2013.

8. [13-22637-E-13](#) DARREN/EMILY DIVER
MOH-3 Michael O'Dowd Hays

MOTION TO CONFIRM PLAN
9-24-13 [[64](#)]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 24, 2013. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

Final Ruling: 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. No appearance required.

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 September 24, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and

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

9. [13-30838-E-13](#) **KENRICK CHEUNG** **OBJECTION TO CONFIRMATION OF**
TSB-1 **Richard L. Jare** **PLAN BY DAVID CUSICK**
10-10-13 [25]

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 10, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

Tentative Ruling: 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). Consequently, the Debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to sustain the Objection. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor cannot make plan payments. Debtors Schedule I lists on line 10 support of \$775.00, line 13 Tax Refunds/Earned Inc. & Child Credits of \$575 and food stamps of \$320. The schedules indicate that Debtor's spouse is a homemaker and that a divorce is pending.

Trustee states that at the first meeting of creditors Debtor testified that he and his spouse are still living together but a divorce is pending and the spouse may move out soon. Debtor also admitted that he pays the \$775 support income to his spouse but that once a divorce is final he will likely receive a smaller amount in refunds.

Trustee argues the \$775 support paid should not be listed as income and there is no evidence that the spouse will be willing to contribute this amount to the plan payment once the divorce is final. The Trustee believes that the Debtor will not be able to make the plan payments without these sources of income.

Taking the soon to be ex-wife's income out of Schedule I, the Debtor's best case scenario for income is \$2,575, with expenses of (\$3,469) as shown on Schedule J. (This assumes that the Debtor's support obligation is only \$775 once his soon to be ex-wife moves out.)

The proposed Chapter 13 Plan requires monthly plan payments of \$200 for sixty months. Dckt. 9. The plan provides for payment of Debtor's attorneys' fees of \$3,200.00, Class 2 car payment of \$104 a month, Chapter 13 Trustee administrative expenses, and a 0.00% dividend to creditors who have unsecured claims. No other claims are provided for payment under this Plan.

The Chapter 13 Trustee is correct, the Debtor has not shown that there is a feasible plan presented to the court. The loss of \$775.00 a month in income is clearly foreseeable. *Hamilton v. Lanning*, 560 U.S. 505 (2010). Even with all of the soon to be ex-wife's income this Debtor is running on the ragged edge of a plan in this case. With that \$1,095 of income gone, the Debtor's income drops below reasonable, rational expenses. FN.1.

FN.1. The court notes that it appears that this Chapter 13 plan is being prosecuted to restructure the Debtor's vehicle loan. Outside of bankruptcy, it does not appear that the Debtor would have lower expenses. This is not a case were the Debtor is trying to save a home and is making large current and arrearage mortgage payments. However, that does not cause the court to ignore the economic realities of the plan in light of the Trustee's objection. If the Debtor can present the Trustee and court with a budget built around the post-divorce, ex-wife move out income, it may well be that a plan can be confirmed. However, the fiction now before the court cannot be confirmed.

Based on the foregoing, 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.

10. [10-43441](#)-E-13 CARL/CAROLYN FORE
TJW-2 Timothy Walsh

MOTION TO MODIFY PLAN
9-13-13 [[57](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 16, 2013. By the court's calculation, 50 days' notice was provided. 35 days' notice is required.

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

The court's tentative decision is to deny the Motion to Confirm the Modified Plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the plan on the basis that the dividend to be paid to unsecured creditors is unclear. The proposed modified plan lists 2% dividend in section 2.15 but the supporting motion and declaration state that the dividend to unsecured creditors is to be changed to 0%.

The Trustee also questions whether the 401k loan repayment has terminated, since no increase in plan payment was commenced in March 2013, nor does the proposed plan take the increase into account.

Lastly, the Trustee argues that the Debtors have failed to file updated income and expenditures. The original schedules I and J were filed September 1, 2010 and Debtors have not updated that information since. In their motion the Debtors make the non-specific statement, not supported by any testimony, that one of the other reasons for the lowering of the payment is,

"The reason for the plan change is that the debtor experienced a raise in the mortgage payment, a change in location of employment, thereby causing increased travel expense, and a raise in other household expenses."

Motion, Dckt. 57. The Debtor's declaration carefully provides the following nondescript, non-specific, non-economically "evidence" to support the above, "This plan is being changed because our mortgage has increased, husband's

job is changed requiring higher transportation expenses and household expenses have increased." Declaration, Dckt. 59.

This proposed Modified Plan raises even more significant issues for these Debtors. The Debtors come to the court stating that they cannot make the increased payments under the existing plan (which were keyed to Debtors repayment of a 401K loan to themselves) because,

- A. The Debtors' Mortgage has increased to \$2,583 a month (from \$2,252.00).
- B. The Claim of the Internal Revenue Service and Franchise Tax Board are larger than projected by the Debtor
 - 1. Internal Revenue Service
 - a. Claim No. 27, Filed January 14, 2011
 - (1) \$1,657.57 secured
 - (2) \$4,522.36 priority
 - (3) \$ 134.04 unsecured
 - b. Chapter 13 Plan
 - (1) \$5,600 Priority
 - 2. Franchise Tax Board
 - a. Claim No. 16, Filed October 22, 2010
 - (1) \$2,717.53 Priority
 - (2) \$ 276.70 Unsecured
 - b. Chapter 13 Plan
 - (1) \$2,387.52 Priority

The existing confirmed Chapter 13 Plan in this case requires the Debtors to increase the Plan payments to \$1,000 a month beginning in March 2013. Order Confirming Plan filed November 13, 2010, Dckt. 22.

The present motion is not support by evidence as to the current finances for the Debtors. No evidence is presented as to the Debtors' current income and expenses. Rather, they merely make general statements about the need to modify the plan, now that they have repaid their 401K loan because their mortgage payment has increased and they have a change in income.

With respect to the change in mortgage payments, such change is not new. Actually, the only notice of payment change for the Debtors' mortgage was filed on December 23, 2011 - 23 months ago. That change only increased the payment by \$36 a month. The Debtors have easily made that payment while they continued to repay themselves \$400 a month for their 401K loan.

The court has no idea, and the Debtors have hidden from the court (1) any change in income, (2) any change in employment, (3) the change in transportation expenses, (4) the tax consequences of any increase in transportation expenses, and (5) what household expenses have increased. Reviewing the now stale information from 2010 in Schedules provides the following significant information.

- I. Debtors' Gross Income
 - A. Carl Fore.....\$7,158
 - B. Carolyn Fore.....\$2,917
 - C. Total Gross Income.....\$10,075

- II. Deductions From Income
 - A. Payroll Taxes, Social Security...(\$2,315) [23% of gross]
 - B. 401K Loans.....(\$ 905)
 - C. 401K.....(\$ 57)

- III. Debtors' Expenses
 - A. Mortgage, Taxes, Insurance.....(\$2,252)
 - B. Food (two adults and one child).....(\$ 900)
 - C. Transportation.....(\$ 730)
 - D. Tuition.....(\$ 500)

In reviewing the above, it appears that the taxes and Social Security payments appear to be high, especially in light of the Debtors' having a significant mortgage interest deduction and a minor child deduction. But even if that is correct, the Debtors have \$905 of 401K loan payments which are no longer being made, with an additional \$57 of new 401K contributions to themselves. The Debtors could easily pare \$200 from their food expense. There is also the \$730 transportation expense, which is significantly higher than this court sees in most cases. The Debtors offer no explanation as to why it should be even higher. For two adults, with an allowance of \$300 a month for gas and maintenance, there is a \$130 cushion.

It appears that the Debtors have the following surplus in their budget from 2010 which exists as of the modest \$400 a month plan payment in March 2013:

- 401K Loan Payment Monies.....\$905
- New 401K Contributions.....\$ 57
- 3 Person Food Budget.....\$200
- Adjusted Transportation.....\$130

From this, the Debtors show that they have \$1,292 a month of additional monies fund the Chapter 13 Plan.

Failing to disclose to the court their actual finances and providing only general, cryptic statements that they need to make lower payments is not in good faith. Further, it manifests a pre-conceived plan to defraud the court and creditors.

Further, the Debtors contention that since there has been an increase in the tax claims and the mortgage payment the payments have to be lowered is not made in good faith. The Debtors have been aware of the larger tax claims for almost two years and have taken no action. This is most likely because the "increase" is *de minimus*. The Debtors had already provided for these claims as priority claims which would be paid in full.

For the Internal Revenue Service claim, the difference between the \$5,600 priority claim stated in Original Confirmed Plan and the \$1,657.57 secured and \$4,522.36 priority claim set forth in Proof of Claim No. 27 is \$779.93 - which is \$9.67 per month of the 60 month plan.

For the Franchise Tax Board, the difference between the \$2,387.52 priority claim stated in Original Confirmed Plan and the \$2,717.52 priority claim set forth in Proof of Claim No. 16 is \$330.01 - which is \$5.50 per month of the 60 month plan.

The contention that \$15.17 a month additional payment on taxes and the \$36 a month increase in the mortgage payment which the Debtor has been paying the past 22 months "breaks the Debtors' financial back" is not credible and not supported by the evidence. The evidence shows that the Debtors should be increasing the plan payments, even after deducting these "substantial" changes in the tax claims and mortgage payments (totaling \$51.17) by \$1,292 a month, for a plan payment of \$1,892 a month.

The proposed First Modified Plan fails to comply with 11 U.S.C. §§ 1329, 1325(a), and 1322. The Motion is denied.

The court instructs the Chapter 13 Trustee to not only consider the conduct of the Debtors in this case and the lack of evidence filed in support of this motion in determining whether a motion to dismiss is appropriate, but to also forward a copy of this ruling to the U.S. Trustee for his office to review the issues raised and whether any action by the U.S. Trustee is warranted.

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.

11. [10-25842-E-13](#) DAVID/CLARA SEMERIA
CJY-3 Christian J. Younger

MOTION TO MODIFY PLAN
10-1-13 [[41](#)]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2013. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

Final Ruling: 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. No appearance required.

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 October 1, 2013 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.

12. [10-26951](#)-E-13 ALLEN PEREZ
SDH-1 Scott D. Hughes

MOTION TO MODIFY PLAN
9-20-13 [[57](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 20, 2013. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

The court's tentative decision is to grant the Motion to Confirm the Modified Plan, but strikes that portion of the Plan which provides for payment of additional fees to counsel for the Debtor. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

The Trustee opposes confirmation offering evidence that the Debtor is \$3,009.25 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Trustee also states that Section 2.06 of Debtor's modified plan proposes attorney's fees of \$1,000.00 paid prior to the filing of the case and \$0.00 to be paid through the plan. Under the confirmed plan attorney's fees are \$1,226.00 paid prior to the filing of the case and \$2,274.00 to be paid through the plan. The Trustee has disbursed \$1,481.16 in attorney's fees with \$792.84 remaining to be paid. Debtor's attorney filed an *Ex Parte* Application for Order Substituting Scott D. Hughes as Attorney of Record for the Debtor on September 5, 2013, which was subsequently granted on September 17, 2013. Debtor's attorney has filed Rights and Responsibilities which indicate the Debtor has paid an initial fee of \$1,000.00. The Trustee is uncertain whether Debtor's attorney is proposing that the attorney's fees under the confirmed plan be disregarded even though the Trustee has disbursed \$1,481.16 with \$792.84 remaining to be paid to prior counsel.

Additionally, the Trustee states he is uncertain of the correct amount of mortgage arrears. Section 2.08 of Debtor's modified plan proposes to reclassify Debtor's mortgage from a Class 4 claim paid directly by the Debtor to a Class 1 secured claim, and also to provide for mortgage arrears in the amount of \$17,433.00. The creditor, Select Portfolio Servicing, Inc. filed a secured proof of claim no. 1 on April 13, 2010, reflecting pre-petition arrears in the amount of \$2,896.55. Debtor's Declaration indicates that the Debtor will be contacting the bank to amend its proof of claim to include the mortgage arrears and estimates them to be approximately \$17,433.00. It appears Debtor intends to request the creditor to amend their claim for pre-petition arrears to include post-petition arrears, where the claim form only provides for arrears at the time the case was filed. The modified plan appears to combine pre-petition and post-petition arrears rather than providing for post-petition arrears separately.

Lastly, the Trustee argues the Debtor's modified plan provides for a monthly contract installment amount of \$1,937.00 to Select Portfolio Servicing for Class 1 mortgage payments. However, the creditor filed a Notice of Mortgage Payment Change on February 11, 2013 indicating Debtor's mortgage payment is \$1,977.07 effective April 1, 2013.

DEBTOR'S RESPONSE

Debtor responded stating he has attempted to resolve the objection with the Trustee's office and that the order confirming clarify the following:

- I. The debtor has contacted the trustee's office to resolve the objection. In an effort to resolve the objection, the debtor proposes that the following be included in the Order confirming the First Modified Plan:
 - A. That the remaining attorney's fees owing to debtor's prior counsel in the amount of \$792.84 be paid;
 - B. That the attorney's fees for the debtor's new attorney in the full amount of \$1,000.00 be approved, \$1,000.00 of which was paid to debtor's attorney post-petition and held in trust. The balance of \$00.00, provided that the attorney and debtor have complied with Local Bankruptcy Rule 2016-1 (c), shall be paid by the trustee from plan payments at the rate specified in the confirmed plan.
 - C. That \$2,896.55 consists of pre-petition mortgage arrears as evidenced by the proof of claim filed Select Portfolio Servicing, Inc. and that \$18,599.14 is the post-petition arrears which is (2) two payments @ \$1,937.00, (7) seven payments @ \$1,977.07 per month, (2) late charges @ \$96.85 per month and (7) late charges at \$98.85 per month.
 - D. That the ongoing monthly payment is now \$1,977.07 per month as shown by the Notice of Payment Change filed on February 11, 2013;

- E. That the plan payment change from \$433.75 to \$3,826.00 per month effective October 25, 2013.
- F. That the debtor has paid in a total of \$18,219.50 as of September 26, 2013.
- G. That the trustee be authorized to pay the \$2,896.00 pre-petition mortgage claim to Select Portfolio Serving, Inc. as a Class One claim. (As stated in the debtor's declaration in support of the plan, he was current on the mortgage when this case was filed except for the \$2,896.00 in fees and costs in the claim).
- H. That the trustee be authorized to pay \$18,219.50 as a Class One post-petition mortgage claim to Select Portfolio Serving, Inc.
- I. That the ongoing mortgage payments are to start October 25, 2013 along with the pre-petition and post-petition arrears on that mortgage to be included in Class One.

The debtor therefor requests that the court allow language in the Order confirming the plan that the payments be increased to \$3,826.00 to cover the shortfall raised by the pre-petition arrearage claim which is not mortgage payments, but rather late charges, inspection fees, BPO and foreclosure fees. The difference is less than 10 percent of the debtor's budget and it appears there is sufficient room in his monthly expenses to cover the extra \$383.00.

The debtor argues that he is not really delinquent. The debtor was advised that the payments would increase on October 25 rather than September 25, but because of the language in the Additional Provisions, the trustee argues the debtor is in default because based on that language, the plan payments should have increased on September 25, 2013.

The debtor made payments of \$3,443.00 and \$383.00 for a total of \$3,826.00 by October 25 to comply with these provisions and to resolve the trustee's objections to the plan.

Finally, The debtor has been in contact with the trustee and believes that the trustee will withdraw his objection to the plan if the court is willing to resolve the issues in the Order confirming it and the debtor is able to make the October 25 plan payment.

TRUSTEE'S REPLY

The Trustee filed a reply, stating that the response from Debtor resolves the Trustee's objections other than for attorney fees.

The Trustee states the Debtors are proposing to have the attorney's fees of substitute counsel approved through the modified plan without filing a Motion to Approve such fees. While the Trustee believes a Motion should be filed to approve the fees, the Trustee does not want to deter counsel from substituting into cases for the benefit of Debtors. Therefore if the Court determines the attorney's fees are allowable through the modified plan

without the need for a separate motion, the Trustee would not oppose this as a resolution.

DISCUSSION

The proposed plan amendments resolve the Trustee's Objections. The address shall be stated in the order confirming the First Modified Plan filed on September 20, 2013.

The Plan improperly attempts to also approve attorneys' fees for Debtor's counsel. Fees must be approved by the court. There are two methods for obtaining that approval. Counsel and the Debtor may elect to accept the pre-authorized amount of "no-look fees" under Local Bankruptcy Rule 2016-1(c) [or its predecessor General Order]. Once the debtor and counsel elect the no-look fees, then they are deemed sufficient for all of the legal work to the case. However, if the actual facts of the case show that the no-look fee was reasonable for substantial and unanticipated work, the attorney may then file an application for additional fees. Counsel may file a motion or use Local Form EDC 3-095. Sticking the request for additional fees in a modified plan is not an option permitted under the Local Bankruptcy Rules. If counsel for the Chapter 13 debtor does not elect to accept the no-look fees, then he or she must file a motion for allowance of fees and expenses before accepting payment of any monies for the bankruptcy services provided. Local Bankruptcy Rule 2016-1.

The order confirming the First Amended Plan in this case provides for the allowance of \$3,500.00 in fees pursuant to Local Bankruptcy Rule 2016-1(c). Of this, \$1,226.00 was paid prior to the commencement of this case, and \$2,274.00 is to be paid through the plan. The Trustee reports that \$792.84 of the prior approved fees have not yet been paid.

To the extent that the Debtor's current counsel asserts that additional fees above the \$3,500.00 no-look fees approved in this case should be allowed, then he has to file a separate application. However, if he is contending that the remaining \$792.84 of the existing fees should be paid to the new counsel for doing work within the scope of the no-look fees, then he should clearly request that from the court, giving prior counsel notice of such motion and hearing.

What is clear to this court is that prior counsel should not be paid the full \$3,500.00. He or she will not be representing the Debtor through the completion of the plan and obtaining the discharge (which is included as part of the no-look fees). Merely getting a plan confirmed does not entitle the first counsel to the full \$3,500.00 and then the estate having to pay new counsel a second time for some of the work.

The provisions of the Plan and requested amendment to provide for the payment of \$1,000.00 in fees to Scott D. Hughes is denied, without prejudice to Mr. Hughes seeking payment of the \$792.84 of the remaining no-look fee and filing an application for any additional fees which may properly be allowed pursuant to Local Bankruptcy Rule 2016-1(c).

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 First Modified Chapter 13 Plan filed on September 20, 2013, with all amendments set forth in the Debtor's Response (Dckt. 68) filed to the Trustee's Opposition, with the exception of the allowance of \$1,000.00 in attorneys' fees to Scott D. Hughes, 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 the proposed amendment to allow \$1,000.00 in attorneys' fees to Scott D. Hughes is overruled, without prejudice to Scott D. Hughes seeking payment of the \$792.84 of the remaining fees approved by this court in the Order confirming the First Amended Plan, Dckt. 38, and filing an application for any additional fees which may properly be allowed pursuant to Local Bankruptcy Rule 2016-1(c).

13. [13-29251](#)-E-13 DAMION BOATMAN MOTION TO CONFIRM PLAN
SS-2 Scott D. Shumaker 9-20-13 [[34](#)]

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

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

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

A Motion to Confirm Plan having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

IT IS ORDERED that the Motion to Confirm Plan is dismissed without prejudice.

14. [12-39152-E-13](#) SHEILA/SCOTT EDWARDS
RI-4 Rebecca E. Thejirika

MOTION TO CONFIRM PLAN
9-18-13 [[154](#)]

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, 2013. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

Final Ruling: 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. No appearance required.

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 September 18, 2013 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.

15. [13-32453](#)-E-13 KIM HALILOVIC
JT-1 John A. Tosney

MOTION TO VALUE COLLATERAL OF
UNITED GUARANTY RESIDENTIAL
INSURANCE COMPANY OF NORTH
CAROLINA
10-3-13 [[14](#)]

**IF COUNSEL CONCUR ON THE DATE FOR THE
CONTINUANCE, NO APPEARANCE REQUIRED
FOR NOVEMBER 5, 2013 HEARING**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Value Collateral 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 court's tentative decision is to continue the hearing on the Motion to 3:00 p.m. on December 10, 2013. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 300 Fayette Way, Folsom, California. The Debtor seeks to value the property at a fair market value of \$419,000.00 as of the petition filing date. The Debtor provided an appraisal as the evidence of the property value.

OPPOSITION

Creditor United Guaranty Residential Insurance Company of North Carolina ("Creditor") filed opposition to the Motion. The Creditor asserts that based on a valuation from Zillow.com obtained on October 24, 2013, the subject real property may be more than the amount alleged in the motion. The Creditor further states that due to the relatively short period between their receipt of notice of the Motion and the deadline to file an opposition to the Motion, the Creditor was unable to obtain an appraisal of the property in time to include an appraisal with this opposition. Creditor is in the process of obtaining an expert appraisal of the property. Further,

Creditor argues the Motion includes an appraisal, but does not provide a declaration authenticating the appraisal.

Based on the opposition filed by Creditor, the Court continues the hearing on the Motion for the Creditor to obtain an appraisal and confer with Debtor.

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

IT IS ORDERED that the hearing on the Motion is continued to 3:00 p.m. on December 10, 2013.

16. [11-35060](#)-E-13 ANTONETTE TIN MOTION TO MODIFY PLAN
RK-3 Richard Kwun 9-27-13 [[74](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 27, 2013. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

The court's tentative decision is to deny the Motion to Confirm the Modified Plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects on the grounds that the Debtor's plan will complete in 63 months. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

The Debtor's petition was filed June 17, 2011, 33 months remain in the 60 month plan. The Trustee states the following amounts remain to be paid under the proposed plan:

Priority claim	\$1,208.66
Unsecured claims (\$113,531.66 x 3.5%)	\$3,973.61
<u>Approximate Trustee fees</u>	<u>\$272.75</u>
Total	\$5,455.02

This excludes any additional attorney fees of \$1,750.00 to be requested per Section 6.02 of the plan.

The Trustee also states that the Debtor's Plan may not be the Debtor's best effort under 11 U.S.C. § 1325(b). The debtor submitted as Exhibits B & C a projected profit and loss and explanation. These documents reflect a projected \$390.00 per month Net Revenue. The debtor did not provide current statements of income and expense.

DEBTOR'S RESPONSE

Debtors state they inadvertently credited a plan payment of \$3,405 that included the Class 1 claim to Bank of America. However, Debtor states she make a \$150.00 payment to the Trustee and directly paid Bank of America pursuant to her HAMP Trial Loan Modification Plan.

Counsel also states that he is unclear what current statements of income and expense are in the context of a modified plan. There is no local rule regarding current statements of income and expense or any generally publicly available posting thereto. Debtor proposes that she pay \$250/month from 10/2013 to the final month pursuant to her Order Confirming Plan.

DISCUSSION

From this piecemeal explanation from the Debtor, the court cannot gain an understanding of how Debtor's changed income and expenses affect her ability to support a plan. While the local rules may not expressly provide for updated statements of income and expense, the court and interested parties cannot determine if the plan is feasible or made in good faith without an explanation of the changes made from the prior plan to the proposed plan. This is a common request of the court and the Chapter 13 Trustee to enable them to determine if the modified plan complies with 11 U.S.C. §§ 1322, 1325(a) and 1329. This bankruptcy case was filed more than two years ago. The Debtor is now coming to this court asking for an order which requires the court to determine today, in 2013, that the plan is feasible. The court will not guess as to what is the Debtor's income and expenses after two and one-half years have passed.

Though uncertain, counsel scrambled and has provided the Debtor's expenses in 2013 after he received the Trustee's opposition to the Motion. The Debtor states that she will make modest decreases in her expenses and has provided her current expenses as set forth in Exhibits A. Declaration, Dckt. 93; Exhibit A, Dckt. 94. These were filed six days prior to the hearing and the court does not have the benefit of the Chapter 13 Trustee's and creditor's review of this information.

The Debtor's personal expenses are unremarkable, except that no expenses are shown for (1) renter or homeowner's insurance, (2) real property taxes, (3) no auto insurance, and \$6,449.00 for business expenses. For the business expenses the Debtor provides no explanation. The court has reviewed the Original and Amended Schedules I and J for income and expenses for the Debtor's business.

Date Filed	Schedule	Business Income	Business Expense
June 23, 2011	Original Schedule I, Dckt. 13	\$5,400.00	
	Original Schedule J, Dckt. 13		(\$2,272.14)
July 22, 2011	First Amended Schedule I, Dckt. 24	\$6,200.00	
	First Amended Schedule J, Dckt. 24		(\$2,706.47)
November 11, 2012	Second Amended Schedule J, Dckt. 47		(\$2,706.47)
October 29, 2013	Statement of Current Expenses, Exhibit A, Dckt. 94		(\$6,449.00)
	Projected Profit and Loss, Exhibit A, Dckt. 94	\$8,500.00	

For each of the Schedules J filed the Debtor does not provide the required detailed statement of the expenses which is to be attached to Schedule J and is necessary for the court, creditors, and the Chapter 13 Trustee to intelligently review the expense contentions of the Debtor. Included with Exhibit A is a chart of 10 expenses totaling (\$6,449). Of this (\$3,600) is for two caregivers, (\$980) for food supplies, and \$160.00 for taxes (IRS, EDD).

No provision is made on the expenses for the payment of state and federal income taxes and self-employment taxes for the Debtor. The court cannot identify a reason why this self-employed Debtor does not have an expense of more than \$160 a month for her self-employed business.

The modified Plan does not comply with 11 U.S.C. §§ 1322 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,

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 hearing on the Objection to confirmation is continued to 3:00 p.m. on December 10, 2013.

18. [12-26563-E-13](#) YASWANT/KAMINI SINGH MOTION TO DISMISS CASE
ADS-3 Peter G. Macaluso 10-19-13 [[211](#)]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on October 19, 2013. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Dismiss Case 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Dismiss Case. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Movants Rudolph and Evelyn Satterfield ("Movants") move for an order dismissing the case pursuant to 11 U.S.C. § 1307(c)(1) for unreasonable delay that is prejudicial to creditors. Movants state that the Debtors have been in bankruptcy for 18 months without a confirmed plan. Movant states the court has heard and denied four plans.

Movants also argue that dismissal is proper pursuant to 11 U.S.C. § 1307(c)(5) for denial of a plan. Movants also state that the Debtors are not current with their proposed plan payments.

At the hearing on the Motion to Confirm, the court noted that there appears to be several factual issues between the parties arising in this Motion to Confirm. First, the court must determine if Debtors made the payments to Creditors as purported in the loan modification and the proposed plan. Second, the loan modification was approved by the court on July 16, 2013, Dckt. 185, allegedly resolving the dispute between the parties. However, it appears the parties are still disputing the mortgage related fees related to a tax payment made by Creditors. The parties shall clearly and expressly state the payments which they assert are to be made under the settlement agreement, any additional amounts to be added thereto, and the defaults (or payments made for the alleged defaults) which exist. The fact that the court approved a settlement in July 2013 and by September 2013 the parties are squabbling about it may well be an indication that one or more of the parties are not proceeding in good faith. Further, the fact that neither party timely provided any evidence in support of their contentions may well indicate that they are not proceeding in good faith and significant correction sanctions may be warranted.

The Debtors have now demonstrated over the past 20 months that they are unable to confirm a Chapter 13 Plan. The Debtors and Movants have been engaged in a protracted running battle in this court. Though the Debtors purported to have settled the matter, within months they are again battling. In opposing confirmation of the Chapter 13 Plan, the Movant presented evidence of the Debtors' default under the Stipulation.

This not the Debtors' first foray into bankruptcy. They filed their first case as a Chapter 13, on August 22, 2011. Bankr. E.D. Cal. 11-40337. On January 9, 2012, the Debtors (represented by the same counsel as in the current case) elected to convert their case to one under Chapter 7. *Id.*, Dckt. 92. They received their discharge on July 10, 2012.

On April 3, 2012, after converting the first case to one under Chapter 7, the Debtors (in *pro se*) filed their second bankruptcy case (the present case) as a Chapter 13. On May 19, 2012, the Debtors' counsel from the first case substituted in as counsel for the Debtors. Dckt. 19.

These Debtors have existed in the warm embrace of bankruptcy without confirming a Chapter 13 Plan for 28 months. Though they purport to have entered into good faith with the Movants and the court approved a settlement, they offered no evidence to counter Movant's evidence that the Debtors were in default on the settlement and the proposed Fifth Amended Plan in this case. The Debtors have shown that they cannot prosecute a Chapter 13 case and confirm a plan.

The Motion is granted and the Chapter 13 case is dismissed. Under the procedures in the Eastern District of California, a subsequent case filed by a debtor is assigned to the judge who had the prior case. For the Debtors, that is the judge in Department E, Ronald H. Sargis. The court shall order the Debtors, and each of them, and any attorney representing both or either of the Debtors, in any future bankruptcy case filed in or transferred to the United States Bankruptcy Court for the Eastern District of California, on or before January 1, 2020, by either or both of the Debtors, shall notify the Clerk of the Court of the prior cases and that any subsequent filed case is to be assigned to Ronald H. Sargis if he is then serving as a bankruptcy judge in this District.

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 Case filed by Creditors Rudolph and Evelyn Satterfield 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 bankruptcy case is dismissed.

IT IS FURTHER ORDER that Debtors, and each of them, and any attorney representing both or either of the Debtors, in any future bankruptcy case filed in or transferred to the United States Bankruptcy Court for the Eastern District of California, on or before January 1, 2020, by either or both of the Debtors, shall notify the Clerk of the Court of the prior cases and that any subsequent filed case is to be assigned to Ronald H. Sargis if he is then serving as a bankruptcy judge in this District. This order is made pursuant of the policy of in the Eastern District of California for subsequent cases to be assigned to the judge having the prior case to avoid the appearance of "judge shopping" in the federal court by one of the parties.

19. [11-20268-E-13](#) VINCENZIA MELLONE
SDH-4 Scott D. Hughes

MOTION FOR COMPENSATION FOR
SCOTT D. HUGHES, DEBTOR'S
ATTORNEY(S), FEES: \$1,450.00,
EXPENSES: \$35.53
9-30-13 [[56](#)]

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, respondent creditors, and Office of the United States Trustee on September 30, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion for Compensation is granted. No appearance required.

Scott D. Hughes, Counsel for Debtor, seeks additional attorney fees in the amount of \$1,450.00 and costs in the amount of \$35.53. Counsel argues that these additional fees are actual, reasonable, necessary and unanticipated as post-confirmation work required.

Description of Services for Which Fees Are Requested

1. Modify the Confirmed Plan. Counsel suggests this was unanticipated, as Debtor requested loan modifications and addition of property tax claims post-confirmation.

2. Prepare a Motion to Value Debtor's residence and strip off the second mortgage. Counsel suggests this was unanticipated.

3. Prepare and file two Motions to Approve Loan Modifications. Counsel suggests this was unanticipated and necessary to lower the Debtor's payment.

4. Case management including correspondence and meetings.

5. Prepare and service application for additional fees.

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 5.8 hours of unanticipated and substantial work. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$1,450.00 and costs in the amount of \$35.53 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

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

The Motion for Compensation filed by Counsel for Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and Scott D. Hughes, Counsel for Debtor, is allowed the following fees and expenses as a professional of the Estate:

Scott D. Hughes, Counsel for Debtor
Applicant's Fees Allowed in the amount of \$1,450.00 and
Costs in the Amount of \$35.53.

20. [13-32772-E-13](#) CONSUELO ROGERS
HLG-1

MOTION TO VALUE COLLATERAL OF
BANK OF AMERICA, N.A.
10-3-13 [[10](#)]

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, respondent creditor, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 2805 Gibson View Way, Antelope, California. The Debtor seeks to value the property at a fair market value of \$259,996.00 as of the petition filing date. The Debtor provided this value based on the fair market value reflected on [www.zillow.com](#). 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 first deed of trust secures a loan with a balance of approximately \$283,723.00. Creditor Bank of America, N.A.'s second deed of trust secures a loan with a balance of approximately \$51,843.61. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The 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:

replacement value of \$800.00 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 personal property's title secures a purchase-money loan incurred in May 1, 2008, more than one year prior to filing of the petition, with a balance of approximately \$1,371.34. Therefore, the respondent 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 \$800.00. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the value of the property described as a couch, loveseat, queen mattress, washer & dryer is determined to be the valued at \$800.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. Accordingly, the Creditor holds a secured claim of \$800.00.

22. [13-32772-E-13](#) CONSUELO ROGERS
HLG-3 Kristy A. Hernandez

MOTION TO VALUE COLLATERAL OF
CAPITAL ONE, N.A. (BEST BUY
CO., INC.)
10-3-13 [[20](#)]

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, respondent creditor, and Office of the United States Trustee on October 2, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral is granted and creditor's secured claim is determined to be \$1,500.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of personal property described as a television. The Debtor seeks to value the property at a replacement value of \$1,500.00 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 personal property's title secures a purchase-money loan incurred in December 1, 2011, more than one year prior to filing of the petition, with a balance of approximately \$3,126.90. Therefore, the respondent 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 \$1,500.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon

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

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of secured by an asset described as a television is determined to be a secured claim in the amount \$1,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the asset is \$1,500.00 and is encumbered by liens securing claims which exceed the value of the asset.

23. [13-32772-E-13](#) CONSUELO ROGERS MOTION TO VALUE COLLATERAL OF
HLG-4 Kristy A. Hernandez CAPITAL ONE, N.A. (HELZBERG
DIAMONDS)
10-3-13 [[25](#)]

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, respondent creditor, and Office of the United States Trustee on October 3, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Value Collateral 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 court's tentative decision is to deny the Motion to Value Collateral. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of personal property described as a white gold band. The Debtor seeks to value the property at a replacement value of \$1,200.00 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).

However, Debtor has not established that underlying debt is not a purchase-money loan acquired within the one year period prior to the filing of the petition. If so, Debtor is statutorily unable to prevail on this motion to value collateral pursuant to 11 U.S.C. §1325(a)(*). The Debtor has not stated the prima facie case for the requested relief. See Fed. R.

Bankr. P. 9013. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is denied without prejudice.

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

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

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

IT IS ORDERED that the Motion is denied without prejudice.

24. [13-32179](#)-E-13 DIANA LECOMPTE MOTION TO VALUE COLLATERAL OF
RAC-1 Richard A. Chan BANK OF AMERICA, N.A.
10-1-13 [[14](#)]

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, respondent creditor, and Office of the United States Trustee on October 1, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and creditor's secured claim is determined to be \$0.00. No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 7000 Lindero Ln, Rancho Murieta, California. The Debtor seeks to value the property at a fair market value of \$277,809.00 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 first deed of trust secures a loan with a balance of approximately \$306,332.00. Creditor Bank of America, N.A.'s second deed of trust secures a loan with a balance of approximately \$86,319.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The 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 Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Bank of America, N.A. secured by a second deed of trust recorded against the real property commonly known as 7000 Lindero Ln, Rancho Murieta, 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 \$277,809.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

25. [09-32288-E-13](#) ERNESTO/KATHLEEN ROMO MOTION TO SELL
SAC-2 Scott A. CoBen 10-7-13 [[74](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 7, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). 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 court's tentative decision is to grant the Motion to Permit Debtor to Sell Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the Debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b) and 1303.

Here, the Debtor proposes to sell the subject property 1131 West El Camino Ave, Sacramento, California through a short sale. The sales price is \$128,000.00, which Debtor contends is fair market value. The prospective purchaser is RealResults, LLC. Debtor states they will receive \$3,000.00 as a seller's incentive for this sale and it will be used for Debtor's moving expenses.

The Chapter 13 Trustee, David Cusick, filed a statement of non-opposition to the Motion to Sell.

CREDITOR'S CONDITIONAL NON-OPPOSITION

Secured Creditor, Green Tree Servicing LLC, filed a conditional non-opposition to the Debtor's Motion to Approve Short-Sale. Creditor states that its non-opposition is contingent on including the following provisions in the order: (1) creditor's secured claim will be paid off in full or in accordance with any approval authorized by the Creditor, (2) if the short sale does not take place, Creditor will retain its lien in the full amount due under the loan and (3) each party will bear its own attorneys fees and costs regarding Debtor's Motion to Sell.

The court will not restate or add terms that are based on contractual rights between Debtor and Creditor. Creditor will retain their rights under the contract.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Debtor to Sell Property is granted, the court having considered any additional offers from other potential purchasers at the time set for the hearing for the sale of the property as stated on the record.

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to sell property 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 Ernesto Alvarez Romo and Kathleen Mary Romo, the Debtors ("Debtor"), is authorized to sell pursuant to 11 U.S.C. § 363(b) to RealResults, LLC or nominee ("Buyer"), the residential real property commonly known as 1131 West El Camino Ave, Sacramento, California ("Real Property"), on the following terms:

1. The Real Property shall be sold to Buyer for \$128,000.00, on the terms and conditions set forth in the Motion.
2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
3. The Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale.
5. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Debtors. Within fourteen (14) days of the close of escrow the Debtors shall provide the Chapter 13 Trustee with a copy of the Escrow Closing

The Objection to 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 to Plan is dismissed as moot.

27. [13-27996-E-13](#) **FREDERICK/JACQUELYN** **CONTINUED OBJECTION TO**
NLE-1 **TURNER** **CONFIRMATION OF PLAN BY DAVID**
Robert Hale McConnell **CUSICK**
7-25-13 [[29](#)]

CONT. FROM 8-20-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 25, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

Final Ruling: 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 court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The parties, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) and Federal Rule of Bankruptcy Procedure 7041, 9014, dismissed without prejudice the Chapter 13 Trustee's Objection. Stipulation Resolving Trustee's Objection to Confirmation, Dckt. 64. No appearance required.

PRIOR HEARING

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan fails the Chapter 7 Liquidation analysis. The Trustee argues that he is not certain whether all of the Debtor's assets have been scheduled and if not, the plan may fail the Chapter 7 Liquidation analysis. The Debtor lists unsecured property taxes from a mother's property held in trust and then sold on Schedule F. Trustee states the Debtor admitted at the First Meeting of Creditors that he may be the beneficiary of the Trust, but Debtor has failed to list the Trust on Schedule B and exempt any equity on Schedule C. The Trustee has received a copy of the Trust but is not certain as to the current status of the Trust, which at one time held two real properties and at least two checking accounts.

The Trustee also argues that he is not sure the plan complies with applicable law, as the Debtor states in the additional provisions that he will use a portion of his non-income VA Disability award to fund the plan in the amount needed. The Debtor is under the median income and proposes plan payments of \$3,244.00 for 36 months, with a 0% dividend to unsecured creditors. The Debtors sources of income are from social security, VA

disability and pension. Debtor receives a VA award listed at \$2,735.22 per month and is proposing to pay \$2,461.00 of that into the plan. The Trustee argues that whether or not the Debtor's VA Disability qualifies as income for a Chapter 13 proceeding is an issue for an adversary proceeding, as 11 U.S.C. § 1322 does not specifically authorize this determination and to obtain a declaratory judgment requires an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001(9).

The Trustee also argues that the Debtor may not be able to make the plan payments, as Schedule J reflects monthly net income of \$783.32, an amount less than the plan payment of \$3,244.00. The Debtor removes the entirety of the VA disability award as an expense. The Trustee notes Schedule F reflects payday loans on five different dates, past due debts for gas, electric, garbage and sewage and the Trustee is not sure the Debtor will not be able to make payments called for under the plan.

Lastly, the Trustee argues that the plan is not the Debtor's best effort. Trustee states the Debtor claims they are below median income with a family of two and claim \$150.00 for unspecified personal care, \$200.00 for Cable/DishTV, \$400.00 for home maintenance, \$170.00 for laundry and dry cleaning, \$660.00 for transportation, \$400.00 for recreation and \$58300 for charitable contributions.

Debtor's Objection

The Debtor objects on an evidentiary basis to the Trustee's objection regarding the Chapter 7 Liquidation analysis issue. Debtor does not provide a substantive response to the Trustee's concerns.

Debtor states that he is not seeking to file an adversary proceeding, but rather states 38 U.S.C. § 5301(1) specifically exempts payment of benefits by the Secretary of Veterans Affairs from the claim of creditors and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process. Debtor argues this prevents the Trustee, who is in the position of being a judgment creditor, from looking at or considering the amount of VA disability awards for any purpose. The Debtor states that an examination of the interrelationship of 38 U.S.C. § 301(1) and 11 U.S.C. § 1325(a)(1) is beyond the jurisdiction of the Bankruptcy Court and would require a proceeding in the district court, should the Trustee desire to make that claim.

Though the Debtors state that 38 U.S.C. § 301(1) "exempts payment of benefits by the Secretary of Veterans Affairs from, inter alia, the claims of creditor, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever, either before or after receipt by the beneficiary." Opposition 2:16-20., Dckt. 41. However, 38 U.S.C. § 301 states,

§ 301. Department

(a) The Department of Veterans Affairs is an executive department of the United States.

(b) The purpose of the Department is to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans.

(c) The Department is composed of the following:

- (1) The Office of the Secretary.
- (2) The Veterans Health Administration.
- (3) The Veterans Benefits Administration.
- (4) The National Cemetery Administration.
- (5) The Board of Veterans' Appeals.
- (6) The Veterans' Canteen Service.
- (7) The Board of Contract Appeals.
- (8) Such other offices and agencies as are established or designated by law or by the President or the Secretary.
- (9) Any office, agency, or activity under the control or supervision of any element named in paragraphs (1) through (8).

However, 38 U.S.C. § 5301 provides [emphasis added],

§ 5301. Nonassignability and exempt status of benefits

(a) (1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.** The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

Debtors argue that since 11 U.S.C. § 1325(b) does not expressly state that veteran's benefits are included in income, then they should be excluded in the same manner as Social Security Benefits given that the anti-assignment language of veterans' benefits are the same as those for social security benefits.

Trustee's Response

The Trustee states that he did in fact receive a copy of the trust and the supplemental declaration by the Debtor clears up that issue for the Trustee.

The Trustee maintains his objection to confirmation because of the plan provision calling for the Debtor to use unspecified amount of VA disability to fund the plan. The Trustee maintains that his objection allows the court to determine what effect such a provision has on the plan.

Trustee acknowledges that cases exist which support the Debtor's position, but that the method Debtor is using is procedurally inappropriate, if the Debtor wants to the court to decide the issue, it should be through a motion or more appropriately, an adversary proceeding.

The Trustee states that the Debtor has not addressed the ability to pay, citing four recent payday loans and past due utility debts.

The Trustee also maintains his objections as to the reasonableness of the expenses.

Discussion

The court does not agree that an adversary proceeding is necessary to determine whether the VA benefits can be used to determine current monthly income. Here, the Trustee has raised several valid objections to a proposed Chapter 13 plan, one being whether or not the Debtor's VA Disability qualifies as income for this Chapter 13, which affects the confirmation of the proposed plan. The court can view this matter in order to determine whether confirmation of the plan is feasible.

Current Monthly Income ("CMI") is defined in 11 U.S.C. § 101(10A) [emphasis added] as,

(A) means the **average monthly income from all sources** that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) **without regard to whether such income is taxable income**, derived during the 6-month period ending on-

(I) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but **excludes benefits received under the Social Security Act** [42 U.S.C. §§ 301 et seq.], **payments to victims of war crimes or crimes against humanity** on account of their **status as victims of such crimes, and payments to victims of international terrorism** (as defined in section 2331 of title 18) or **domestic terrorism** (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

Thus, there are several important exclusions from current monthly income. Most notably, benefits received under the Social Security Act are excluded. This exclusion will greatly assist many elderly and disabled recipients of Social Security benefits, not only protecting them from the relatively low median income means test thresholds for one or two person households, but also immunizing such income from being considered available to pay creditors in chapter 7 or chapter 13. 2 COLLIER ON BANKRUPTCY ¶ 101.10A (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

CMI is a component of a statutory means test that bankruptcy courts use to determine whether a debtor's bankruptcy petition is to be presumed an abuse of Chapter 7. See 11 U.S.C. § 707(b)(2). The means test is applied only if the debtor's CMI is above the safe harbor amount set forth in 11 U.S.C. § 707(b)(7). If the debtor's CMI minus certain expenses specified in the Internal Revenue Service's collection standards multiplied by 60 is either (1) greater than or equal to \$ 7,475 or 25 percent of the debtor's nonpriority secured debts, whichever is greater, or (2) greater than or equal to \$ 12,475, then the case is presumed to be an abuse and the bankruptcy court may either dismiss it under § 707(b) or, with the debtor's consent, convert it to Chapter 13. See *id.* §§ 707(b)(2)(A), (b)(1).

The Court of Appeals for the Ninth Circuit in *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) explained,

Before the BAPCPA, bankruptcy judges had authority to determine a debtor's ability to pay based on the individual circumstances of each case and each debtor. Congress replaced this discretion with a detailed, mechanical means test, which requires debtors with above-median income to calculate their "disposable income" by subtracting specific expenses from "current monthly income," as defined by the Bankruptcy Code.

Id. at 1130. The court further found that the calculation of "disposable income" now incorporates the definition of "current monthly income," and the definition of "current monthly income" excludes Social Security income. *Id.*

Once CMI is correctly calculated, "disposable income" for purposes of the confirmation test in § 1325(b) is the portion of CMI that is left after the following five deductions:

a. "[A]mounts reasonably necessary to be expended—" as determined under § 1325(b)(2)(A) and (B) if CMI is less than applicable median family income¹ and determined in accordance with § 707(b)(2)(A) and (B) if CMI is greater than applicable median family income;

b. Amounts included in CMI by § 101(10A)(B) that are not "received by the debtor";

c. "[C]hild support payments, foster care payments or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child";

d. "[A]mounts required to repay" a pension loan described in §§ 1322(f) and 362(b)(19); and

e. Wages withheld or payments received by an employer as contributions to an employee benefit plan, deferred compensation plan, tax-deferred annuity or health insurance plan described in § 541(b)(7).

Several courts have held that veterans benefits are not social security benefits and are included in current monthly income, notwithstanding that veterans benefits may be exempt under other state or federal law. *In re Waters*, 384 B.R. 432, 436-38 (Bankr. N.D. W. Va. 2008); *In re Wyatt*, No. 08-14792-SSM, 2008 WL 4572506 (Bankr. E.D. Va. Oct. 10, 2008)(holding Veterans Administration disability compensation is income for purposes of calculating CMI); *In re Hedge*, 394 B.R. 463, 466 (Bankr. S.D. Ind. 2008)(holding VA disability payments are included in CMI); *In re Redmond*, No. 07-80634-G3-13, 2008 WL 1752133 (Bankr. S.D. Tex. Apr. 14, 2008)(holding Veterans Administration disability payments are included in income for purposes of projected disposable income calculation.).

In *In re Waters*, the bankruptcy court held,

[U]nder the changes rendered to § 1325(b) by BAPCPA, the debtor's "current monthly income" for purposes of applying the disposable income test now includes any amount paid by an entity other than the debtor on a regular basis for the household expenses of the debtor. . . . Regarding the application of 11 U.S.C. § 101(10A) to the receipt of VA benefits, those benefits are "income" to the Debtor inasmuch as [the debtor] receives a monthly benefit check. . . . [T]he benefits are paid by the Department of Veterans Affairs, which is an "entity" [B]enefits are received on a regular, monthly basis . . . they are received to help pay for the household expenses of the debtor and/or the debtor's dependents. Accordingly, exempt VA benefits are properly included in the calculation of a debtor's current monthly income pursuant to § 101(10A) . . . regardless of the exempt status of those benefits under federal or State law.

In re Waters, 384 B.R. at 436-38.

Here, Debtor argues that Veteran's Disability is not "income" as defined by the United States Code pursuant to 38 U.S.C. 5301(1). However, 11 U.S.C. § 101(10A) states that "current monthly income" is income from all sources the debtor receives, excluding benefits received under the Social Security Act. Further, 38 U.S.C. § 5301(1) does not specifically exempt payment of benefits by the Secretary of Veterans Affairs from "current monthly income" calculation, rather it states the benefits "shall not be liable to attachment, levy, or seizure." Including the amount of benefits in the CMI calculation is not creating an attachment, levy or seizure upon the benefits. Rather it is merely a component of a statutory means test that bankruptcy courts use to determine whether a debtor's bankruptcy petition is to be presumed an abuse of Chapter 7. Debtor has not shown that the VA disability award is an exception to the CMI definition Congress created in 11 U.S.C. § 101(10A).

Finally, on this point the Debtors' contention that since the anti-garnishment and alienation provisions of the Veterans' Benefits are the same as Social Security Benefits they should be excluded confirms why Veterans' Benefits are included. Congress created a specific exclusion for Social Security Benefits from the definition of current monthly income. 11 U.S.C. § 101(10A). Congress demonstrated thereby how extremely broad the concept of "income" under the Bankruptcy Code and that absent such an exclusion, Social Security Benefits would otherwise be included in the computation of current monthly income-disposable income-projected disposable income.

Additionally, the Debtor has not addressed the reasonableness of the expenses raised by the Trustee. Debtors have failed to meet their burden of proving the requirements of confirmation. See *Amfac Distribution Corp. v. Wolff (In re Wolff)*, 22 B.R. 510, 512 (9th Cir. B.A.P. 1982) (holding that the proponent of a Chapter 13 plan has the burden of proof as to confirmation).

CONTINUANCE

The court continued the hearing to allow Debtors to serve the Chapter 13 Trustee supplemental pleadings concerning expenses, debts and to support the Debtor's assertion that the plan is feasible.

STIPULATION

The parties filed a Stipulation Resolving Trustee's Objection to Confirmation with the following amendments of the plan in the order confirming:

1. to increase the plan payments from \$3,244.00 to \$3,444.00 as of the November 2013 plan payment, and
2. that the additional provision appearing in Section 6 on Page 5 of the plan, (Plan, DN #5, Page 5), will be removed from the plan.
3. No other party has appeared on the objection. Pursuant to FRCP 41(a)(1)(A)(ii), the objection is hereby dismissed.

Based on the stipulation between the parties, the Objection to Confirmation has been dismissed without prejudice, on the conditions stated in the Stipulation.

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, respondent creditor, and Office of the United States Trustee on October 7, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Value Collateral 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 court's tentative decision is to deny the Motion to Value Collateral. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors seek to value the collateral of "Mortgage Electronic Registration System ("MERS") as Nominee for RBS Citizens, N.A." However, there are several issues with this Motion. The Movant does not provide evidence that MERS is the creditor (as defined in 11 U.S.C. § 101(10)) in this case. The Movant actually shows that MERS is not the creditor but merely a placeholder on the deed of trust for the actual creditor. A Motion to Value the Collateral of a secured claim values just that: the creditor's secured claim, not any interest of the nominee for purposes of the deed of trust. This court recently addressed how MERS functions:

While many consumers have blunted their spears on the issue of whether the deed of trust was assigned, it is clear under California law that the relevant issue is who owns or has the right to enforce the note. It is well-established law in California that a deed of trust does not have an identity separate and apart from the note it secures. The note and the mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); accord *Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); Cal. Civ. Code § 2936. Therefore, if one party receives the note and another receives the deed of trust, the holder of the note prevails regardless of the order in which the interests were transferred. *Adler v. Sargent*, 109 Cal. 42, 49-50 (Cal. 1895). Case Number: 2013-28189 Filed: 9/10/2013 Doc # 36.

In 2011, the Ninth Circuit Court of Appeals addressed this note-deed of trust issue in *Cervantes v. Countrywide Home Loans, Inc. et. al.*, 656 F.3d 1034, (9th Cir. 2011). The creation of the Mortgage Electronic Registration Systems, Inc. (MERS) by lenders to facilitate multiple transfers of promissory notes as part of securitized loan portfolio trading is at the root of many of these timing and document of transfer issues. The purpose of creating MERS was to avoid the recording of assignments of deeds of trust while promissory notes were transferred from investment portfolio to investment portfolio. Only when the ultimate buyer would have to foreclose would MERS then stop acting as the nominee for the original lender and its assigns. Thus, it is not unusual for there not to be an assignment of the deed of trust every time a promissory note is transferred from buyer to subsequent buyer. Instead, only at the eleventh hour when the final buyer has to proceed with a non-judicial foreclosure sale is an assignment of the deed of trust recorded. No evidence has been presented that the assignment of the Deed of Trust was anything other than an assignment to identify Defendant as the person entitled to have the Deed of Trust enforced when it was time have the trustee proceed with a non-judicial foreclosure sale due to the monetary defaults.

Macklin v. Deutsche Bank Nat'l Trust Co. (In re Macklin), 495 B.R. 8 (Bankr. E.D. Cal. 2013). MERS not being the creditor, the court has no claim before it to value.

The Motion also suffers from several fundamental flaws which precludes the granting of relief. First, the Motion does not clearly identify the person against whom the relief is requested. The title to the Motion is Motion for Order Valuing Collateral of Mortgage Electronic Registration System (MERS) as Nominee for RBS Citizens, N.A. However, nowhere in the motion itself do the Debtors state that they request the court to enter an order against or determining the rights of any specific person. The court and parties should be able to read the plain language of the motion itself and figure out who the parties are and whose rights will be determined.

Second, the Motion states that MERS as the nominee for RBS Citizens, N.A. has a second deed of trust in the amount of approximately \$19,264.00. Since the deed of trust can only secure the debt, then what must be meant is that MERS, solely as a nominee, has a deed of trust securing a debt in the amount of \$19,264.00. However, it is well established law that the person who owns the debt also has the deed of trust. A deed of trust does not have an identity separate and apart from the note it secures. Possibly the motion is intended to seek relief against RBS Citizens, N.A., but that it not clearly stated. The court will not guess at the target creditor when it is such a simple task for the Debtors to clearly state the target creditor against whom relief is requested.

Lastly, to the extent the motion is targeted at RBS Citizens, N.A., a federally insured depository institution, service must comply with Federal Rule of Bankruptcy Procedure 7004(h). 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 did not serve RBS Citizens, N.A.

Based on the foregoing, the motion is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by 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.