UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 18, 2014 at 3:00 p.m.

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1. 11-43500-E-13 ACW-5 | **MICHAEL PANNELL AND LORI CHERNEY**
Andy Warshaw | **AMENDED MOTION FOR COMPENSATION FOR ANDY C. WARSHAW, DEBTORS' ATTORNEY**
10-16-14 [111]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and all creditors on October 16, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Andy Warshaw ("Applicant"), the Attorney for Michael Pannell and Lori Cherney, the Chapter 13 Debtor ("Client"), makes a Second Interim Request for the Allowance of Fees and Expenses in this case. FN.1. The

period for which the fees are requested is for the period July 23, 2013 through June 23, 2014. The order of the court approving the substitution of Applicant was entered on July 23, 2014, Dckt. 44. Applicant was substituted into the case after Client's previous attorney was unable to continue practicing law.

FN.1. Applicant states that he has not been compensated for any of the work he has done in this case to date. This is accurate, to a point. Applicant made an earlier request for compensation on July 11, 2014 that was denied. The court will, accordingly, refer to this request as a Second Request for Compensation even though the first was denied.

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

General Case Administration: Applicant spent 1 hour in this category. Applicant met and consulted with Client about their case.

Significant Motions and Other Contested Matters: Applicant spent 13 hours in this category. Applicant drafted and responded to objections to a modified Chapter 13 Plan, drafted a motion for compensation, and responded to Trustee's motion to dismiss.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on

> the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including discussing the Client’s financial situation, reviewing documents, and preparing necessary motions to file with the court. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

“NO-LOOK” FEES

In this District the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the

services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

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

The Order Confirming the original Chapter 13 Plan expressly provides that Client's former attorney was allowed $3,500.00 in attorneys fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 7. The order confirming the Plan was prepared by the former attorney.

If Applicant believes that there has been substantial and

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

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

Applicant's declaration states that Client's prior attorney was unable to "continue with the practice of law." Applicant further states that he and his firm have not been compensated for the representation of Client since Applicant substituted into the case.

Applicant could, consistent with Local Bankruptcy Rule 2016-1(c)(3), seek the payment of additional fees for "substantial and unanticipated work" outside of what is included in the agreed to set fee. Here, Applicant sought such additional fees, and did not ignore the agreed set fee and Local Bankruptcy Rule 2016-1. Applicant provided the court with the standard lodestar analysis (even if from reconstructed records), which will include a statement as to the benefit of the services to the Client and estate.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to this Motion on November 4, 2014. Dckt. 118. The Trustee objects to the Motion on the basis that Applicant filed an amended motion for compensation instead of moving to reconsider Applicant's prior motion that was denied or appealing the ruling.

Applicant seeks the same compensation for the same services as the prior motion. In denying the prior Motion, the court stated that Applicant should adjust the fees to account for the fundamentally defective first motion to confirm modified plan, which was denied. In the instant Motion, Applicant merely states that more than one motion to modify was needed due to Debtors' delinquency on the initial motion to modify.

Further, the Trustee objects to the scheme Applicant proposes for

the payment of the fees. Applicant requests an order requiring the Debtors to pay $625.00 of the $4,064.00 total fees through the plan and the remaining fees at $287.59 per month after the completion of the plan. The Trustee opposes this arrangement unless the order granting the fees expressly states that payments to Applicant are to commence no earlier than the discharge, conversion of the case, or dismissal of the case. The fee agreement sets a date for the beginning of the payments in October 2016, which may or may not align with the timing of the case.

DENIAL OF PRIOR MOTION FOR FEES RELATING TO MOTION TO CONFIRM CHAPTER 13 PLAN

When the court denied the prior motion, one of the grounds related to an earlier motion to confirm a plan which itself was denied. In concluding that such fees did not appear proper, the court stated,

> "The court also notes that the first motion to confirm a modified plan by this Counsel was denied. Civil Minutes, Dckt. 76. The denial was for several reasons. First, Counsel failed to properly serve the Internal Revenue Service. Second, the Debtors were in default with their proposed modified plan payments. (This second ground is not one in which Counsel would have to accept the blame.) Third, the motion stated conflicting plans which were purported be subject of the motion. Fourth, counsel had improperly modified the mandatory plan form and failed to set forth the amendments in additional provisions which are required to be set forth on separate pages attached to the mandatory plan form. It appears that counsel is seeing to be paid fees (computed at $300.00 per hour) for that fundamentally defective motion. See Exhibit C, Itemized Time Entry by Project, Dckt. 101."

Civil Minutes, Dckt. 108.

Counsel once again requests that he be compensated $1,260.00 for the fundamentally defective prior motion to confirm and that Chapter 13 Plan. The fees relating to the prior motion (ACW-2) and plan are,

Date	Legal Services	Hours	Amount
08/26/13	Motion to Modify Chapter 13 Plan	2.6	$780.00
08/28/13	Review of Trustee's Response and Objection to Motion to Modify	0.1	$30.00
08/29/13	Review and Drafting of Response to Trustee's Comments on Motion to Modify	1.3	$390.00
09/03/13	Review of email from Debtors. Phone call to Debtors to discuss response to Trustee objection. Email to Debtors.	0.1	$30.00

09/09/13	Review of Tentative Ruling on Motion to Modify	0.1	$30.00
			$1,260.00

The court is unsure as to the services billed for August 26, 2013 - Motion to Modify Chapter 13 Plan. That motion was filed on August 5, 2013. Dckt. 47. The responses and reply services on August 28 and 29 are consistent with the filing of the opposition by the Trustee and response by the Debtors.

In reviewing the Civil Minutes for the hearing at which the motion to confirm was denied, the court notes that Debtors also presented the court with substantial and unexplained changes to their expenses. These changes made it appear that the prior statement of expenses under penalty of perjury were made-up numbers solely for the purpose of achieving a pre-determined net monthly income number. Civil Minutes, Dckt. 60.

The court addressed in detail why the contentions by the Debtors for why there were such substantial changes in their expenses were not credible new statements under penalty of perjury. The court concluded,

> "It appears that rather than making an original good faith statement as to their expenses when preparing Schedule J and originally filing a plan in this case, the Debtors engaged in 'outcome determinative' budgeting. The Debtors computed the amount they needed to fund the minimum creditor payments, and then constructed expenses to consume all of the remaining monies...
>
> The court confirmed the Debtors' plan on February 9, 2012. Order, Dckt. 38. However, the Trustee noticed a default in plan payments in July 2013. Dckt. 41. That led to the modified plan now before the court. The post-petition defaults are to be cured through the Plan, with the Debtors to reduce the monthly plan payments to $1,820.00 for the final 39 months of the Plan. The cure is to be accomplished without increasing the monthly plan payments by reducing the Class 7 general unsecured claim dividend to 1%.
>
> The Debtors' testimony that they can make the payments is not credible. Glaring is that to make this "work" the Debtors have been able to reduce their expenses. The first is that their electricity/hearing expense can be dropped from $300.00 a month to only $180.00. No explanation has been given how this standard, routine, well documented family expense could have been overstated by $120.00 a month when the Debtors confirmed their original plan. No explanation has been given as to how, if possible, the Debtors have reduced their electricity/heating fuel usage.

> Medical and Dental expenses of $250.00 a month, to which the Debtors testified to under penalty of perjury in getting the original plan confirmed have melted to only $40.00 a month. No testimony has been provided that medical treatment have been terminated, new insurance or benefits have been obtained, or any other reason for $210.00 of prior bona fide monthly medical expenses no longer exist.
>
> The same questionable reductions exist for food, water/sewer, and transportation, and an increase in telephone expenses. The court [*sic*] weight to statements made under penalty of perjury, so when a witness states something difference later under penalty of perjury, some more than "believe me now" is required for the witness to be credible. Testifying under penalty of perjury is not merely an opportunity to tell whatever will help a party win. The testimony must be truthful and credible."

Id. While the Original Schedules and those statements under penalty of perjury occurred during prior counsel's watch, the insufficient explanation occurred during, and fees are requested by, current counsel.

Counsel then requests an additional 1.4 hours for an amended motion to modify, $420.00, which expressly references that it is to take into account the "feedback" from the hearing at which the prior motion was denied. Some additional modest charges are made to modifications (all in the 0.1 to 0.3 time billing range) for the motion to modify.

While it appears that all of the August and September 2013 fees relate to the motion to modify that was denied, the court concludes that some of the work actually related to the motion by which the modified plan was ultimately confirmed. These entries, such as the August 26, 2013 "Drafted Motion to Modify Chapter 13 Plan" ($780), and August 28, 2013 "Review of Trustee's response and objection to Motion to Modify" ($30) could fairly be found to relate to the subsequent motion.

However, some of the services relate to the first motion to modify and the efforts to paper over Debtors' substantial, unexplained changes in expenses. The court disallows $420.00 of the fees sought, which are the August 20, 2013 "Review and Drafting of Response to Trustee's Comments on Motion to Modify" ($390.00) and the September 3, 2013 "Review of email from Debtors. Phone call to Debtors to discuss response to Trustee objection. Email to Debtors." ($30.00) services.

PRIOR ALLOWANCE OF CHAPTER 13 FEES TO FORMER COUNSEL

Debtors' former counsel, Aron Rofer, was allowed $3,500.00 in fees through the confirmed Chapter 13 Plan. February 9, 2012 Confirmation Order, Dckt. 38. Pursuant to that Confirmation Order, no further attorneys' fees and costs are to be paid to Debtors' counsel, whomever it is, except as provided by Local Bankruptcy Rule 2016-1(c). The $3,500.00 in fees allowed includes all of the "normal" work through the Debtors' obtaining their discharge.

The substitution of counsel was authorized by the court July 23, 2013. Order, Dckt. 44. At that time, Aron Rofer had not performed all of the legal services for which the full $3,500.00 fee was authorized. Neither the Debtors nor the Chapter 13 Trustee address whether Mr. Rofer has been paid the full $3,500.00; if not, whether the Trustee is continuing to make such payments; or whether any portion of the $3,500.00 should be disallowed and recovered for or retained by the estate to pay current counsel for the additional services he is having to provide.

The current requested fees do not cover the services for which compensation has already been ordered by the court, but for which Mr. Rofer will not be representing the Debtors. The current fees are only for substantial and unexpected legal services in this case. However, current counsel should consider whether such fees allowed to Mr. Rofer should be disallowed and not paid or recovered, as the court does not authorize duplicate fees to be paid merely because one attorney does not provide the services.

The court shall refer this matter to the attention of the Chapter 13 Trustee and U.S. Trustee as well to consider whether either, or both, of those offices should seek the disallowance and recover of any such fees which have been paid to Mr. Rofer. The court is cognizant that the dollar amount at issue may be modest, though necessary to recover, and that leaving such recovery to the Debtors or their current counsel who has substituted in may be a less than reasonable burden to place on them in light of these two other parties in interest.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Andy Warshaw (Attorney)	13.2	$300.00	$3,960.00
Melissa Markle (Paralegal)	0.8	$130.00	$104.00
Matt Avetoom (Law Clerk)	1.5	$0.00 (Written Off)	$0.00
Total Fees For Period of Application			$4,064.00

The court finds that the hourly rates reasonable and that Applicant generally effectively used appropriate rates for the services provided. However, Applicant spent 1.4 hours, which equates to $420.00 of requested fees, working on trying to justify the fatally flawed initial motion to modify plan and Debtor’s testimony in this case.

Next, the court considers whether the total fees charged for the drafting of the modified plan and the motion to confirm the plan which was confirmed are reasonable. The court notes that the Motion to Confirm the Modified Plan (Dckt. 78) clearly states the grounds with particularity (Fed. R. Bankr. P. 9013) upon which the relief is requested. The Motion clearly states the modifications and basis for the modification. Debtors also provided an appropriately "short and sweet" points and authorities. Debtors' declaration provided the court, Chapter 13 Trustee, and Creditors with testimony under penalty of perjury by which a determination could be made that the substantial changes in expenses arose due to changes in circumstances and not as part of an ongoing scheme to defraud the court and creditors. Dckt. 81. Counsel has performed substantial work to confirm the Modified Plan and the overall fees, after adjusting for the $420.00 is reasonable.

The court also next considers that counsel has requested $300.00 for the fee application filed in this case. (This is explained to be for 1.5 hours, with no charge being made for 0.5 hours of that time.) The court respects the fact that when attorneys file motions for compensation they are expending billable time which could be spent doing paying work for other clients. Such reasonable billable time is equally compensable for the fee application process. It appears that the 0.5 hours non-charged time may be an adjustment relating to the other services. The court awards counsel the 0.5 hours of compensation ($150) and 0.9 ($270) hours of compensation for the hearing on the motion – which by coincidence equals exactly $420.00. The adding of this additional fee allowance is offset by the $420.00 in fees relating to the prior motion which was disallowed, thereby making the changes financially neutral with respect to the total fees requested.

The court allows $4,064.00 of additional fees for counsel. Though this amount is higher than one normally expects for a motion to modify and motion for compensation, there are some more unique facts which required the expenditure of additional counsel time. Attorneys reviewing this ruling should recognize it as the aberration, and not a new "floor" on the attorneys' fees to be extracted from the estate on a motion to modify a plan. These First Interim Fees are allowed pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330, and are authorized to be paid by the Chapter 13 Debtor under the confirmed plan from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

PAYMENT OF FEES

Counsel and Debtors request that $3,439.00 of the fees be allowed to be paid by the Debtors after completion of the plan. Counsel states that he will work with them on the payments. $625.00 is to be paid through the plan. The Debtors' Declaration states that the payment arrangement with counsel is to pay $287.59 a month, commencing upon the conversion, dismissal, discharge or completion of the Chapter 13 case, until the $3,439.00 is paid in full. Dckt. 113. If the case is converted or dismissed, it may well be that the Debtors' obligation to pay the fees is discharged and counsel has no legal right to enforce the obligation. Further, if either of those were to occur, it is possible that the court might not (though not likely) give final approval of such fees.

The court must take into account the financial realities of this case, which is now more than four years old. The Debtors can only pay their projected disposable income into the plan, and it may be impossible for them to increase their payments over the final ten months of the plan to pay the entire $4,064.00 through the plan (which would require an increase of approximately $410.00 a month).

However, the obligation to pay the additional fees may be ameliorated by any monies not disbursed to or recovered from prior counsel from the $3,500.00 of no-look fees previously approved in this case.

The court, under the unique circumstances of this case allows and authorizes the Debtors to pay, after completion of this Chapter 13 case and the entry of their discharge, to pay the remaining balance due on the $4,064.00 of additional fees approved by the court, after credit for all monies paid to counsel by the Trustee for such fees.

Applicant does not seek the allowance and recovery of any costs or expenses.

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

Fees	$4,064.00
Costs and Expenses	$ 0.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Andy Warshaw (“Applicant”), Attorney for the Chapter 13 Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Andy Warshaw is allowed the following fees and expenses as a professional of the Estate:
>
> Andy Warshaw, Professional Employed by Chapter 13 Debtor
>
> Fees in the amount of $ 4,064.00
> Expenses in the amount of $ 0.00,
>
> **IT IS FURTHER ORDERED** that the Chapter 13 Debtor is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

IT IS FURTHER ORDERED that Michael Pannell and Lori Cherney, the Debtors, are authorized to pay the remaining balance due on the $4,064.00 directly to Counsel on the following terms:

1. No interest, except as further ordered by this court in subsequent proceedings if Debtors default in payment;

2. With monthly payments in the amount of $288.00;

3. The monthly payments to commence on the 10th day of the first full calendar month after the entry of the Debtors' discharge, continuing to be made until the remaining balance of the allowed fees is paid in full;

4. In the event of default, the court shall waive any reopening fee, if any, for Counsel to reopen this case to enforce this order allowing fees and authorizing the payment of such fees by the Debtors directly.; and

5. The obligation to pay these fees by Debtors shall be enforced only by this court pursuant to this order. The authorization for the Debtors to pay the attorneys' fees after the entry of their discharge constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014)."

IT IS FURTHER ORDERED that the Clerk of the Court shall serve a copy of this order on the Chapter 13 Trustee and U.S. Trustee for Region 17, Sacramento Division, Attn: Antonia Darling, Esq., for their respective review and consideration whether the prior approved attorneys' fees of $3,500.00 for Aron Rofer should be reduced or whether any such reduced amounts should be recovered from said former counsel if previously paid under the prior confirmed plan. The court is not ordering the Chapter 13 Trustee or U.S. Trustee to take any action with respect to such fees.

2. 12-31800-E-13 JOHN/GINGER MCCORMICK MOTION TO INCUR DEBT
RLC-2 Stephen Reynolds 10-20-14 [53]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on October 20, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Incur Debt is denied without prejudice.

The motion seeks retroactive permission to purchase a 2009 Dodge Avenger ("Vehicle"), which the total purchase price is $8,591.00 plus a $2,195.00 three-year service contract and a $795.00 gap contract. FN.1. Of this amount, Ginger McCormick ("Debtor") financed $7,428.23 at an annual percentage rate of 5.59%. Exh. B, Dckt. 56. Debtor's former vehicle was totaled in an accident and Debtor applied her $5,000.00 insurance proceeds to this purchase. The contract provides for 60 monthly payments of $142.52. Debtor purchased the case on August 16, 2014.

FN.1. The court notes that Debtor's Counsel provides a Kelley Blue Book valuation in support of the purchase price being reasonable. This exhibit was not properly introduced and authenticated. Though the court may recognize the a Kelly Blue Book or NADA report is a published price guide commonly used for the valuation of vehicles (thereby qualifying for a hearsay exception), someone must still authenticate the document and attest to it being what it purports to be. However, the price was not objected to as being unreasonable, so this oversight is not fatal to the Motion.

Debtor states that she needed the vehicle to replace her former car that was totaled in early August. She uses her vehicle to transport her grandchildren to school and visit area food banks to keep grocery costs down. Dckt. 55. Debtor states that she "forgot that prior court approval" was needed in this instance, until she spoke with her attorney in October. Dckt. 55. Debtor also states that although the purchase of this vehicle did not cause Debtor and her husband to modify their plan, her husband's subsequent loss of his job means that Debtors will file a plan modification.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the Motion on October 27, 2014. Dckt. 60. The Trustee does not oppose the purchase of the Vehicle under these terms. The Trustee is concerned that Debtors will not be able to sustain both the monthly payment for the Vehicle plus the current plan payment since Debtor John McCormick has lost his job. The Trustee also notes that Debtors have not filed amended Schedules I and J.

The Trustee also does not object to the Debtor seeking retroactive approval under the circumstances described in Debtor's Declaration.

DISCUSSION

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

The court notes that Debtors filed a Motion to Modify and a modified plan on October 28, 2014. This modified plan adjusts the monthly payments to reflect the loss of Debtor's job. However, the substance of the motion to modify is beyond the scope of the instant Motion and it will not be discussed further. The Debtors also filed Supplemental Schedules B, C, I and J on October 22, 2014, which addresses another of the Trustee's concerns.

Debtors' Ability to Pay for Credit

On October 22, 2014, Debtors filed a Supplemental Schedule J to reflect their current expenses. Dckt. 58 at 11-13. These expenses are provided to the court under penalty of perjury, for which the court gives significant weight – if credible. If believed, Debtors have incurred this $7,428.23 in debt when their income and expenses are stated to be.

Supplemental Schedule I, Dckt. 58 at 8-10.		**Supplemental Schedule J, Dckt. 58 at 11-13.**	

Social Security Disability	$665.00	Mortgage	($1,255.65)
Unemployment Benefits	$1,935.00	Home Maintenance	$0.00
		Electricity, Gas, Heating	($158.78)
		Water, Sewer	($59.91)
		Phone, Internet Cable	($280.94)
		Garbage	($40.14)
		Food and Housekeeping	($250.00)
		Clothing, Laundry	$0.00
		Personal Care	($20.00)
		Medical, Dental	($80.00)
		Transportation (gas and maintenance)	($100.00)
		Entertainment	$0.00
		Vehicle Insurance	($165.00)
		Vehicle Tax, Registration	($35.00)
		Car Payment	($142.52)
	------		-------
Total Monthly Income	**$2,600.00**	**Total Expenses**	**($2,587.94)**

On Amended Schedule B Debtors list owning three cars, one which is not running. The two running vehicles are the 2009 Dodge Avenger, with 95,000 miles (which averages approximately 18,000 miles a year), and a 2001 Mitsubishi Eclipse, with 103,477 miles (which averages approximately 7,360 miles a year).

The $142.52 car payment in the Supplemental Schedule J expenses is for the Dodge Avenger. If approved, these payments will have to be made for 60 months (at which time the car will be ten model years old.

The fact that Debtors found it necessary to pay $2,155.00 for a two year service contract is problematic. This represents 25% of the value of the vehicle. The service contract is only for three years, and represents annual repair and maintenance expenses of $720 – a very significant annual repair expense for an otherwise reliable vehicle.

The purchase of a vehicle was necessary because their former vehicle

was totaled in an accident. Debtors received $5,000.00 in insurance proceeds, which they use to purchase the Dodge Avenger, which is stated to have a value of $8,591.00. But after paying the $5,000.00 insurance proceeds toward the purchase price and with $654.98 in sales tax, with all of the add-on contracts the purchase price balloons to $13,551.20. The balance due after application of the insurance proceeds almost equals the retail value of the vehicle.

Compounding the Debtors problems is that they demonstrate that they do not have the ability to pay for this loan. The expenses stated on Supplemental Schedule J are clearly unreasonable. They appear to be made-up numbers to create the illusion that Debtor can made the payments in this case.

Though the Debtors own their home and are paying their mortgage, they state under penalty of perjury that they pay no expenses to maintain the home and property. See proposed First Amended Plan providing for direct Class 4 monthly mortgage payment of $1,255.65. Debtors state under penalty of perjury that their gas and vehicle expenses are only $100 a month for two Debtors and two vehicles. Even having pre-paid $2,155.00 for a "Service Contract" (for which no explanation as to scope of the "service" has been provided), the $100.00 a month expense has not been shown to be reasonable. (Even with regular gas at $2.85 a gallon, the $100 represents only eight gallons of gas a week. Assuming 20 miles to the gallon, the two cars could only be driven eighty miles a week.)

Further, Debtors ask the court to believe that they do not buy any clothes or do any laundry. Further, that the Debtors each only spend $125.00 a month on food. The court does not find that credible under the information filed with the current motion.

In reality, Debtors now seek retroactive approval of a post-petition credit transaction which they used to obtain a vehicle which they wanted – but likely knew (whether consciously or subconsciously) that the court would not approve. So, they obtained the vehicle and have presented the court with a fait accompli, with the court being little more than a rubber stamp for the transaction. The court does not, and will not, approve this, or any similar transaction.

The Motion is denied without prejudice.

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

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

3. 14-23800-E-13 TROY/KIMBERLY JEPSEN
DPC-2 Mark W. Briden

CONTINUED MOTION TO DISMISS CASE
9-17-14 [49]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, and Office of the United States Trustee on September 17, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Dismiss is denied without prejudice.

David Cusick, the Chapter 13 Trustee, filed a Motion to Dismiss on September 17, 2014. Dckt. 49. The Trustee moved to dismiss on the basis that his Objection to Confirmation was sustained at the hearing on July 22, 2014. Since that time, Troy and Kimberly Jepsen ("Debtors") have not filed an amended plan for confirmation. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

DEBTORS' OPPOSITION

On September 25, 2014, Debtors filed an opposition to this Motion. Dckt. 60. Debtors state that they filed a First Amended Chapter 13 Plan on September 24, 2014 and set it for hearing on November 18, 2014. Debtors also state that they are current under the Plan's terms.

OCTOBER 15, 2014 HEARING

At the October 15, 2014 hearing, the court continued the Motion to November 18, 2014, at 3:00 p.m. to afford the Debtors the opportunity to file a supplement to the motion to confirm which shall state with particularity the grounds upon which the relief is properly requested. The court further ordered that if the supplement is filed on or before October 30, 2014, the court will consider it as part of the motion to confirm.

DISCUSSION

Upon review of the docket, no further pleadings have been filed by either party. On November 5, 2014, the Debtors filed a "Notice of Withdrawal of Motion for Ordering Confirming First Amended Chapter 13 Plan." Dckt. 68. In the Notice, the Debtors state that the Debtors will be converting their Chapter 13 bankruptcy to a Chapter 7.

On November 12, 2014, Debtors filed their election to convert the case to one under Chapter 7. Dckt. 70. The case having been converted, to one under a Chapter 7, the Motion to Dismiss is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, the Case having been converted to one under Chapter 7, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

4. 14-23800-E-13 TROY/KIMBERLY JEPSEN — MOTION TO CONFIRM PLAN
MWB-3 Mark W. Briden — 9-24-14 [54]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

Troy and Kimberly Jepsen ("Debtors") having filed a "Notice of Withdrawal of Motion" for the pending Motion to Confirm First Amended Plan (Dckt. 68), the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, and good cause appearing, **the court dismisses without prejudice the Debtors' Motion to Confirm First Amended 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 First Amended Plan having been filed by the Debtors, the Debtors having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm First Amended Plan is dismissed without prejudice.

5. 14-27203-E-13 JOSE VALLEJO **MOTION TO CONFIRM PLAN**
TOG-1 Thomas O. Gillis **9-25-14 [26]**

Final Ruling: No appearance at the November 12, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 25, 2014. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by creditors. The Chapter 13 Trustee filed a nonopposition on November 3, 2014. 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 25, 2014 is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

6. 10-25007-E-13 JEFFERY/JUANITA SCHAFF — MOTION TO SET ASIDE DISMISSAL OF CASE
RPB-11 Raymond P. Burton — 11-3-14 [157]

No Tentative Ruling: The Motion to Set Aside Dismissal of 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.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 3, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Vacate the Order Dismissing the Chapter 13 Case is xxxxxxx.

Jeffery and Juanita Schaff ("Debtors") filed the instant Motion to

Set Aside Dismissal of Case on November 2, 2014. Dckt. 157. The Debtors' case was dismissed on October 19, 2014 when an Order granting the Chapter 13 Trustee's Motion to Dismiss for failure to make plan payments. Dckt. 154. The Debtors assert that Debtors have paid $40,320.00 through October 15, 2014, the date of the hearing on the Trustee's Motion to Dismiss. The Debtors asset that following the hearing, Debtors forwarded to the Trustee the sum of $2,30.00, bringing current the total amount required to be paid, including the October payment.

Debtors argue that they intended to cure the default well in advance of the hearing but did not, due to "mistake, inadvertence, surprise, or excusable neglect," as used in Fed. R. Civ. P. 60(b)(1), made applicable by Fed. R. Bankr. P. 9024. The Debtors argue that if the court grants the instant Motion, and after posting of the payment of $2,270.00 sent October 30, 2014, Debtors will be required to make five further payments of $790.00, or a total of $3,950.00 to complete their Chapter 13 Plan, subject to final audit by the Trustee. The Debtors allege that this sum is less than ten percent of the amount already paid to the Trustee under the Plan.

In support, Debtor Jeffrey Schaff states in his declaration that it was believed that the payment of $2,370.00 was made and it was only when the Debtors received the Notice of Entry of the Order Dismissing Case that Debtors became aware that the instruction to forward this sum had not been made. The Debtors argue that this oversight was due strictly to the excusable neglect of the Debtors.

The Chapter 13 Trustee filed non-opposition to the instant Motion on November 7, 2014.

DISCUSSION

Local Bankruptcy Rule 9014-1(d)(5) states that each motion, opposition and reply shall cite the legal authority relied upon by the filing party. Movant has failed to provide the legal authority for the court to grant the relief sought.

Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable;

or

(6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463.

In reviewing the Declaration of Jeffrey Schaff, one of the Debtors, he testifies that the Debtors' legal strategy was that they assumed the Chapter 13 Trustee would dismiss the motion to dismiss the case if the default was cured prior to the hearing. Dckt. 159. This legal strategy is "problematic," at best. Merely paying multiple months of payments on the even of a hearing for dismissal of the case does not guaranty that the motion to dismiss will be withdrawn or that such a motion will be denied by the court. A debtor, who is struggling to make the regular monthly plan payment is required to explain how there can be "extra" monies in one month to make the current payment (which exhausts the debtor's projected monthly income) and then multiple arrearage payments.

As to the "surprise" or "excusable neglect," this Debtor testifies that for some unknown reason he did not make the payment, though the Debtors had the money.

Debtors' counsel also provides his declaration, apologizing for "dropping the ball" by not verifying that the Debtors made the necessary payments to cure the defaults. Dckt. 160.

What neither counsel nor the Debtor address is that no opposition was filed or asserted at the October 14, 2014 hearing on the Trustee's Motion to Dismiss the Chapter 13 case. The motion was filed pursuant to Local Bankruptcy Rule 9014-1(f)(1), with written opposition required at least fourteen days prior to the hearing. No written opposition was filed

and the case was dismissed.

The law and motion practice in federal court is not one in which motions can be ignored and the court, trustee, or creditors will prosecute or defend the case for the debtors. Such lack of attention to the prosecution of the case has resulted in the Chapter 13 Trustee incurring otherwise unnecessary legal expenses in having to address the order dismissing the case and now Debtors' scrambling with this Motion to Vacate the Dismissal.

NOT VACATING THE DISMISSAL WOULD WORK A SIGNIFICANT PREJUDICE ON DEBTORS

The Debtors have not presented the court with a "mistake, inadvertence, surprise, or excusable neglect" to vacate the order dismissing the Chapter 13 case. Though the Chapter 13 Trustee does not oppose the Motion, that does not constitute a statement that the Trustee asserts that such grounds exist. Even if the Trustee so believed, the court does not.

Debtors' Points and Authorities does not provide the court with any cases supporting their contention that such proper grounds exist. Instead, they merely quote Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 and conclude that sufficient grounds exist.

What Debtors ignore is that they did not oppose the motion. The failure to oppose the motion was a conscious legal strategy with their counsel. They all operated under the faulty legal conclusion that so long as the Debtors cured the default before the hearing, then the motion was automatically dismissed. That is not, and has not, been the law in this court for at least the past five years (the period which the current judge in Department E has been sitting in this court). While ill-conceived, this was a deliberate strategy of Debtors and their counsel. Because no opposition was filed, neither the Debtors nor their counsel were in court at the hearing on the Trustee's motion and the continuing default of the Debtors was not addressed. There was no mistake, inadvertence, or excusable neglect with respect to not opposing the motion to dismiss.

However, the court does acknowledge that the failure to vacate the dismissal will cause significant prejudice to the Debtors. Though not obtaining a "lien strip" in this bankruptcy case, the Debtors would lose the discharge of the general unsecured claims after having endured almost five years of performing a bankruptcy plan.

Federal Rule of Civil Procedure 60(b)(6) provides that the court may vacate an order "for **any other reason** which justifies relief." [Emphasis added.] Under these facts, the "reason" is the Debtors' substantial performance under the plan and substantial payments made to the Trustee – in excess of $40,000.00.

Such "reason" is conditioned on the Debtors reimbursing the Chapter 13 Trustee for the wasted legal time and expense in addressing the order dismissing the case (not for filing the motion to dismiss) and the present motion to vacate the dismissal. This is consistent with how the court has addressed a debtor's failure to oppose a motion to dismiss a Chapter 13 case and then seek to vacate the dismissal. The court has previously, and

continues to do so in this case, concludes that a $250.00 an hour fee for Trustee's counsel is reasonable (and actually reflects a discounted rate for such experienced counsel). For this case, the court allocates one hour of counsel time relating to the dismissal order, one hour for considering the motion to vacate the dismissal, and one hour for the hearing on this motion. Thus, the Debtors' failure to oppose the motion to dismiss and seek having that order vacated has cost the Chapter 13 Trustee at least $750.00 in legal expenses.

The vacating of this order is conditioned on the Debtor's reimbursing the Chapter 13 Trustee $750.00 for the otherwise unnecessary legal expenses cause by the failure to oppose the motion to dismiss and filing this Motion to Vacate. The payment of the $750.00 in expense reimbursement is required in addition to all payments required under the confirmed Chapter 13 Plan, and no order granting the Debtors a discharge will be entered until the $750.00 has been paid to the Trustee.

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 Set Aside Dismissal of Case filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxxx and the order of the court dismissing the case filed on October 19, 2014 (Dckt. 154) is vacated.
>
> **IT IS FURTHER ORDERED** that Jeffrey and Juanita Schaff, the Debtors, shall pay $750.00 to the Chapter 13 Trustee to reimburse the Trustee for legal expenses incurred upon the court entering the order dismissing this case and addressing Debtors' motion to vacate the dismissal. No discharge shall be entered for the Debtors, and each of them, until the $750.00 to reimburse the Chapter 13 Trustee for these legal expenses has been paid in full.

7. 09-36410-E-13 MARC/SHARON VERLE
FF-5 Gary Ray Fraley

OBJECTION TO CLAIM OF CITIFINANCIAL, INC., CLAIM NUMBER 18
9-22-14 [90]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 22, 2014. By the court's calculation, 56 days' notice was provided. 30 days' notice for asserting opposition is required. (Fed. R. Bankr. P. 3007(a) 30 day notice.)

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007(d)(2). The Creditors, Debtor, Trustee, the U.S. Trustee, and any other parties in interest were required to file a written response or opposition to the motion.

The Objection to Proof of Claim Number 18 of CitiFinancial, Inc. sustained and the claim is disallowed in its entirety.

March and Sharon Verle, the Chapter 13 Debtors ("Objector") requests that the court disallow the claim of CitiFinancial, Inc. ("Creditor"), Proof of Claim No. 18 ("Claim"), Official Registry of Claims in this case. On November 12, 2014, Cit Financial, Inc. Filed a Withdrawal of Proof of Claim No. 18. November 12, 2014 Docket Entry. CitiFinancial, Inc. states its "[r]equest to withdraw claim # 18, filed on 10/12/09 in the amount of $19,712.44 filed in error in the above bankruptcy case."

This Withdrawal is consistent with Objectors assertion that this claim has been satisfied by the surrender of the collateral to this creditor.

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

The Objection being unopposed and Creditor filing a Withdrawal, the objection is sustained and Proof of Claim No. 18 is disallowed in its entirety.

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

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

The Objection to Claim of CitiFinancial, Inc., Creditor filed in this case by Marc and Sharon Verle, Chapter 13 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the objection to Proof of Claim Number 18 of CitiFinancial, Inc. is sustained and the claim is disallowed in its entirety.

8. 09-36410-E-13 MARC/SHARON VERLE — CONTINUED MOTION TO MODIFY PLAN
FF-4 Gary Ray Fraley — 9-5-14 [80]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 5, 2014. By the court's calculation, 46 days' notice was provided. 35 days' notice is required.

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

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

Marc and Sharon Verle ("Debtors"), through Debtors' Counsel, filed

the instant Motion to Confirm First Modified Plan on September 5, 2014. Dckt. 80.

MOTION

Debtors, in the motion, state that the financial circumstances of the Debtors have changed since confirmation of the Plan. Debtors state that the plan must be modified because:

1. Due to the fact the unsecured claims came in $27,239.91 greater than scheduled the Debtors are filing this Plan to lower the percentage paid to all unsecured creditors from one-hundred percent to seventy-eight percent.

2. The unsecured claims came in greater than expected because CitiFinancial filed a claim for the full amount of an automobile - without deducting the money they received for the sale of the automobile. Debtors surrendered the automobile to CitiFinancial at the beginning of their bankruptcy filing.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant motion on October 7, 2014. Dckt. 99. The Trustee objects on the grounds that it appears that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). Specifically, the Trustee states that the Debtors are delinquent $1,422.00 under the terms of the proposed modified plans. The Trustee asserts that the payments due under the proposed modified plan for the 60 month term are $84,579.00 and the Debtors have paid a total of $83,157.00 to the Trustee with the last payment posted August 1, 2014.

DISCUSSION

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

The Trustee's objection is well taken. The court cannot confirm a plan when the Debtors are delinquent under the terms of the proposed plan. According to the Trustee's records, the Debtors are delinquent in the amount of $1,422.00. The Debtors offer no evidence or declarations explaining this delinquency.

At the hearing the Trustee confirmed that the default xxxxxx.

Debtors have now objected to the claim of CitiFinancial, Inc., Proof of Claim No. 18. That Objection has been sustained and the claim disallowed in its entirety.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. 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 Marc and Sharon Verle (“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 15, 2014, is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

9. 14-20512-E-13 VIRAB/EVA ABRAMYAN MOTION TO CONFIRM PLAN
PGM-3 Peter Macaluso 10-6-14 [63]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Virab and Eva Abramyan ("Debtors") move to confirm their Third Amended Plan, which will last 60 months and pay no less than a 100% dividend to general unsecured creditors.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to this Motion on November 4, 2014. Dckt. 69. The Trustee objects to confirmation on the basis that the Plan and Debtors' petition are not in god faith. The Trustee is uncertain if Debtors have filed their Amended Plan and petition in good faith because Debtors appear to have significantly undervalued their real property (through statements under penalty of perjury in the Schedules) until after the bar date for creditors to file claims. This is also Debtors' third case in a series, preceded by Case Nos. 11-29032 and 10-47884.

When Debtors filed their petition on January 20, 2014, Debtors listed their residence at 4201 California Ave, Carmichael, California with a value of $225,000.00 on Schedule A and secured claims totaling $182,000.00. This left Debtors with $43,000.00 in equity, which Debtors exempted completely on Schedule C. The Trustee noticed that on Schedule D, Debtors reported the value of their residence at $320,000.00, which does not match the value reported on Schedule A.

At the First Meeting of Creditors, the Trustee expressed a potential objection to confirmation of the Debtors' plan, and the Debtors filed an amended plan on March 3, 2014. On April 8, 2014, the Trustee filed an objection to the first amended plan, objecting on the basis that Debtors failed to list all debts and that the plan did not meet the liquidation analysis. The Trustee also questioned the valuation of the house at $225,000.00, as it seemed unreasonably low when compared to the Sacramento County Assessor's value of $487,425 as of September 2013.

After the Trustee's objection was sustained, the Debtors filed a second amended plan on July 17, 2014, which added the Debtors' second deed of trust on their residence. The Plan indicated that the claim was paid in full on September 21, 2012 and the creditor had failed to release the lien. The Trustee again filed an opposition to the second amended plan, based on his concerns about the liquidation analysis that were not addressed in the new plan. The Trustee also alleged that Debtors failed to provide adequate information about the valuation of their home. In response, Debtors filed specifics of their home, including square footage, and admitted that the original value listed on Schedule A was a "scriber's error" and the value should have been $320,000.00. This value reduces Debtors' exemption to $17,308.36.

Debtors then filed an amended Schedule A that listed the value of their real property at $725,000.00, a $500,000.00 difference from the original value listed. That would leave Debtors with $442,000.00 in equity. The Third Amended Plan is now a 60 month plan that will pay 100%. Amended Schedule I now shows that Debtors receive $875 in Social Security Income for their mother. Although Debtors have listed their mother as a dependent since the inception of this case, they are only now disclosing that they receive this additional household income.

The Trustee argues that Debtors have benefitted by undervaluing their residence because it created a disincentive to file claims. Specifically, the Trustee points out that Debtors listed $177,389.99 in unsecured claims on Schedule F, but only about 5% of those claims were filed – a total $35,296.98. The time for unsecured creditors has long passed. Debtors could have filed claims for their creditors, but did not do so.

DISCUSSION

The Debtors lack of candor and truthful statements under penalty of perjury are troubling. Debtors commenced their first Chapter 13 Case, with the assistance of current counsel, on October 20, 2010. 10-47884. On Schedule A Debtors stated that the value of the California Avenue Property was only $160,000.00, which was less than the lien listed on Schedule A. 10-47784 Dckt. 13 at 11. On Schedule D the creditor is listed as "Bac Home Loans Servici," but only for a $44,611.00 debt second by a "2ND DOT." *Id.* at

16. This First Bankruptcy Case was dismissed by order of the court on March 19, 2011. *Id.*, Dckt. 51. The Chapter 13 Trustee requested the dismissal based on Debtors being $21,000.00 delinquent under the plan in that case. Motion to Dismiss, *Id.*, Dckt. 39. The proposed plan in the First Chapter 13 case does not provide for the payment of any claim secured by the California Avenue Property except for the "Bac Home Loans Servici" claim. Plan, Dckt. 12.

Debtors filed their second Chapter 13 case, again with the assistance of the same counsel as in the present case and the first case, on April 11, 2011. 11-29032. Debtors continue to state under penalty of perjury on Schedule A that the California Avenue Property has a value of $160,000.00 and is subject to a lien in the amount of $194,488.00. 11-29032, Dckt. 1 at 18. On Schedule D Debtors again only list "Bac Home Loans Servici" as the creditor having a claim secured by the California Avenue Property, in the amount of $44,611.00. The Second Bankruptcy Case was dismissed due to the Debtors being $7,400.00 in default in plan payments. The proposed plan in the Second Chapter 13 case does not provide for the payment of any claim secured by the California Avenue Property except for the "Bac Home Loans Servici" claim. Plan, *Id.*, Dckt. 5.

Debtors commenced this current, their third, Chapter 13 Bankruptcy case, with the assistance of the same counsel as in the two prior cases, on January 20, 2014. On Schedule A Debtors now state that the California Avenue Property has a value of $225,000.00 and is subject to lines of $182,000.00. Dckt. 1 at 18. On Schedule A in this Third Bankruptcy Case Debtors now state that Bank of America, N.A. has a claim in the amount of $182,000.00 which is secured by the California Avenue Property. *Id.* at 23. As noted above, on Schedule D Debtors state under penalty of perjury that this Property has a value of $320,000.00. Though stated to be a "scrivener's error," Debtors reviewed the Schedules and signed them under penalty of perjury. (The review and filing of bankruptcy schedules are not a new or foreign concept to Debtors, having experience in bankruptcy cases from their prior two cases.)

In the Original Chapter 13 Plan Debtors now provide for a secured claim, with monthly payments of $1,449.04, and a second secured claim with payments of $225.00 to be paid as a Class 4 Claim. The collateral for the two secured claims is the California Avenue Property. These payments do not match in dollar amount to any secured claims to be paid through the Chapter 13 Plans in the First or Second Bankruptcy cases.

In the First Amended Plan filed in this case, the payment of the $225.00 for the Class 4 Claim disappears. Dckt. 22. In the Second Amended Plan the debt corresponding to the $225.00 a month payment reappears as a Class 2 claim to be valued at $1.00. Dckt. 48. The Additional Provisions of the Second Amended Plan states that Bank of America Home Loans was paid on the Class 2 claim in full on September 21, 2012.

In the Second Amended Plan the Debtors propose to seek out a 1.5% dividend for creditors holding general unsecured claims. For the projected $216,277.05 in unsecured claims this would total $3,244.26 over the three years of the Second Amended Plan.

On October 6, 2014, the Debtors filed an Amended Schedule A which

now lists the California Avenue Property to have a value of $725,000.00, and is subject to liens of $182,001.00. Dckt. 68 at 4.

Contrary to Debtors' protestations that the Trustee has provided no evidence that the Debtors undervalued the property until the eve of the hearing on the Motion to Confirm the Third Amended Plan, the Trustee has presented substantial evidence – the Debtors' own statements of value under penalty of perjury.

It is the Debtors who offer no evidence to explain how they have made such conflicting statements under penalty of perjury as to the value of the California Avenue Property. It does not appear to be mere inadvertence that it is only counsel who is sent in to argue against the Trustee's evidence. Rather, given that Debtors argue the absence of evidence, it appears that Debtors are intentionally avoiding providing any testimony under penalty of perjury of the now 322% ballooning of the California Avenue Property value in the past ten months based on the conflicting statements under penalty of perjury by the Debtors.

While the Debtors now propose to pay 100% of the general unsecured claims, the court agrees with the Trustee that this is after they have "gamed the system" to mislead creditors as to the value of the Debtors' assets. Debtors state on Schedule F that they have $232,811.88 in general unsecured claims. Dckt. 33 at 5-15. The creditors appear to be the type, if they received notice of the bankruptcy case, proofs of claim would be filed if, based on the information provided in the schedules, indicate a likelihood of payments.

The Debtors have not prosecuted this case, have not proposed the Chapter 13 Plan, and have not attempted to restructure their debt in good faith. The information stated in the Schedules under penalty of perjury was grossly inaccurate. The Debtors offer no explanation and fail to provide the court with credible (or any) testimony under penalty of perjury as to how they could have so grossly understated the value of the California Avenue Property.

The Debtors' credibility, and good faith, is further impaired by the inconsistent disclosure of claims in the prior bankruptcy cases. The Bank of America, N.A. claim to be paid as a Class 4 Claim in this case was not ever listed in the prior cases. The Debtors have demonstrated by their own conduct that they disclose only what information they believe to be to their benefit, and make statements under penalty of perjury or in documents filed with the court (all of which are subject to Fed. R. Bankr. P. 9011) without regard to the truthfulness of the information – so long as it allows them to achieve an advantage in the bankruptcy case.

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

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

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

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

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

10. 14-24616-E-13 JGD-3 — NICOLE GOLDEN AND STEPHEN ALTER — John Downing — CONTINUED MOTION TO CONFIRM PLAN — 7-8-14 [35]

No Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 8, 2014. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

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

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

Nicole Golden and Stephen Alter ("Debtor") filed the instant motion on July 1, 2014 seeking to confirm their First Amended Chapter 13 Plan.

TRUSTEE'S OPPOSITION

The Chapter 13 Trustee filed an objection on August 6, 2014, arguing that the First Amended Chapter 13 Plan cannot be confirmed because: (1) Debtor is delinquent in plan payments; (2) the Debtor did not file the First Amended Chapter 13 Plan in good faith or in Debtor's best efforts; and (3) Debtor failed to properly complete the required Statement of Financial Affairs of the petition.

The Chapter 13 Trustee alleges that, under 11 U.S.C. §1325(a)(6), the First Amended Chapter 13 Plan cannot be confirmed because the Debtor cannot make payments under the Plan's terms. At the time of the objection, the Chapter 13 Trustee states that the Debtor is $2,140.00 delinquent in plan payments. As of September 25, 2014, the plan payments are to increase by $200.00. Due to the delinquencies in the Plan, the Trustee objects to the confirmation of the Plan.

The Chapter 13 Trustee argues that the plan should not be confirmed under 11 U.S.C. §1325(a)(3) because the Debtor is over the median income on Form B22C, the Statement of Current Monthly Income. The Opposition does not state the significance of this contention.

Lastly, the Chapter 13 Trustee argues that the Plan cannot be confirmed because Debtor did not complete the Statement of Financial Affairs. Specifically, Debtor fails to list Wells Fargo under the "Payments to Creditors" section of the Statement of Financial Affairs while the Plan lists Wells Fargo is listed in Class 4 of the Plan. Furthermore, Debtor failed to list any information under "Property held for another person" on Statement of Financial Affairs concerning the 2013 Highlander in the Debtor's hold or control. The Chapter 13 Trustee argues that, under 11 U.S.C. §1325(a)(6), the plan should not be confirmed because the Debtor failed to properly complete the Statement of Financial Affairs.

U.S. BANK NATIONAL ASSOCIATION'S OBJECTION

U.S. Bank National Association, as Trustee for Banc of America Funding Corporation, Mortgage Pass-Through Certificates, Series 2006-G ("Creditor") filed an objection on August 8, 2014, arguing that the Plan cannot be confirmed because the Plan does not provide for the full value of Creditor's claim and does not promptly cure Creditor's pre-petition arrears.

Creditor argues that under 11 U.S.C. § 1325(a)(5)(B)(ii) the Plan cannot be confirmed because the plan fails to provide for the payment of Debtor's pre-petition arrears on Creditor's secured claim in the amount of $5,399.88.

AUGUST 26, 2014 HEARING

At the August 26, 2014 hearing, the court overruled U.S. Bank National Association, as Trustee's, opposition, specifically stating that the court is making no determination as to whether a pre-petition arrearage exists.

As to the motion, the court continued the hearing to 3:00 p.m. on October 7, 2014. Because the Debtor failed to properly serve the Internal Revenue Service, pursuant to Local Bankruptcy Rule 2002-1, the court ordered that on or before September 2, 2014, service of the pleadings on the

Internal Revenue Service. The court ordered that the service period for the Internal Revenue Service (which has already been served at one of the three required addresses) is shortened for the October 7, 2014 hearing.

PROOF OF SERVICE - SEPTEMBER 22, 2014

On September 22, 2014, *20 days after the court ordered deadline to properly serve the Internal Revenue Service*, Debtor filed a Notice of Continued Hearing and Certificate of Proof of Service, stating that the Debtor's served all three required addresses for the Internal Revenue Service. Service of the Notice of the Continued hearing and service on the Internal Revenue Service was not made until September 22, 2014 – fifteen (15) days before the hearing date.

OCTOBER 7, 2014 HEARING

The court continued the hearing on the request of the parties. The hearing was continued to November 18, 2014 to be heard concurrently with the objection to claim of U.S. Bank, N.A.

DISCUSSION

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

Upon review of the motion, oppositions, and supporting document, the amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 and 1325(a) and is not confirmed. Debtor is delinquent on payments. Debtor has not properly completed required forms. Finally, Debtor did not provide for or cure pre-petition arrears in the Plan. There have been no further pleadings or responses filed to explain or justify the delinquencies outlined by the Trustee in his opposition.

Furthermore, the court is concerned with the failure of Debtor and Debtor's Counsel to follow the directions of a court order. The Debtor and Debtor's Counsel appear to have failed to serve the Internal Revenue Service by the September 2, 2014 deadline that was ordered by the court.

At the hearing, Xxxxxxxxxxxxxxxxxxxxxxx

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

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

> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is xxxxx.

11. 14-24616-E-13 JGD-4 NICOLE GOLDEN AND STEPHEN ALTER
John G. Downing
OBJECTION TO CLAIM OF U.S. BANK, N.A., CLAIM NUMBER 5-1
10-6-14 [61]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 13 Trustee,, parties requesting special notice, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 44 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim Number 5-1 of U.S. Bank, N.A., as Trustee for Banc of America Funding Corporation, Mortgage Pass-Through Certificates, Series 2006-G sustained and the $5,399.88 arrearage portion of the claim is disallowed, without prejudice.

Nicole Golden and Stephen Alter, the Chapter 13 Debtors ("Objector") requests that the court disallow the claim of U.S. Bank, N.A., as Trustee for Banc of America Funding Corporation, Mortgage Pass-Through Certificates, Series 2006-G ("Creditor"), Proof of Claim No. 5-1 ("Claim"), Official Registry of Claims in this case.

The Objection incorrectly identifies the creditor as Wells Fargo Bank, N.A. However, Creditor has responded and the court substitutes U.S. Bank, N.A., as Trustee, as the real party in interest in this Contested Matter.

Objector asserts that they do not owe any escrow arrearage, and that

the $5,399.88 arrearage stated in Proof of Claim No. 5-1 should be disallowed. Objector does not object to any other portion of Claim No. 5-1.

Objector provides the Declaration of Stephen Alter in support of the Objection. Dckt. 63. He testifies that when the Debtors entered into a loan modification for this claim it was represented by Wells Fargo Bank, N.A. (the apparent loan servicer) that there would not be a required monthly escrow payment. He testifies that the Debtors have been paying the property taxes and insurance for the property which secures Creditor's Claim.

OPPOSITION TO THE OBJECTION

Creditor concurs that the loan was modified on or about April 21, 2014. Opposition, Dckt. 69. An unauthenticated document (Fed. R. Evid. 901) identified as the "loan modification documents" has been filed as Exhibit D in opposition to the Objection. Dckt. 70 at 33-36. Though Creditor states that the loan was modified in April 2014, Exhibit D is a document dated April 1, 2011. This loan modification documents is also attached to Proof of Claim No. 5-1.

Creditor asserts that based on the *prima facie* validity of a proof of claim, the asserted $5,399.88 arrearage has not been rebutted by Objector. Creditor also states that other than one of the Debtor's testimony, no evidence of the payment of insurance or taxes has been provided by Objector. Creditor asserts, but offers no evidence, that it paid 2013 and 2014 taxes.

No response has been filed by Objector.

DISCUSSION

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

In light of the evidence presented, the court's analysis begins with Proof of Claim No. 5-1 itself. Proof of Claim No. 5-1 Mortgage Proof of Claim Attachment states that pre-petition fees, expenses, and charges total $5,399.88. But for documentation of this asserted $5,399.88 arrearage, the court is directed to "See Attached Escrow Analysis."

In reviewing the attached escrow analysis the court cannot identify any statement that any advances were made by Creditor for pre-petition taxes or pre-petition insurance. Rather, it appears that effective with the June 2014 payment Creditor adjusted the monthly payment to include a $291.17 escrow payment.

The Escrow Analysis begins in June 2014 with a negative ($3,833.18)

escrow balance. This would be 13.165 times the June 2014 monthly escrow payment amount of $291.17. Additionally, the creditor charged insurance is $1,739.00 for the year. This creditor imposed insurance, if there was not a failure to provide insurance by the Debtors, to be very high for a house valued at $450,000.00 (real property and improvements) on Schedule A. Dckt. 19 at 3.

Based on the evidence presented, consisting of Proof of Claim No. 5-1 and the testimony of Mr. Alter, the court sustains the objection and disallows the pre-petition arrearage of $5,399.88. Proof of Claim No. 5-1, as filed, states that Creditor imposed an escrow requirement beginning with the June 2014 payment, and then created an "arrearage" to fully fund a years worth of escrow payments over a five month period.

The court sustains the objection and disallows the arrearage claim without prejudice to allow Creditor to amend Proof of Claim No. 5-1 to state any actual arrearage which existed as of the filing of the case. It may well be true that Creditor was required to make advances for property taxes and insurance as alleged. But Creditor does not provide evidence of such advances. While Debtor states that all taxes and insurance has been paid, no Reply has been filed and Objector has not attempted to rebut this contention.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of U.S. Bank, N.A., as Trustee for Banc of America Funding Corporation, Mortgage Pass-Through Certificates, Series 2006-G ("Creditor"), filed in this case by Stephen M. Alter and Nicole Golden, Chapter 13 Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that U.S. Bank, N.A., as Trustee for Banc of America Funding Corporation, Mortgage Pass-Through Certificates, Series 2006-G, is substituted in as the real party in interest creditor for Proof of Claim No. 5-1 in the place of Wells Fargo Bank, N.A.
>
> **IT FURTHER ORDERED** that the Objection to Proof of Claim Number 5-1 of Creditor is sustained and the $5,399.88 arrearage stated in the Proof of Claim is disallowed, without prejudice to Creditor filing an amended proof of claim clearing stating the pre-petition arrearage which existed as of the April 30, 2014 filing of Debtors' bankruptcy case.

12. 14-27618-E-13 MAS-2 | **JERRY WADLEY AND TRACY URBANO-WADLEY** | **MOTION TO DISMISS CASE**
Eric John Schwab | **10-28-14 [31]**

Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2)

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, and Office of the United States Trustee on October 28, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is that Motion is conditionally granted and the case will be dismissed without further hearing if the Debtors have not filed and served on or before November 30, 2014 an amended plan and motion to confirm.

Jerry Wadley and Tracy Suzanne Urbano-Wadley commenced the current bankruptcy case on July 25, 2014. By Order filed on October 3, 2014, the court denied confirmation of the proposed Chapter 13 Plan in this case. Dckt. 30. Donna M. Christin ("Christin") a creditor filed an objection to confirmation, which the court sustained. The court found that the Debtors making new monthly contributions of $459.00 and paying an additional $559.00 into their 401k plans to repay pre-petition loans precluded confirmation of the proposed plan. Civil Minutes, Dckt. 28.

On October 28, 2014, a month after denial of confirmation, Christin filed the present motion to dismiss the current Chapter 13 Case. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested dismissal of the case is based.

A. Christin is a judgment creditor of the Debtors, having obtained two small claims judgments prior to the commencement of this case.

B. Christin's claim in this case is approximately $17,000.00 and represents more than half of the debt scheduled by Debtors.

C. Though confirmation of the Original Plan was denied on

September 30, 2014, no amended plan and motion to confirm were filed as of the October 28, 2014 filing of this Motion to Dismiss.

D. Christin is 80 years old and seeks to enforce the two small claims judgments.

Motion, Dckt. 31. Christin's counsel, not Christin, provides his declaration in support of the Motion. Dckt. 33. Counsel's testimony consists of recounting of the objection to confirmation and the court sustaining the objection. Counsel also testifies that his client is 80 years old and has received no payments on the judgment. Counsel shows no basis for having personal knowledge of these two facts testified to by him. Finally, counsel provides his legal conclusion that further delay is "extremely prejudicial" to Christin. No facts are provided as to what prejudice exists for the enforcement of a $17,000.00 claim. (It is common for a person who asserts that delay itself is actionable prejudice to provide testimony as to the negative financial impact on the creditor. None has been provided in support of the Motion.)

RESPONSE OF DEBTORS

The Debtors have not provided any evidence in opposition to the Motion, but merely have directed their attorney to file arguments in response. Dckt. 35. In the Response counsel for Debtors argues that since the denial of confirmation the Debtors have requested that their voluntary 401k monthly contribution be discontinued. Though no evidence is provided, it is argued that the first paycheck without the 401k contribution was for October 31, 2014.

Counsel for Debtors further argues that one of the Debtors' parents passed away (on an unstated date), thereby distracting the Debtors from addressing the court's denial of confirmation. However, the Debtors will filed an amended plan and have the motion set for hearing on January 13, 2015. (Which appears to be the first available date on the court's calendar that a proper 42 day noticed motion to confirm can be set for hearing.)

CONDITIONAL GRANTING OF MOTION

Though Christin has not provided evidence of the "financial prejudice" caused by the delay, the record in this case demonstrates that the Debtors may well need some "prodding" to prosecute the case. The Original Chapter 13 Plan provided for making di minimis $200.00 a month payments and having only a 24% dividend. This $200 a month payment was proposed from the $7,677.00 monthly gross income of the Debtors.

The Motion is conditionally granted and the case will be dismissed without further hearing if the Debtors have not filed and served on or before November 30, 2014.

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

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

The Motion to Dismiss the Chapter 13 case filed by Donna Christin, a creditor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is conditionally granted, and the case shall be dismissed without further hearing if the Debtors have not filed and served on or before November 28, 2014 an amended plan and motion to confirm.

IT IS FURTHER ORDERED that if the amended plan and motion to confirm are not timely filed and served, counsel for Creditor shall prepare and lodge with the court a proposed order dismissing this Bankruptcy Case.

13. 13-24322-E-13 ALEX LICHINE — MOTION TO MODIFY PLAN
HLG-2 Kristy Hernandez — 9-30-14 [38]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 30, 2014. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Alex Lichine ("Debtor") moved to modify his plan on the basis that his confirmed plan did not include a priority unsecured claim of the California Employment Development Department ("Creditor"). Debtor and his counsel believed they had resolved the claim informally through a series of negotiations in 2013 and 2014. Although Debtor asserts that he does not owe the debt set forth in Creditor's Proof of Claim, he would rather pay the claim in full than incur the time and expense necessary to object to the claim through the court. Accordingly, the Modified Plan increases monthly

plan payments to $177.00 beginning in October 2014.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the Motion on November 3, 2014. Dckt. 47. The Trustee objects on the basis that:

1. The Trustee is uncertain when the plan payment of $177.00 starts. Section 6.01 of the Modified Plan proposes a plan payment of $75.00 for months 1–19, for a total of $1.355.00, then $177.00 for months 20–36. October was month 19, as Debtor's petition was filed on March 29, 2013. The Trustee also calculates that 19 months of a $75.00 payment totals $1,425.00, not $1,335.00. Debtor has paid $1,532.37 to date, including the last payment of $177.37 posted on October 17, 2014. Debtor's Motion states that the $177.00 plan payments will start in October, month 19, not month 20 as the Modified Plan's additional provisions state.

2. Debtor's amended schedules I and J indicate Debtor has monthly income of $2,872.34 and expenses of $2,695.00, yielding a monthly net income of $177.34. Debtor's Motion and Declaration state that Debtor's monthly income is $3,665.34 and expenses of $3,488.00, leaving a monthly net income of $177.34. The figures for expenses and income are inconsistent between Debtor's schedules and motion. Further, the Trustee alleges that Debtor's Amended Schedule J no longer budgets for the rental property mortgage in the amount of $793.00, while Debtor's proposed plan continues to provide for the rental property in Class 4 with a monthly contract installment of $793.00. Debtor's Amended Schedule I reflects a net income from the rental property of $232.00, but Debtor's prior Schedule I showed a $1,200.00 net income. Debtor has not explained these changes in expenses and income.

On November 14, 2014, the Debtor filed proposed Second Modified Plan. The hearing on the Motion to Confirm the Second Modified Plan is set for January 13, 2014. Though not expressly stated, the filing of a new plan and motion to confirm the new plan is a *de facto* dismissal of the existing plan and motion.

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

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

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

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

14.	**14-29023-E-13 DPC-1**	**DARREN CARTER AND AMY ALEXANDER-CARTER Scott Sagaria**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-22-14 [18]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on October 22, 2014 By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Darren Carter and Amy Alexander-Carter's ("Debtors") Plan does not provide for the secured portion of the claim filed by the Internal Revenue Service in the amount of $21,473.91 (Claim 2). Treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), but failure to provide

treatment may indicate that the Debtors either cannot afford the payments called for under the plan because they have additional debts, or the Debtors wish to conceal the proposed treatment of a creditor.

2. The Plan calls for $28,980.00 in total plan payments at the rate of $483.00 per month for 60 months. The Plan also proposes to pay $2,000.00 in attorney's fees, a total of $9,183.21 to USAA Federal Savings Bank, $9,178.88 to the Internal Revenue Service, $6,829.05 to the Franchise Tax Board, and 0% to unsecured creditors. The priority portion of the Internal Revenue Service claim totals $34,110.66, which is $27,281.01 more than the scheduled amount. Debtor cannot make the payments and comply with the Plan, and the Plan does not comply with 11 U.S.C. §§ 1325(a)(1) and (6).

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

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

Additionally, the fact that the Plan does not fully account for the priority portion of the Internal Revenue Service's claim casts doubt on the feasibility of the plan.

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

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

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

15. 14-29223-E-13 WILLIAM/TERRY SHOUSE — CONTINUED MOTION TO EXTEND AUTOMATIC STAY
SDH-1 Scott Hughes — 9-17-14 [8]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

Local Rule 9014-1(f)(2) Motion - Final Hearing, No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on September 17, 2014. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The court set the matter for final hearing and no written opposition was filed by any party in interest.

The Motion to Extend the Automatic Stay is granted.

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

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

1. Why was the previous plan filed?

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

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

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as

Debtors were trying to stop a trustee's sale on their home, however, due to a cut in Debtor Terry Shouse's hours and loss of paid holidays, Debtors missed plan payments. Debtors state that now Debtor Terry Shouse's is back to a full 40 hour work schedule and reinstated paid holidays. Also, the Debtors allege that they are owed more in income tax refund for 2013 than they initially anticipated. Because Debtor Terry Shouse is now back to full time schedule with paid holiday, she has increased her withholdings for taxes, Debtors argue that the instant case was granted in good faith.

Multiple Bankruptcy Case Filings

This is not merely the second bankruptcy case filed by Debtor, but third case which has been pending since 2013. The First Chapter 13 Case was filed on June 15, 2012 and dismissed on June 5, 2013. Bankr. E.D. Cal. 12-31326. The Trustee's Notice of Default upon which the First Case was dismissed stated that Debtor was in default in $4,058.00 in Plan payments. *Id.* Dckt. 27. Debtor did not respond to the Notice of Default and the First Bankruptcy Case was dismissed. Order, *Id.* Dckt. 30.

Debtor's Bankruptcy Case was filed on June 7, 2013 (two days after the First Bankruptcy Case was dismissed). Bankr. E.D. Cal. 13-27790. Debtor immediately filed a motion to extend the stay in the Second Bankruptcy Case, alleging,

A. Debtor filed the bankruptcy case to stop a foreclosure.

B. Debtor William Shouse had a stroke and surgery.

C. The Debtor is recovering.

Motion, *Id.* Dckt. 8. Debtor Terry Shouse has provided her declaration testifying as to the medical condition of the co-debtor. *Id.* Dckt. 10. Debtor Terry Schouse states that having resolved the medical issues, she will be able to make the payments under the Chapter 13 Plan.

Debtor's Chapter 13 Plan in the Second Bankruptcy Case required $4,345.00 a month plan payments for sixty months. Plan, *Id.* Dckt. 5. This payments were to be used to pay (1) $3,464.25 a month to the Class 1 claim (arrearage and current monthly mortgage payment), (2) Debtor's counsel fees, (3) Chapter 13 Trustee administrative expenses, (4) $26,800.00 state and federal income taxes (for 2009-2012 tax years), which payment averages $488.00 a month (subordinated in payment to Debtor's attorneys' fees), and (5) a 0.00% dividend to creditors holding general unsecured claims.

Debtor's Schedules I and J filed in the Second Bankruptcy Case computes Debtor to have $3,875.20 (wages), $1,968.00 (Social Security), and $675.00 (pension) in monthly gross income. *Id.* Dckt. 1 at 23. From this gross income, Debtor has $306.90 withheld for "payroll taxes." On Schedule J Debtor listed $1,767.00 for expenses (excluding mortgage, property insurance, property taxes). *Id.* at 24.

The Trustee's Notice of Default in the Second Bankruptcy Case states that Debtor was $8,690.00 in default (two plan payments). *Id.* Dckt. 47.

Current Bankruptcy Case Finances

Debtor offers explanation as to why substantial monetary defaults have occurred in the prior two cases. Debtor supports the present case with Schedule I and J which show the following income and expenses:

Income	$6,976.24		Expenses	($2,505.90)
Debtor 1				
Gross Wage Income	$4,661.94		Mortgage, Taxes, Insurance	$0.00
Tax Medicare Social Security	($806.52)		Electricity/ Gas	($350.00)
Insurance	($194.08)		Food	($750.00)
Debtor 2			Transportation	$350.00
Social Security	$2,207.80		Health Insurance	$104.90
Pension	$675.16		Taxes	$0.00

Dckt. 1 at 24-29. Debtor's expenses have increased in this bankruptcy case, apparently in conjunction with Debtor now showing a higher income. In the Second Bankruptcy Case Debtor stated under penalty of perjury that the monthly expenses were only $1,767.00. Schedule J, 13-28890 Dckt. 1 at 24-25. In 2013 Debtor's food and household expenses were only ($500) a month. Debtor had no house maintenance expense. Debtor had not health insurance expense. Debtor's transportation expense was only $250.00.

The court is concerned that Debtor has, and continues, to "construct" Schedule J expenses to justify a budget which provide for paying 50% of their monthly income just for their mortgage, property insurance, and tax payments – to keep their home at all costs – ($3,498.58 Class 1 payment/$6,976.24 Schedule I monthly income. Whether the monthly net income is accurate appears problematic as Debtor's tax withholding may well be insufficient, especially in light of the multiple years of significant income tax debt.

For the final hearing, Debtor will have to address, and provide evidence, to show that the expenses listed on Schedule J are reasonable and complete. The failure of the prior two cases may have at their core unrealistic economic calculations by Debtor to save a house which has plunged them into multiple bankruptcy cases.

Interim Extension of Automatic Stay

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay for the court to extend it on an interim basis.

The motion is granted and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court through and including November 30, 2014.

The court shall conduct a final hearing on the Motion at 3:00 p.m. on November 18, 2014. Debtor shall file supplemental pleadings substantiating monthly income, monthly deductions (including how proper tax withholding is computed), and reasonable expenses (all expenses, not merely the several summarized by the court in the ruling granting the Interim Order) on or before October 24, 2014. Opposition shall be filed and served on or before November 8, 2014.

SUPPLEMENTAL PLEADINGS

On October 17, 2014, Debtor filed the Declaration of Terry Shouse (Dckt. 27) and supplemental exhibits (Dckt. 26).

Mrs. Shouse's Declaration states that she has adjusted her pay withholdings and has requested that taxes be taken out of her husband's Social Security. Mrs. Shouse further states that she understands the court is concerned with Debtor's tight budget and the amount of money they are using to try to save their house. Debtor now plans to sell the house after the holidays. Mrs. Shouse also reviewed Schedules I and J and made adjustments accordingly. She states that their expenses are low because she lives very simply. She further requests that the court extend the automatic stay beyond November 30, 2014 to the life of the case to afford them one last chance to save the house and repay taxes. If Debtor can sell the house after the first of the year, Debtor will modify the plan to stay in Chapter 13 and repay the taxes.

Debtor provided new pay stubs reflecting new deductions and W-4 withholding change requests that Mrs. Shouse mentioned in her Declaration in Exhibit A. Dckt. 26. Exhibit B includes Schedules I and J with Mrs. Shouse's edits to the amounts listed for her income and expenses in handwritten notes. Dckt. 26. Exhibit B also includes medical bill stubs for William Shouse.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, with the stay extended for all parties and purposes until terminated by operation of law or further order of the court.

16. 14-22226-E-13 SHAHLA HOWELL — OBJECTION TO CLAIM OF ATLAS ACQUISITIONS, LLC, CLAIM NUMBER 12
DPC-1 Scott J. Sagaria

9-22-14 [17]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required (Notice of Hearing Did Not Clearly State That Written Opposition Was Required).

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on September 22, 2014. By the court's calculation, 53 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim Number 12 of Atlas Acquisitions, LLC is sustained and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee ("Objector") requests that the court disallow the claim of Atlas Acquisitions, LLC ("Creditor"), Proof of Claim No. 12-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $315.00. Objector asserts that (1) the proof of claim was filed on August 6, 2014, after the expiration of the July 2, 2014 claims filing bar date, and (2) that the statute of limitations for the enforcement of the claim expired prior to the commencement of the case. Objector asserts that the four year statute of limitations arising under California Code of Civil Procedure § 337 expired no later than February 12, 2014, based on the Proof of Claim stating that the debt was "charged off" on February 12, 2010. Though not stated, the default from which the statute of limitations would commence running would necessarily occur prior to the charge off.

Section 502(a) provides that a claim supported by a Proof of Claim

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

The Trustee has sufficiently rebutted the prima facie evidentiary value of Proof of Claim No. 12-1. Based on the evidence before the court, the creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Atlas Acquisitions, LLC, Creditor, filed in this case by David Cusick, the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 12-1 of Atlas Acquisitions, LLC is sustained and the claim is disallowed in its entirety.

17. 14-29226-E-13 MERLYN DIZON
DPC-1 Ashley Amerio

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-22-14 [17]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 22, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The hearing on the Objection to confirmation the Plan is continued to 3:00 p.m. on November 25, 2014.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Plan relies on valuing collateral. Merlyn Dizon's ("Debtor") Plan relies on a Motion to Value Collateral being filed for Fred Meyer Jewelers, listed in Class 2B. Debtor has not filed a Motion to Value. If a motion is not filed and granted, the creditor will be paid a monthly dividend of $7.50 on the amount of $1,521.77, which will not pay the claim in full in 60 months.

DEBTOR'S REPLY

Debtor filed a reply to the Trustee's Objection on November 4, 2014. Debtor states that she filed a Motion to Value the Secured Claim of Fred Meyer Jewelers on October 28, 2014. That motion is set for hearing on November 25, 2014.

The court's review of the docket shows that Debtor filed a Motion to Value on October 28, 2014. Dckt. 21. The court's decision is to continue the hearing to November 25, 2014 to be heard in conjunction with the motion to value.

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

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

counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Objection to confirmation the Plan is continued to 3:00 p.m. on November 25, 2014.

18. 11-27933-E-13 JIMMY LOVE — MOTION TO MODIFY PLAN
DEF-5 David Foyil — 10-2-14 [75]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 2, 2014. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

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

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

Jimmy Love ("Debtor") filed the Motion to Confirm the Third Modified Plan on October 2, 2014. Dckt. 75. Debtor filed this plan because Debtor became delinquent on his Chapter 13 plan payments. Debtor's payments increased in Month 37, and although Debtor continued making regular payments, they were not the new full amount. The Third Modified plan reduces the previous payments to the amounts Debtor paid and increases the remaining payments in order to pay all creditors in full. Further, Debtor has taken on side jobs that increase his income in the amount of $652.00 per month.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed opposition on November 3, 2014. Dckt. 82. The Trustee objects to the Motion on the basis that:

1. The Trustee is uncertain of the plan payment proposed. Section 6.03 of the plan states that the payment in months 1–15 will be $1,696.00, in 40–42 will be $1,782.86, and thereafter will be $2,348.00. Debtor does not indicate what they payments are for months 16–39. The Trustee, therefore, is unable to determine if Debtor is current under the modified plan. The Plan is currently in its 44th month.

2. Sections 6.01 and 6.02 of Debtor's proposed modified plan show the monthly payments for administrative fees, ongoing mortgage payments, and pre-petition mortgage arrears for the life of the plan. The monthly payments for administrative fees and pre-petition arrears are not correct or an accurate depiction of any monthly payments made under the confirmed plan to date. The Trustee would not oppose the modified plan if Debtor removed all additional language in Section 6.01, or simply authorized payments made to date and specify monthly dividends going forward.

3. Debtor filed Exhibit E, Proof of Income, which consists of copies of bank statements for personal and business accounts. Bank statements for the account ending in 16 appear to be Debtor's personal account and reflect deposits of $8,300.00 total from June 18 to September 18, 2014. This averages $2,766.67 per month. The bank statements for account number 54 appear to be for Debtor's business, RJ Construction, and reflects $0.00 in deposits for the months June 14 through September 14, 2014. The Trustee is unsure how these statements provide proof of Debtor's income. The deposits in Debtor's personal account do not appear to the from Debtor's employment, nor do they match the $992.00 Debtor claims on Amended Schedule I as additional monthly income for side jobs. The statements do not support Debtor's income as represented in Schedule I.

DEBTOR'S REPLY

Debtor filed a reply to the Trustee's opposition on November 4, 2014. Dckt. 85. Debtor states that:

1. The amount set forth in the special provisions regarding the Chapter 13 plan payments is not correct. Debtor is willing to consent to an order modifying the plan, which includes the correct plan payment amounts.

2. Debtor is willing to remove all additional language within section 6.02, other than to authorize the payments made to date and specify the monthly dividends going forward.

3. Debtor asserts that he commingles his personal and business bank accounts.

4. Debtor consents to an order modifying the terms of the proposed plan as follows:

a. As of November 4, 2014, Debtor has paid the Trustee $75,925.22 (months 1 through 43). The Chapter 13 plan payment thereafter until the end of the plan (month 43 onward) shall be $2,348.00.

b. As of November 3, 2014, Debtor has paid the ongoing mortgage payments to Bank of America, N.A. (BAC Home Loans Servicing, LLP) in the amount of $61,446.26. The ongoing mortgage payment to Bank of America, N.A. (BAC Home Loans Servicing, LLP) shall be $1,393.34 starting in Month 43.

c. As of November 3, 2014, Debtor has paid the pre-petition arrears to Bank of America, N.A. (BAC Home Loans Servicing, LLP) in the amount of $9,295.99. The ongoing mortgage payment to Bank of America, N.A. (BAC Home Loans Servicing, LLP) shall be $410.00 starting in Month 43.

DISCUSSION

Though Debtor proposes amendments to clean up the Modified Plan with respect to the plan payments, he fails to address the Trustee's objection based on the Debtor's bank accounts. Debtor has intentionally commingled his personal and business finances, rendering them untrackable by the Trustee and Creditors.

Debtor provides no evidence concerning his finances and the commingling of accounts. He merely has his attorney file a reply and "argue" that Debtor commingles his personal and business finances.

Though 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation, it does not permit a debtor to hide his finances and render it impossible for the Trustee to evaluate whether a plan is proposed in good faith and is feasible.

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

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

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

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

19. 11-29436-E-13 JCW-1 — DONALD IRVING AND FAMMIE HOLMES-IRVING — Martha Lynn Passalaqua — CONTINUED MOTION TO APPROVE LOAN MODIFICATION — 9-12-14 [101]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, and all creditors on September 12, 2014. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The hearing on the Motion to Approve Loan Modification with Nationstar Mortgage is denied without prejudice.

The Motion to Approve Loan Modification filed by Nationstar Mortgage, LLC ("Creditor"), with the endorsement of Donald Irving and Fammie Holmes-Irving's ("Debtors") attorney, seeks court approval for Debtors to incur post-petition credit. Creditor, whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $1,432.90 a month to $902.86 a month. The modification will creates a new principal balance and adjusts the interest rate to 5.750%.

The Motion is not accompanied by a supporting declaration.

REVIEW OF MOTION

This Motion was prepared and filed by Jennifer C. Wong, an attorney with McCarthy & Holthus, LLP, lawyers for Nationstar Mortgage, LLC. Ms. Wong and other attorneys in the McCarthy & Holthus, LLP law firm regularly appear in this court, appearing before all the judges in this District. They are well aware of the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, Federal Rules of Evidence, and the basic Constitutional requirements that the court have an actual case or controversy between the real parties in interest before it – not a "proxy party" for some unnamed party.

The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which Nationstar Mortgage, LLC and McCarthy & Holthus, LLP base the relief requested from this court:

a. Nationstar Mortgage, LLC, its assignees and/or successors, seek an order from the court. FN.1.

FN.1 The court notes that this Motion carefully excludes any principals of Nationstar Mortgage, LLC from seeking or obtaining any relief. As addressed below, Nationstar Mortgage, LLC is not the creditor, appears to be attempting to hide the existence of a person who is actually the creditor, and if it is acting as the servicing agent for the creditor, to insulate that person from any order issued by the court.

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b. The order sought is for "Authorizing a Loan Modification Agreement" regarding the real property generally described as 8034 Coronado Coast Street, Las Vegas, Nevada.

c. The basic terms of the Loan Modification Agreement are set forth in Exhibit 1.

d. The Term is 40 years, with an interest rate of 5.750%, with (presumably monthly) principal and interest payments of $902.86.

e. The court should issue an order.

Nationstar Mortgage, LLC and McCarthy & Holthus have filed an exhibit which purports to be a Loan Modification Agreement. Exhibit 1, Dckt. 103, but is unauthenticated. See Fed. R. Evid. 901 et seq. for basic authentication of document requirements in federal court. It is significant that not one person with personal knowledge of this document is willing to state under penalty of perjury what it is, and then be responsible if such document is false.

OPPOSITION

David Cusick, the Chapter 13 Trustee, filed opposition to this Motion on October 6, 2014. Dckt. 105. The Trustee objects to the Motion on the basis that:

1. Neither the Creditor nor Debtors have field a declaration in support of the Motion for Order Authorizing Loan Modification Agreement. While the Trustee is aware the Debtors have signed

the agreement and Debtors' counsel has approved the form and content of the Motion, no declaration has been filed to properly authenticate the loan modification agreement attached as Exhibit 1. Dckt. 103.

2. Creditor's Motion and the Loan Modification Agreement both name Nationstar Mortgage, LLC as the lender for the loan regarding 8034 Coronado Coast Street, Las Vegas, Nevada. Dckt. 101, 103. Debtors' confirmed plan states that the creditor for the property at 8034 Coronado Coast Street is BAC Home Loans Servicing, LP. Notice Mortgage Payment Changes regarding this property were filed on September 27, 2011 and October 4, 2012. Dckt. 69, 72. The first identifies the creditor as Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP. The second identifies the creditor as Bank of America, N.A. as well. The Trustee is uncertain whether Nationstar Mortgage, LLC is actually the creditor having a claim in this case or has the authority to enter into the loan modification. There is no evidence showing that Nationstar is the creditor.

DISCUSSION

Although Debtors have not provided a declaration in support of their motion, this is not fatal to the Motion. Debtors, through their attorney, have endorsed and consented to the Motion as filed by Creditor.

Though Debtors' counsel has "joined" in the Motion and thereby satisfied the Bankruptcy Code requirement that it is the trustee, debtor in possession, or Chapter 13 debtor who seeks post-petition financing, that "joinder" does not fix two problems,

(1) The proposed loan modification is not with the creditor,

(2) The motion is unsupported by any competent, credible evidence.

Identity of Creditor

Interestingly, no proof of claim for the loan to be modified has been filed in this case. While the Motion and Exhibit 1 state that some unidentified loan for which Nationstar Mortgage, LLC is the creditor is to be modified, there is not a scintilla of evidence that Nationstar Mortgage, LLC is a creditor, as that term is defined in 11 U.S.C. § 101(10) and (5).

It appears that Nationstar Mortgage, LLC and McCarthy & Holthus, LLP are working in concert to hide the identify of the actual creditor from the court and obtain orders for which the actual creditor could later deny any responsibility or that the purported loan modification is effective.

The Loan Modification Agreement itself is suspect. First, it uses the defined term "Lender" to identify Nationstar Mortgage, LLC. The common dictionary definition for lender is "to give (money) to someone who agrees to pay it back in the future." http://www.merriam-webster.com/dictionary/lender. On its face, this Loan Modification Agreement appears to be a representation by Nationstar Mortgage, LLC and McCarthy & Holthus, LLP that it was Nationstar

Mortgage, LLC which, somewhere in the past, actually gave money to the Debtors and it is that money upon which the current claim is based.

The unauthenticated document purporting to be a Loan Modification Agreement has another glaring omission – no recording information is provided for the alleged deed of trust, though the "official" Fannie Mae loan modification form has open fields for that information. It may well be that no such deed of trust exists or that Nationstar Mortgage, LLC has no interest in any such deed of trust or the note which is secured by the deed of trust.

The purported Loan Modification Agreement purports to be executed by a Krista Moore, identified as an "Assistant Secretary" of Nationstar Mortgage, LLC. The purported Loan Modification Agreement is signed by Nationstar Mortgage, LLC in its individual, personal capacity, and does not purport to be done pursuant to a power of attorney or as the authorized agent of the actual creditor.

In other cases where loan servicers have been "reluctant" to identify the actual creditor in the Loan Modification Agreement form itself, the court has approved modifications so long as the loan servicer has identified itself as exercising a power of attorney or as the authorized agent in the signature block, with the identify of the principal disclosed in the signature block. With that minimal disclosure it is clear that (1) the loan servicer is not purporting to be the actual creditor, (2) the loan servicer is making the clear representation that there is a principal, and (3) the least sophisticated consumer on these loans (to borrow a concept from the Federal Fair Debt Collection Practices Act which has been necessarily fashioned by the federal courts to protect consumers from unsavory practices from creditors using third-parties to obtain payment from consumers) knows who is then currently the creditor and who the loan servicer is purporting to bind with the loan modification.

The court, left in the dark as to who is the creditor and how Nationstar Mortgage, LLC is now before this court purporting to be the "Lender" and the creditor (acting as the principal and not the servicing agent), continues the hearing to afford Nationstar Mortgage, LLC and the Debtors to address these identity issues relating to the actual creditor. If Nationstar Mortgage, LLC is a creditor, it can file a proof of claim with the necessary attachments to show that it is a creditor. If it is a loan servicer for the actual creditor, it can provide documentation of such (there being nothing improper about providing such services or acting as the authorized agent of the actual creditor) and have the Loan Modification Agreement reflect that it is acting in such agency capacity.

Though the Debtors have consented to the Motion, the court still must have the real parties in interest before it and have an actions "case or controversy" to adjudicate. U.S. Constitution, Article III, Section 2. The level of sophistication of this issue will require the appearances of Nationstar Mortgage, LLC (Telephonic Appearance Permitted), counsel for Nationstar Mortgage, LLC (No Telephonic Appearance Permitted), and counsel for the Debtors (No Telephonic Appearance Permitted) to assist the court in identifying the creditor and insuring that the exercise of federal judicial power in this court complies with the basic, fundamental requirements of the United States Constitution.

The court requires that not only Jennifer C. Wong, the attorney signing the pleadings for Nationstar Mortgage, LLC at issue, but JaVonne M. Phillips, the senior attorney listed on the pleadings to appear. Ms. Wong was admitted to the California State Bar in December 2006. FN.2. Ms. Phillips was admitted to the California State Bar in January 1997. FN.3. It appears that Ms. Phillips is the law firm partner or senior associate responsible for Ms. Wong's education and practice, and has the ultimate responsibility to explain these pleadings to the court so as to clear up any confusion. Her participation in the hearing with Ms. Wong is critical.

FN.2. http://members.calbar.ca.gov/fal/Member/Detail/246725.

FN.3. http://members.calbar.ca.gov/fal/Member/Detail/187474.

OCTOBER 21, 2014 HEARING

The court continued the hearing to November 18, 2014 in order to allow Nationstar Mortgage, LLC to file a Proof of Claim, if it is the creditor, regarding the loan purporting to be modified through this Motion. It was also continued to allow Nationstar's attorneys and representatives to appear and provide adequate evidence of the claim and Nationstar's authority to offer the modification. Further, Debtor's counsel was ordered to appear.

PROOF OF CLAIM FILED NOVEMBER 4, 2014

Nationstar Mortgage, LLC filed a proof of claim on November 4, 2014, the last day it could file such a claim per the court's order on October 28, 2014. Claim No. 19. This proof of claim lists Nationstar Mortgage, LLC as the creditor for a $177,706.64 deed of trust on 8034 Coronado Coast Street, Las Vegas, Nevada. However, the attached deed of trust (recorded in Clark County, Nevada) states that the lender is Republic Mortgage, LLC, Nevada LLC and lists Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for the lender. It then shows an Assignment of Deed of Trust recorded December 24, 2012, assigning the deed from MERS, as nominee for Republic Mortgage LLC, Nevada LLC to Bank of America, N.A. Finally, an Assignment of Deed of Trust dated May 10, 2013 (but without recording certification) shows that MERS, as nominee for Republic Mortgage LLC, Nevada LLC, assigned the deed of trust to Nationstar Mortgage LLC.

The documents, as presented, appear to indicate that MERS first assigned the deed of trust encumbering the Property to Bank of America, N.A. in late 2012. Then, several months later, attempted to assign the same deed of trust to Nationstar. It is unclear how MERS would be able to assign a deed of trust to Nationstar if it had previously assigned its rights pertaining to that deed of trust to Bank of America, N.A. five months prior. It seems that as of May 10, 2013, MERS had nothing to assign to Nationstar. This raises even more questions about who the real creditor is for this claim.

Nationstar has also filed the Declaration of Andrew Kempe to explain how it is a creditor in this case. Dckt. 111. His testimony under penalty of perjury states,

A. The Investor for this claim (which the court interprets to mean the owner of the debt) is Federal National Mortgage Association ("Fannie Mae").

B. Nationstar is the loan servicer, for compensation, for the loan upon which the claim is based.

C. Nationstar asserts that it is in possession of the original note, endorsed in blank, through Deutsche Bank National Trust Company.

D. Mr. Kempe states that Deutsche Bank National Trust Company, on behalf of Fannie Mae, is Nationstar's custodian.

Declaration, Dckt. 111.

Mr. Kempe authenticates various documents upon which he bases his testimony under penalty of perjury that Nationstar is a "creditor" to enter into the loan modification as a principal.

Exhibit 4 is identified as the Master Custodial Agreement by which Mr. Kempe testifies under penalty of perjury that Deutsche Bank National Trust Company ("DBNTC") is the custodian for Nationstar. Dckt. 112 at 28-46. Though neither Nationstar nor Mr. Kempe direct the court to any specific language in the Master Custodial Agreement by which DBNTC is obligated to serve as the custodian for Nationstar, the court finds the following provisions (emphasis added) relevant.

A. The Master Custodial Agreement is executed by Fannie Mae, DBNTC, and "Lender." Recitals.

B. Lender is the servicer of mortgage loans pursuant to a contract with Fannie Mae. Recitals.

C. **DBNTC** will maintain custody of the Documents [notes and related documents] "on behalf of, and **as custodial agent for, Fannie Mae**..." Recitals.

D. **DBNTC**'s "custody of the Documents **shall provide Fannie Mae with legal possession** thereof...." Recitals.

E. The **servicer** is the "party obligated to Fannie Mae **to perform the functions of the 'servicer'** in the Fannie Mae Servicing Guide. Lender is the Servicer." Section 1, ¶ (p).

F. If the servicer is also the custodian [which is not the case for this claim] Servicer must maintain such Documents in an independent custody department. Section 2, ¶ (c).

G. "**Custodian** at all times **acts for the sole benefit of Fannie Mae**." Section 3, ¶ (b).

H. "All Documents are **held solely and exclusively for Fannie Mae**." Section 6, ¶ (a).

I. DBNTC shall "maintain **continuous custody** of all Documents, and in a manner that identifies such Documents as being **held on behalf of Fannie Mae** and **distinguishes them from documents held for** itself or **other parties**." Section 6, ¶ (b)[1].

Id.

Nationstar has also provided a redacted portion of the Limited Power of Attorney which it asserts is the basis for asserting that DBNTC is holding possession of the notes for Nationstar. Exhibit 5, Dckt. 112 at 47. From the portion of the Limited Power of Attorney provided to the court, the following points [emphasis added] can be distilled.

A. Fannie Mae authorizes Nationstar to act in Fannie Mae's name to do limited, specified acts. These acts are as follows.

B. Release the borrower from personal liability following the authorized transfer of the security property. ¶ 1.

C. Full satisfaction and release of **mortgage or deed of trust**. ¶ 2.

D. Partial release or discharge of a **mortgage or deed of trust**. ¶ 3.

E. Modification or extension of a **mortgage or deed of trust**. ¶ 4.

F. Completing and managing the foreclosure process. ¶ 5.

G. Conveyance of properties to FHA, HUD, VA, Rural Housing Authority, or state or private mortgage insurers. ¶ 6.

H. Assignment or endorsement of **mortgages**, **deeds of trust**, or **promissory notes** to FHA, HUD, VA, Rural House Service, state or private mortgage insurer, or MERS.

Id. Interestingly, most of the powers specifically relate to "mortgages" and "deeds of trust," and in only one part is the power given with respect to "promissory notes."

What Nationstar has proven is that DBNTC is not the custodian for Nationstar, DBNTC does not hold possession of the notes for Nationstar, and Nationstar is not in possession of this, or any notes by virtue of the Master Custodial Agreement.

The court finds it shocking that Nationstar, Mr. Kempe, and Nationstar's attorneys have filed documents and testified under penalty of perjury asserted certain "unassailable fact" which are in direct conflict with the documents filed as exhibits. It is as if Mr. Kempe and Nationstar's attorneys did not bother to read the documents, but merely parrot whatever they were being told as part of "doing their jobs."

If Nationstar is acting as the agent for Fannie Mae, then all they have to do is so disclose in the Loan Modification, and not falsely represent that they are a principal. No good faith reason has been provided for misleading least sophisticated consumers and such consumers' attorneys into thinking that Nationstar is the creditor. Such misrepresentation may well be part of a larger client-servier-attorney conspiracy to defraud consumers and allow some subsequent purchaser to disavow any purported loan modifications by Nationstar and extract more monies from the consumer.

The court will not issue an order which falsely identifies an agent as a principal for a loan modification. The Motion is denied without prejudice to either a loan modification be entered into by the principal or the disclosed agent for the principal with these consumer debtors.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Nationstar Mortgage, LLC having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve Loan Modification is denied without prejudice to either a loan modification be entered into by the principal or the disclosed agent for the principal with these consumer debtors.

20. 13-23841-E-13 PATRICK PADILLA **MOTION TO MODIFY PLAN**
RAC-2 Richard Chan **10-10-14 [35]**

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 10, 2014. By the court's calculation, 38 days' notice was provided. 35 days' notice is required.

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

The Motion to Confirm the Modified Plan is granted.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's First Modified Chapter 13 Plan filed on October 10, 2014, is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit

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

21. 14-21542-E-13 NATALIA RINKER **MOTION TO MODIFY PLAN**
SDH-4 Scott Hughes **10-6-14 [57]**

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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.

Natalia Rinker ("Debtor") moves to modify her plan to decrease monthly plan payments after Seterus increased her mortgage payment on Debtor's rental property. Dckt. 57.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Debtor has filed evidence in support of confirmation, Debtor will be able to make the lower plan payments and continue making the increased mortgage payment. 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 6, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

22. 14-24645-E-13 ANDREW/KATHLEEN REED MOTION TO CONFIRM PLAN
MLA-4 Mitchell Abdallah 9-29-14 [87]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 29, 2014. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

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

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

Andrew and Kathleen Reed ("Debtors") filed a Motion to Confirm the Second Amended Chapter 13 Plan on September 29, 2014. Dckt. 87. Debtors have

proposed an amended plan because they have amended their statement of current monthly income and calculation of commitment period. The amended plan will repay unsecured creditors 16.12% over 60 months with a $241.77 monthly plan payment. Although Debtors' Schedule J shows a monthly net income of $464.00, Andrew Reed currently receives Social Security Income and such income is not included in the calculation of current monthly income. Thus, the payments will not include the entire "monthly net income" in accordance with the Ninth Circuit's holding in *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2012).

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to this Motion on November 4, 2014. Dckt. 93. The Trustee objects because the plan does not appear to provide all of Debtors' disposable income for the commitment period. Debtors are above median income and propose a 60 month plan. Form 22C shows a net excess income of $88.75 in line 59. This would entitle unsecured creditors to $5,325.00 over the 60 month plan.

Additionally, Debtors' tax return shows that Debtors received tax refunds of $6,320.00 in 2014 for tax year 2013. That amount does not include any state tax refund Debtors may have received from the Franchise Tax Board. The total refund would equate to an additional $526.67 per month in disposable income, if Debtor were to distribute the income throughout the year. Debtor has failed to propose this as an additional lump sum payment into their plan and have not included it as an additional source of income on Schedule I.

The Trustee would not object if Debtors included an amendment to the plan in the order confirming it that states that all future tax refunds be turned over to the Trustee, if the court would approve this amendment.

DISCUSSION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. However, the Trustee has shown that the Debtors are under funding the Chapter 13 Plan. The Debtor receives substantial tax refunds, which indicates that income is being over withheld and diverted from computation of projected disposable income.

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

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

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

denied and the proposed Chapter 13 Plan is not confirmed.

23. 08-36047-E-13 JOHN/CHARLENE JOHNSON
PGM-6 Peter Macaluso
CONTINUED AMENDED MOTION TO APPROVE LOAN MODIFICATION
9-24-14 [156]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 23, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is denied without prejudice.

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

PRIOR HEARINGS

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

At the time of the continued hearing, no party had filed any

supplemental responses or objections on the Motion.

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

The Motion continued to that the agreement with the person named "Lender" provided,

> A. The first modified payment will be in the amount of $2,345.19, at 5.000%, will be due on June 1, 2014. Debtor is to make 480 payments. [On its face, the Motion does not state the amount fo any payments other than the first payment, and that the first payment is "at 5.00%."
>
> B. The Modified Principal Balance will be $387,285.19. {Movant does not state the prior principal balance.]
>
> C. There are Unpaid Amounts being added to the Principal Balance. [Movant does not say what amount of "Unpaid Amounts" are being added to the Principal Balance.]

Motion, Dckt. 141.

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

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

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

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

The court continued the hearing to 3:00 p.m. on October 21, 2014 to allow the Debtors to file and serve an amended motion naming the creditor.

DEBTORS' AMENDED MOTION

Debtors filed an amended motion on September 24, 2014. Dckt. 156. The Debtors name Nationstar Mortgage, LLC as the lender. Additionally, the Debtors list the terms of the modification, including the payment plan, the term of months, principal, and interest rate. The Debtors also state that the Debtors have completed their plan and are awaiting discharge.

Nationstar Mortgage, LLC has agreed to a loan modification which will make the payments amount of $2,345.19 at 5.00% over 480 months. The modification will include all amounts and arrearages as of June 1, 2014 (including unpaid and deferred interest, fees, escrow advances, and other costs, but excluding unpaid late charges) less any amount paid to the Nationstar Mortgage, LLC but not previously credited to the Debtors' loan. Because the Debtors have completed that plan, it will not have any direct impact on the estate, the Trustee, or any other secured creditor in this case.

Unfortunately, the court has no idea whether Nationstar Mortgage, LLC is actually a creditor, as defined in 11 U.S.C. § 101(10) and (5), an authorized agent for the creditor, or merely entering into agreements which are unenforceable against the undisclosed creditor as part of a scheme to defraud consumers and the court.

OCTOBER 21, 2014 HEARING

The court continued the hearing to the same date and time as another matter in which Nationstar Mortgage, LLC and its counsel has been ordered to appear. This continuance allows Debtors' counsel and "Nationstar Mortgage, LLC" to correct or supplement the documentation so the court can have a good faith belief that it is approving and authorizing a transaction between the real parties in interest who have a case or controversy before this federal court. U.S. Constitution Article III, Section 2.

NO SUPPLEMENTAL DOCUMENTS FILED

Since the court continued the motion on October 21, 2014, neither Debtors nor Nationstar Mortgage, LLC have filed any supplementary pleadings or documents.

Though Nationstar has not filed supplemental documents in this case, it has done so in other cases as ordered by the court. Those documents have proven that Nationstar is not the creditor and is not in possession of notes which are endorsed in blank. The court ruling in Donald Irving and Fammie Homes-Irving, Bankr. E.D. Cal. 11-29436. The court incorporates the ruling in that case for the Motion to Approve Loan Modification (DCN: JCW-1) and restates it as follows,

> "Nationstar has also filed the Declaration of Andrew Kempe to explain how it is a creditor in this case. Dckt. 111. His testimony under penalty of perjury states,

A. The Investor for this claim (which the court interprets to mean the owner of the debt) is Federal National Mortgage Association ("Fannie Mae").

B. Nationstar is the loan servicer, for compensation, for the loan upon which the claim is based.

C. Nationstar asserts that it is in possession of the original note, endorsed in blank, through Deutsche Bank National Trust Company.

D. Mr. Kempe states that Deutsche Bank National Trust Company, on behalf of Fannie Mae, is Nationstar's custodian.

Declaration, Dckt. 111.

Mr. Kempe authenticates various documents upon which he bases his testimony under penalty of perjury that Nationstar is a "creditor" to enter into the loan modification as a principal.

Exhibit 4 is identified as the Master Custodial Agreement by which Mr. Kempe testifies under penalty of perjury that Deutsche Bank National Trust Company ("DBNTC") is the custodian for Nationstar. Dckt. 112 at 28-46. Though neither Nationstar nor Mr. Kempe direct the court to any specific language in the Master Custodial Agreement by which DBNTC is obligated to serve as the custodian for Nationstar, the court finds the following provisions (emphasis added) relevant.

A. The Master Custodial Agreement is executed by Fannie Mae, DBNTC, and "Lender." Recitals.

B. Lender is the servicer of mortgage loans pursuant to a contract with Fannie Mae. Recitals.

C. **DBNTC** will maintain custody of the Documents [notes and related documents] "on behalf of, and **as custodial agent for, Fannie Mae**..." Recitals.

D. **DBNTC**'s "custody of the Documents **shall provide Fannie Mae with legal possession** thereof...." Recitals.

E. The **servicer** is the "party obligated to Fannie Mae **to perform the functions of the 'servicer'** in the Fannie Mae Servicing Guide. Lender is the Servicer." Section 1, ¶ (p).

F. If the servicer is also the custodian [which is not the case

for this claim] Servicer must maintain such Documents in an independent custody department. Section 2, ¶ (c).

G. "**Custodian** at all times **acts for the sole benefit of Fannie Mae**." Section 3, ¶ (b).

H. "All Documents are **held solely and exclusively for Fannie Mae**." Section 6, ¶ (a).

I. DBNTC shall "maintain **continuous custody** of all Documents, and in a manner that identifies such Documents as being **held on behalf of Fannie Mae** and **distinguishes them from documents held for** itself or **other parties**." Section 6, ¶ (b)[1].

Id.

Nationstar has also provided a redacted portion of the Limited Power of Attorney which it asserts is the basis for asserting that DBNTC is holding possession of the notes for Nationstar. Exhibit 5, Dckt. 112 at 47. From the portion of the Limited Power of Attorney provided to the court, the following points [emphasis added] can be distilled.

A. Fannie Mae authorizes Nationstar to act in Fannie Mae's name to do limited, specified acts. These acts are as follows.

B. Release the borrower from personal liability following the authorized transfer of the security property. ¶ 1.

C. Full satisfaction and release of **mortgage or deed of trust**. ¶ 2.

D. Partial release or discharge of a **mortgage or deed of trust**. ¶ 3.

E. Modification or extension of a **mortgage or deed of trust**. ¶ 4.

F. Completing and managing the foreclosure process. ¶ 5.

G. Conveyance of properties to FHA, HUD, VA, Rural Housing Authority, or state or private mortgage insurers. ¶ 6.

H. Assignment or endorsement of **mortgages**, **deeds of trust**, or **promissory notes** to FHA, HUD, VA, Rural House Service, state or private mortgage insurer, or MERS.

Id. Interestingly, most of the powers specifically relate to "mortgages" and "deeds of trust," and in only one part is

the power given with respect to “promissory notes.”

What Nationstar has proven is that DBNTC is not the custodian for Nationstar, DBNTC does not hold possession of the notes for Nationstar, and Nationstar is not in possession of this, or any notes by virtue of the Master Custodial Agreement.

The court finds it shocking that Nationstar, Mr. Kempe, and Nationstar’s attorneys have filed documents and testified under penalty of perjury asserted certain “unassailable fact” which are in direct conflict with the documents filed as exhibits. It is as if Mr. Kempe and Nationstar’s attorneys did not bother to read the documents, but merely parrot whatever they were being told as part of “doing their jobs.”

If Nationstar is acting as the agent for Fannie Mae, then all they have to do is so disclose in the Loan Modification, and not falsely represent that they are a principal. No good faith reason has been provided for misleading least sophisticated consumers and such consumers’ attorneys into thinking that Nationstar is the creditor. Such misrepresentation may well be part of a larger client-servier-attorney conspiracy to defraud consumers and allow some subsequent purchaser to disavow any purported loan modifications by Nationstar and extract more monies from the consumer.

The court will not issue an order which falsely identifies an agent as a principal for a loan modification. The Motion is denied without prejudice to either a loan modification be entered into by the principal or the disclosed agent for the principal with these consumer debtors.”

As in the above case, the court will not issue an order which falsely states that these least sophisticated debtors are entering into a loan modification with Nationstar Mortgage, LLC as a principal. Since disclosing that it is executing the loan modification as an agent of a principal, and disclosing the principal, is so simple, Nationstar and its attorneys can in good faith quickly modify the Loan Modification Agreement to be accurate and complete this loan modification for these consumer Debtors.

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

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

The Motion to Approve the Loan Modification filed by Nationstar Mortgage, LLC having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve Loan Modification is denied without prejudice to either a loan modification be entered into by the principal or the disclosed agent for the principal with these consumer debtors.

24. 11-29747-E-13 RDS-5 MICHAEL/LINDA PAPERA Richard Steffan CONTINUED MOTION TO AVOID LIEN OF NIAGARA FUNDING, INC. 9-29-14 [93]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

The court having entered an order on November 3, 2014, resolving all issues in this Contested Matter, it is removed from the calendar.

The parties resolved this Motion by a Stipulation filed on October 30, 2014. Pursuant to the Stipulation, the court entered its order on November 3, 2014, Dckt. 102, which fully resolves the Motion.

25. 14-28947-E-13 ERIC/ZENAIDA PANTONIAL MOTION TO CONFIRM PLAN
BMV-1 Bert Vega 10-6-14 [22]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

Eric and Zenaida Pantonial ("Debtors") field a Motion to Confirm First Amended Chapter 13 Plan on October 6, 2014. Dckt. 22. Debtors propose this amended plan to correct the discrepancies regarding attorney's fees that were pointed out in the First Meeting of Creditors. Debtors have also filed amended Schedules I and J and Statement of Current Monthly Income (Form B22C).

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 October 6, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

26. 10-23351-E-13 CASEY/BRENDA HOGAN — MOTION TO INCUR DEBT
CAH-1 Oliver Greene — 10-28-14 [66]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 28, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Casey and Brenda

Hogan ("Debtors") seek court approval for Debtors to incur post-petition credit. Wells Fargo Bank, N.A. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $1,869.00 a month to $1,411.84 a month. The modification will capitalize the pre-petition arrears and provide an interest rate from at 4.6250% over the next 480 months.

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

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on October 30, 2014.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Casey and Brenda Hogan having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Casey and Brenda Hogan ("Debtors") to amend the terms of the loan with Wells Fargo Bank, N.A., which is secured by the real property commonly known as 9442 Lake Natoma Drive, Orangevale, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 69.

27. 14-23554-E-13 PAULA CAMPBELL **MOTION TO CONFIRM PLAN**
DEF-1 David Foyil **9-30-14 [52]**

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 30, 2014. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted.

Paula Campbell ("Debtor") filed the Motion to Confirm First Amended Chapter 13 Plan on September 30, 2014. Dckt. 52. Debtor's prior plan was denied confirmation because it relied on a not-yet granted Motion to Value Collateral. The Motion to Value was granted on August 10, 2014. Aside from this, the Amended Plan changes the amount owed to Amador County Tax Collector, which was less than anticipated. The Amended plan decreases the dividend to that creditor and applies the remaining monies to unsecured creditors.

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

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

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on September 30, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

28. 14-29154-E-13 GARY/CHERYL PETERSEN
DPC-1 Brandon Johnston
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-22-14 [27]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on October 22, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that Gary and Cheryl Peterson's ("Debtors") Plan relies on valuing collateral. Debtors' Plan relies on a Motion to Value Collateral being filed for GM Financial, listed in Class 2B. Debtors have failed to file a motion to value for this claim. If such a motion is not filed and not granted, Debtors' Plan does not have sufficient monies to pay the claim in full.

The court's review of the docket for this case shows that Debtors have not yet filed a motion to value. The Trustee's objection is well-taken. The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

29. 14-24955-E-13 DPC-1 ANTOINETTE TRIGUEIRO Sally Gonzales

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

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

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

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

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

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

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

The court's decision is to sustain the Objection.

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

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

Trustee also argues that while the plan proposes to pay the attorney $500.00 through the plan under LBR 2016-1(c), the Disclosure of Compensation

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

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

JULY 22, 2014 HEARING

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

SEPTEMBER 16, 2014 HEARING

The hearing was again continued to allow Debtor more time to file the necessary documents.

DISCUSSION

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

On November 11, 2014, Debtor filed a Reply directing the court to review the Amended Proofs of Claim filed by the Internal Revenue Service (Proof of Claim No. 1) and Franchise Tax Board (Proof of Claim No. 2). While the Franchise Tax Board amended proof of claim does not state that there are unfiled returns, the Internal Revenue Service still asserts that the Debtor failed to file her 2010 federal tax return. The federal tax claims are filed in the amount of $9,363.86 as a priority claim and $212,494.35 as a general unsecured claim. It appears that the Internal Revenue Service has used a $10,000.00 amount as a placeholder for the 2008 and 2010 tax years for which it states that no federal returns have been filed.

Though the hearing was continued for another 63 days, Debtor has not resolved with her CPA the missing 2010 tax return. No testimony is provided by the CPA stating that the 2010 tax return was prepared and filed. No appropriately redacted copy of a 2010 tax return is provided.

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

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

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

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

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

30. 14-27456-E-13 JENNIFER LINN-KIDWELL **OBJECTION TO CLAIM OF JUNE LINN, CLAIM NUMBER 7**
SDH-1 **9-23-14 [39]**

CASE DISMISSED 11/3/14

Final Ruling: No appearance at the November 18, 2014 hearing is required.

The Bankruptcy Case having been Dismissed by Prior Order of the Court, the Objection to Claim is removed from the calendar.

On November 3, 2014, the court entered its order dismissing this Chapter 13 case. The case having been dismissed, the Objection to Claim is rendered moot.

31. 14-28958-E-13 GEORGE AGUILAR
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-22-14 [23]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on October 22, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. George Aguilar ("Debtor") failed to appear at the First Meeting of Creditors held on October 16, 2014. Debtor is required to attend this meeting and has not presented any evidence to the court to explain why he failed to appear. The Meeting has been continued to December 18, 2014.

2. Debtor has failed to provide the Trustee with his employer payment advices for the 60 days preceding the filing, as required under 11 U.S.C. § 521(a)(1)(B).

3. Debtor has also failed to provide the Trustee with a tax transcript or a copy of his federal income tax return for the most recent pre-petition tax year for which a return was required, or a written statement that no such document exists. This was required seven days before the date set for the First Meeting of Creditors.

4. Debtor has not paid one installment of his filing fee according to the schedule specified in the order granting leave to pay the filing fee in installments. This violates 11 U.S.C. § 1325(a)(2).

5. Debtor cannot make the payments specified under the plan or comply with the plan because his Chapter 13 documents are incomplete. Schedule J lists Debtor's net income as $100.00. According to the Trustee's calculations, Debtor's net income is actually -1,071.00. Debtor failed to list a dividend to unsecured creditors in Section 2.15 of the Plan. Debtor lists Bayview Mortgage in Class 1 of the Plan, but leaves incomplete the arrearage amount, dividend, and interest rate. Class 1 also fails to list the monthly contract amount. Debtor failed to choose and check the appropriate box governing whether additional provisions would be attached to the Plan. Schedule F was marked that Debtor has no creditors holding unsecured claims to report on that schedule. The Trustee is unsure that Debtor completed Schedule F properly. Also, Debtor's Statement of Financial Affairs is incomplete. Debtor lists income for 2013 and year-to-date 2014, but provides no other information in the document.

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

Further, the Trustee asserts that Debtor has failed to file pay advices and tax return documents which are required to be filed with the Trustee in 11 U.S.C. § 521. The failure to comply with other requirements in the Bankruptcy Code is grounds to deny confirmation of the Plan. 11 U.S.C. § 1325(a)(1).

The Trustee then objects that Debtor has not paid his filing fee installments current. From the court's review of the docket in this case, it appears that Debtor brought his installment fees current on November 3, 2014.

Finally, the Trustee objects that Debtor will be unable to comply with the Plan because the plan is incomplete. First, Debtor's Schedule J, filed September 16, 2014, lists a $100.00 monthly net income and the Plan provides for a $100.00 monthly payment. However, as the Trustee has indicated, the amount in Line 12 of Schedule I is 1,173.00. This amount changes to 2,344.00 in Line 23a on Schedule J without explanation, making

the monthly net income $100.00. If the amount listed in Schedule I is subtracted from Debtor's monthly expenses in Line 22 of Schedule J ($2,244.00), Debtor's net monthly income is $-1,071.00. This suggests the plan is not feasible. *See* 11 U.S.C. § 1325(a)(6). Additionally, Debtor's failure to fully complete his statement of financial affairs and his proposed Plan raises suspicions that Debtor has not fully disclosed his debts to the court. This also raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). This is a further reason to sustain the objection.

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

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

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

32. 09-46161-E-13 CHERYL BENTLEY MOTION TO INCUR DEBT
CLH-1 Charles Hastings 10-23-14 [36]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 23, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Motion to Incur Debt is denied without prejudice.

The motion seeks permission for Cheryl Bentley ("Debtor") to purchase a vehicle, which the total purchase price will not exceed $27,000.00, with monthly payments of no more than $500.00, which is the amount of credit for which Debtor has been approved to purchase a business vehicle. FN.1. The interest rate on the loan will be no more than 3%.

FN.1. The court notes that the Motion itself alleges nothing more than "Debtor hereby requests an order allowing her permission to incur debt for the purchase of a vehicle for the reasons set forth in the declaration of Debtor, filed concurrently herewith." Debtor's Counsel even failed to date and sign this Motion. This is unacceptable pleading practice before this

court. Federal Rule of Bankruptcy Procedure 9013 requires that motions be pleaded with particularity, stating with specificity what the movant is seeking. This Motion merely asks the court to grant the motion, without setting forth any grounds on which the court should do so. Instead, Debtor's Counsel directs the court to Debtor's Declaration for the court to reason out the grounds on which the motion should be granted.

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

The Debtor does not address the reasonableness of incurring debt to purchase a vehicle for business during the final months of her Chapter 13 Plan. Debtor only states in her Declaration that the Internal Revenue Service provides a tax incentive to purchase a business vehicle before the end of the year. Yet, aside from a potential tax benefit, Debtor has not provided the court with any reason why it is necessary for the Debtor to incur up to $27,000.00 in debt for a new business vehicle.

Here, the transaction is not shown to be in the best, or even reasonable, financial interests of the Debtor or the estate. A debtor driven to seek the extraordinary relief available under the Bankruptcy Code is hard pressed to provide a good faith explanation as to how a "reward" for filing bankruptcy is to purchase a vehicle of unknown kind for unknown business purposes in order to get a tax benefit. Additionally, as the Trustee indicated in his response filed November 3, 2014 (Dckt. 44), Debtor provides only the pre-approval letter from State Farm Federal Credit Union that lists the total amount she has been pre-approved to incur for the purchase of a vehicle. The letter does not evidence the other terms of the agreement, as the Trustee noted. This letter is not an agreement between the parties, nor does it establish the interest rate and monthly payment as Debtor states in her Declaration.

The motion is denied without prejudice.

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

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

33. 14-28961-E-13 MLA-2 RODEL MAULINO AND MIMSY ABARA-MAULINO Mitchell Abdallah

MOTION TO CONFIRM PLAN 10-2-14 [28]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 2, 2014. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

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

Rodel Maulino and Mimsy Abara-Maulino ("Debtors") filed the Motion to Confirm Chapter 13 Plan on October 2, 2014. Dckt. 28.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to Debtors' Motion on October 30, 2014. Dckt. 45. The Trustee objects to confirmation on the basis that the proposed Plan does not provide all of Debtors' disposable income for the applicable commitment period. The Trustee is uncertain that the gross wages on Form 22C is correct, especially considering that Debtors' household size is five, and two of the three dependants are adults. The Trustee is also uncertain that the deduction listed on Schedule I for "Plan B Loan 1" is reasonably necessary for the maintenance and support of a debtor or dependent. Debtors have not disclosed the amount of the loan and

when it will be repaid. The Plan payments do not increase after the loan is repaid and Debtors have not furnished evidence to show why repayment of this loan is reasonably necessary.

DISCUSSION

The Plan was filed after the notice of the Meeting of Creditors was issued. Debtors properly filed a motion to confirm the Plan. *See* Local Bankr. R. 3015-1(c)(3). However, the Debtors have failed to fully and accurate disclose their financial information. The Debtors have not filed any Reply to the Trustee's Opposition.

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

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

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

34. 14-28862-E-13 DAVID/TOMASA OWENS
DPC-1 Peter Macaluso

AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-29-14 [25]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on October 29, 2014. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. David and Tomasa Owens ("Debtors") are $310.00 delinquent in plan payments to the Trustee. The next scheduled payment of 310.00 is due October 25, 2014. Debtors have paid $0.00 into the Plan to date.

2. Debtors' petition discloses that Debtors have a business, "dba Center Ring Boxing Club." Debtors' Schedule I lists net business income on Lin 8a of $90.00 per month as "Boxing Coach" for "Center Ring Boxing." No attachment showing gross

business income and expenses is attached to the Schedule. Debtors' Statement of Financial Affairs shows $7,500.00 in year-to-date boxing gym dues.

3. Debtors' Schedule J indicates that Debtors have five children, but fails to list the ages of these children or indicate if they reside with Debtors. Debtors' Statement of Current Monthly Income indicates on line 16 a household size of 2 people. Debtors testified at the First Meeting of Creditors on October 16, 2014 that three children reside with Debtors.

4. Debtors' Plan may not be Debtors' best effort under 11 U.S.C. § 1325(b). Debtors are below median income according to the Statement of Current Monthly Income, Form 22C. Debtor David Owens testified at the First Meeting of Creditors that he has obtained new, full-time employment. Debtors may now have additional disposable income which can be paid into the Plan for the benefit of unsecured creditors.

The Trustee's objections are well-taken. Debtors' delinquency in plan payments and failure to accurately state their household size indicate that Debtors may be unable to make plan payments or otherwise comply with the plan. In order to be confirmed, the plan must be feasible. 11 U.S.C. § 1325(a)(6). This is grounds to sustain the objection.

Additionally, Debtor's failure to disclose business income for Center Ring Boxing and the fact that Debtor David Owens has new employment indicate that the Plan might not be Debtors' best efforts. Debtors must dedicate all disposable income to the plan. 11 U.S.C. § 1325(b)(1)(B). Because Debtors' total income is unclear from the evidence the court has currently, the plan may not be confirmed because the Debtors do not appear to have provided an accurate disclosure of their current monthly income.

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

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

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

35. 10-39863-E-13 SDB-3 — ALEXANDER TAYLOR AND CAROLINE GUERRERO-TAYLOR — Scott DeBie — CONTINUED MOTION TO VALUE COLLATERAL OF NATIONSTAR MORTGAGE, LLC — 9-19-14 [73]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Bank of America, N.A.. Mortgage Electronic Registration Systems, Inc., BAC Home Loans Servicing, LP, Nationstar Mortgage, LLC, and Office of the United States Trustee on September 18, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Nationstar Mortgage, LLC ("Creditor") is denied without prejudice.

The Motion to Value filed by Alexander Taylor and Caroline Guerrero-Taylor ("Debtors") to value the secured claim of Nationstar Mortgage, LLC ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 220 Bella Vista Way, Rio Vista, California ("Property"). Debtors seek to value the Property at a fair market value of $225,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

However, the court is unable to determine if proper service on the Motion has taken place. A review of the proof of service shows that Chapter 13 Trustee, Bank of America, N.A.. Mortgage Electronic Registration Systems,

Inc., BAC Home Loans Servicing, LP, Nationstar Mortgage, LLC, and Office of the United States Trustee were served. However, The Bank of New York Mellon, listed on the Proof of Claim as the creditor.

OCTOBER 21, 2014 HEARING

The court continued the hearing to November 18, 2014 to allow Nationstar Mortgage, LLC to offer evidence, if any, supporting its position as the creditor holding the secured claim Debtors seek to value. No such supplemental documents were filed with the court.

DISCUSSION

The Transfer of Claim Other Than for Security (Dckt 78), filed on October 6, 2014, appears to transfer some right to Nationstar Mortgage, LLC but the court cannot discern if it is for just servicing or for the entire lien. There is no supporting evidence to elaborate on what rights are being transferred, particularly since the Transfer lists both The Bank of New York Mellon, the presumed creditor, and BAC Home Loans Servicing, LP, the presumed servicer. The court further notes that this "transfer" did not take place until nearly a month after the instant Motion was filed listing Nationstar Mortgage, LLC as the lender for purpose of the Motion to Value. It raises questions as to whether the parties themselves are fully aware of who the actual creditor is.

Though Nationstar has not filed supplemental documents in this case, it has done so in other cases as ordered by the court. Those documents have proven that Nationstar is not the creditor and is not in possession of notes which are endorsed in blank. The court ruling in Donald Irving and Fammie Homes-Irving, Bankr. E.D. Cal. 11-29436. The court incorporates the ruling in that case for the Motion to Approve Loan Modification (DCN: JCW-1) and restates it as follows,

> "Nationstar has also filed the Declaration of Andrew Kempe to explain how it is a creditor in this case. Dckt. 111. His testimony under penalty of perjury states,
>
> A. The Investor for this claim (which the court interprets to mean the owner of the debt) is Federal National Mortgage Association ("Fannie Mae").
>
> B. Nationstar is the loan servicer, for compensation, for the loan upon which the claim is based.
>
> C. Nationstar asserts that it is in possession of the original note, endorsed in blank, through Deutsche Bank National Trust Company.
>
> D. Mr. Kempe states that Deutsche Bank National Trust Company, on behalf of Fannie Mae, is Nationstar's custodian.
>
> Declaration, Dckt. 111.

Mr. Kempe authenticates various documents upon which he bases his testimony under penalty of perjury that Nationstar is a "creditor" to enter into the loan modification as a principal.

Exhibit 4 is identified as the Master Custodial Agreement by which Mr. Kempe testifies under penalty of perjury that Deutsche Bank National Trust Company ("DBNTC") is the custodian for Nationstar. Dckt. 112 at 28-46. Though neither Nationstar nor Mr. Kempe direct the court to any specific language in the Master Custodial Agreement by which DBNTC is obligated to serve as the custodian for Nationstar, the court finds the following provisions (emphasis added) relevant.

A. The Master Custodial Agreement is executed by Fannie Mae, DBNTC, and "Lender." Recitals.

B. Lender is the servicer of mortgage loans pursuant to a contract with Fannie Mae. Recitals.

C. **DBNTC** will maintain custody of the Documents [notes and related documents] "on behalf of, and **as custodial agent for, Fannie Mae**..." Recitals.

D. **DBNTC**'s "custody of the Documents **shall provide Fannie Mae with legal possession** thereof...." Recitals.

E. The **servicer** is the "party obligated to Fannie Mae **to perform the functions of the 'servicer'** in the Fannie Mae Servicing Guide. Lender is the Servicer." Section 1, ¶ (p).

F. If the servicer is also the custodian [which is not the case for this claim] Servicer must maintain such Documents in an independent custody department. Section 2, ¶ (c).

G. "**Custodian** at all times **acts for the sole benefit of Fannie Mae**." Section 3, ¶ (b).

H. "All Documents are **held solely and exclusively for Fannie Mae**." Section 6, ¶ (a).

I. DBNTC shall "maintain **continuous custody** of all Documents, and in a manner that identifies such Documents as being **held on behalf of Fannie Mae** and **distinguishes them from documents held for** itself or **other parties**." Section 6, ¶ (b)[1].

Id.

Nationstar has also provided a redacted portion of the

Limited Power of Attorney which it asserts is the basis for asserting that DBNTC is holding possession of the notes for Nationstar. Exhibit 5, Dckt. 112 at 47. From the portion of the Limited Power of Attorney provided to the court, the following points [emphasis added] can be distilled.

A. Fannie Mae authorizes Nationstar to act in Fannie Mae's name to do limited, specified acts. These acts are as follows.

B. Release the borrower from personal liability following the authorized transfer of the security property. ¶ 1.

C. Full satisfaction and release of **mortgage or deed of trust**. ¶ 2.

D. Partial release or discharge of a **mortgage or deed of trust**. ¶ 3.

E. Modification or extension of a **mortgage or deed of trust**. ¶ 4.

F. Completing and managing the foreclosure process. ¶ 5.

G. Conveyance of properties to FHA, HUD, VA, Rural Housing Authority, or state or private mortgage insurers. ¶ 6.

H. Assignment or endorsement of **mortgages**, **deeds of trust**, or **promissory notes** to FHA, HUD, VA, Rural House Service, state or private mortgage insurer, or MERS.

Id. Interestingly, most of the powers specifically relate to "mortgages" and "deeds of trust," and in only one part is the power given with respect to "promissory notes."

What Nationstar has proven is that DBNTC is not the custodian for Nationstar, DBNTC does not hold possession of the notes for Nationstar, and Nationstar is not in possession of this, or any notes by virtue of the Master Custodial Agreement.

The court finds it shocking that Nationstar, Mr. Kempe, and Nationstar's attorneys have filed documents and testified under penalty of perjury asserted certain "unassailable fact" which are in direct conflict with the documents filed as exhibits. It is as if Mr. Kempe and Nationstar's attorneys did not bother to read the documents, but merely parrot whatever they were being told as part of "doing their jobs."

> If Nationstar is acting as the agent for Fannie Mae, then all they have to do is so disclose in the Loan Modification, and not falsely represent that they are a principal. No good faith reason has been provided for misleading least sophisticated consumers and such consumers' attorneys into thinking that Nationstar is the creditor. Such misrepresentation may well be part of a larger client-servier-attorney conspiracy to defraud consumers and allow some subsequent purchaser to disavow any purported loan modifications by Nationstar and extract more monies from the consumer.
>
> The court will not issue an order which falsely identifies an agent as a principal for a loan modification. The Motion is denied without prejudice to either a loan modification be entered into by the principal or the disclosed agent for the principal with these consumer debtors."

The court will not value a claim prior to ensuring that all proper and necessary parties were served, especially when the relief sought in the motion is seeking to alter the rights of a creditor. Purporting to value a "Claim" of Nationstar Mortgage, LLC may well be a nullity, or force the Debtors into protracted litigation to prove that there was a principal which Nationstar hid from the Debtors.

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 Alexander Taylor and Caroline Guerrero-Taylor ("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 denied without prejudice.

36. 10-44663-E-13 MARY MANNER **MOTION TO MODIFY PLAN**
AJP-4 Al Patrick **10-1-14 [83]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 1, 2014. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

Mary Manner ("Debtor") filed the Motion to Confirm Debtor's Modified Plan on October 1, 2014. Dckt. 83.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the Motion to Confirm on November 3, 2014. Dckt. 96. The Trustee objects to the modification of Debtor's plan on the basis that:

1. Debtor has not explained why she seeks to modify the plan in her Motion. Federal Rule of Bankruptcy Procedure 9013 requires that motions and complaints be pleaded with particularity. The only particular regarding the plan modification mentioned in the Motion is that "Debtor has included herein an estimated value and cost of replacement of family vehicle." While the Trustee assumes that Debtor seeks

to modify the plan to allow for the purchase of a new vehicle and excuse delinquency under the confirmed plan, Debtor has not stated the reasons for the modification expressly.

2. Debtor's Declaration fails to comply with 28 U.S.C. § 1746 because it appears to go beyond Debtor's personal knowledge.

3. According to the Trustee's calculations, the Plan will complete in more than the 60 months proposed, possibly lasting 79 months. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). Debtor's plan proposes to pay no less than 2% to unsecured creditors. Because unsecured claims total $195,148.57, the Trustee calculates that it will take about $3,497.75 to complete the plan (with $666.11 already disbursed to unsecured creditors). Debtor's modified plan proposes plan payments of $115.60 for months 49 through 60, for a total remaining to be paid to Trustee of $1,387.20. This is insufficient to fund the plan within the proposed 60 month commitment period.

4. Debtor's modified plan uses an outdated form. Debtor used form EDC 3-080 (effective October 17, 2005) instead of form EDC 3-080 (effective May 1, 2012).

5. Debtor is modifying her plan to accommodate financial changes and to surrender her current automobile. Debtor's modified plan proposes to reclassify Schools Federal Credit Union from Class 2 to Class 3 surrender regarding a 2004 Volvo. Debtor's proposed modified plan does not authorize payments made to date by the Trustee. The Trustee has disbursed $12,831.46 in principal and $1,890.69 in interest to Schools Federal Credit Union. Modifying the plan to disallow prior payments to the claim appears beyond the scope of 11 U.S.C. § 1329(a)(1).

6. Debtor filed a Motion to Incur Debt on October 1, 2014 seeking court permission to purchase an automobile (make and model not provided) for a total purchase price of $19,500.00. Dckt. 76. Debtor's motion was denied on October 22, 2014 and Debtor has not filed a new motion to incur debt. Dckt. 93.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. However, the Debtor has failed to comply with the requirements to confirm a modified plan.

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

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

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

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

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

37. 10-25465-E-13 SS-2 LUCLLE/ALEXANDER CARIGMA

MOTION TO SUBSTITUTE AS SUCCESSOR TO DEBTOR LUCILE CARIGMA
10-13-14 [72]

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

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

Below is the court's tentative ruling.

On October 13, 2014, Alexis Carigma filed a motion to be appointed as the successor personal representative for Lucile Carigma, the debtor, in this bankruptcy case. The Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds for the relief requested.

A. Debtor Lucile Carigam passed away on January 31, 2014.

B. Since Lucile Carigam death, co-debtor Alexander Carigma has continued to make the plan payments.

C. The plan payments are current and will be completed in approximately six months.

D. Alexis Carigma accepts the responsibility of being appointed the personal representative for the late Lucile Carigam.

Motion, Dckt. 72.

In her Declaration Alexis Carigma provides some additional information as to why she would qualify as an appropriate personal representative for this bankruptcy case. Dckt. 74. She testifies that Lucile Carigam was her mother, and that co-debtor Alexander Carigma is her father. She testifies that it has been, and will continue to be the co-debtor who will make the

plan payments. A copy of the death certificate has been filed as Exhibit 1 in support of the Motion. Dckt. 75.

Upon the death of a Debtor in a Chapter 13 Case, the court shall determine whether the case should proceed or be dismissed. Fed. R. Bankr. P. 1016. The Motion has been served on the Co-Debtor and creditors. Certificate of Service, Dckt. 76.

The appointment of a successor representative as provided in Federal Rule of Civil Procedure 25 and Federal Rule of Bankruptcy Procedure 9014 and 7025 is appropriate under the circumstances. The Debtors invested substantial time and effort in prosecuting this case. Through an unfortunate event one of the Debtors is not able to continue such prosecution on the eve of the plan being completed.

The court grants the Motion and appoints Alexis Carigma as the successor representative for the rights and interests of the late Lucile Carigma in this bankruptcy case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Substitute a Representative for the late Lucile Carigam, Debtor, filed by Alexis Carigma 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 Alexis Carigma is appointed as the successor representative for the rights and interests of the late Lucile Carigam in this bankruptcy case.

38. 10-25465-E-13 LUCLLE/ALEXANDER CARIGMA **MOTION TO SUBSTITUTE ATTORNEY**
SS-3 **10-13-14 [77]**

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

The Motion is granted and Scott Shumaker is substituted in as counsel for Lucille Carigma, in the place of John Harrison, and John Harrison is authorized to withdraw as counsel for Lucille Carigma in this bankruptcy case.

On October 13, 2014, a Document titled "Motion of Alexis Carigma, as Successor to, and on Behalf of, Debtor Lucile Carigma, To Substitute Scott Shumaker as Attorney." Dckt. 77. All the "motion" states is that Movant wants to substitute Mr. Shumaker as the attorney in the place of John Harrison. There is a parenthetical directing the court to "(See accompanying Substitution of Attorney)." Dckt. 79 is a Substitution of Attorney, which is "signed" by the names for the moving party, original counsel, and new counsel are typed in.

The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Substitute Counsel filed by Alexis Carigma 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 Shumaker is substituted in as counsel for Lucille Carigma, in the place of John Harrison, and John Harrison is authorized to withdraw as counsel for Lucille Carigma in this bankruptcy case.

39. 10-25465-E-13 LUCLLE/ALEXANDER CARIGMA
SS-4

MOTION TO DETERMINE FEASIBILITY OF FURTHER ADMINISTRATION OF CASE
10-13-14 [81]

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

The Motion and Notice of Motion were served on the Trustee, creditors, and the U.S. Trustee on October 13, 2014. The court computes that 36 days' notice was provided. 28 days notice is required.

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

Below is the court's tentative ruling.

The Motion is granted and Administration of the Chapter 13 Case shall continue in this court.

The Debtors, with Alexis Carigma acting as the personal representative of the late Lucile Carigma, assert that the case should continue notwithstanding the death of Lucile Carigma. In addition to the income previously disclosed, there is $100,000 of insurance proceeds which will be used to complete the plan and provide for a 100% dividend to creditors holding general unsecured claims.

There are approximately only six months left to be performed under the plan.

Based on the evidence submitted, the court orders that the Chapter 13 case proceed for both debtors.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Determine the Feasibility of Further Administration of the Case filed by Alexander Carigma, Debtor, and Alexis Carigma, successor representative for the late Lucile Carigma, 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, the court concluding that based on the evidence presented further administration is feasible. Administration of the case shall proceed in this court.

40. 10-25465-E-13 LUCLLE/ALEXANDER CARIGMA
SS-5

MOTION FOR EXEMPTION FROM FINANCIAL MANAGEMENT COURSE AND/OR MOTION FOR EXEMPTION TO FILE DECLARATIONS/CERTIFICATIONS PURSUANT TO 11 U.S.C. §§ 1328 AND 522
10-13-14 [86]

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

The Motion and Notice of Motion were served on the Trustee, creditors, and the U.S. Trustee on October 13, 2014. The court computes that 36 days' notice was provided. 28 days notice is required.

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

Below is the court's tentative ruling.

The Motion is granted and Administration of the Chapter 13 Case shall continue in this court.

Co-Debtor Alexander Carigma and Successor Representative Alexis Carigma for the late Lucile Carigma, the other Co-Debtor, request that the court waive the requirement for Lucile Carigma to complete a financial management course or file the required Certifications thereof pursuant to 11 U.S.C. §§ 1328 and 522(q).

The Motion is granted.

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

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

The Motion to Waive the Requirement that the late Lucile Carigma complete the required financial management course or file the declarations and certifications required for entry of a discharge filed by Alexander Carigma and Alexis Carigma, successor representative for the late Lucile Carigma, 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 requirement that Lucile Carigma complete a post-petition financial management course, file a certification of such course, file the certifications of 11 U.S.C. § 522(q), and provide the certifications required pursuant to 11 U.S.C. § 1328. Alexis Carigma, appointed pursuant to Federal Rule of Civil Procedure 25(a) and Federal Rule of Bankruptcy Procedure 7025 and 9014 to serve as the personal representative of the rights and interests of the late Lucile Carigma, is authorized to provide certifications of plan completion and other information consistent with her appointment as the personal representative.

41. 10-25465-E-13 SS-6 LUCLLE/ALEXANDER CARIGMA Scott Shumaker

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA HOME LOANS SERVICING, LP
10-13-14 [89]

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

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 BAC Home Loans Servicing, LP, QuickenLoans, Inc., Chapter 13 Trustee, and Office of the United States Trustee on October 13, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered

The Motion to Value secured claim of Bank of America Home Loans Servicing ("Creditor") is denied without prejudice.

The Motion to Value filed by Alexander and Lucile Carigma ("Debtors") to value the secured claim of "Bank of America Home Loans Servicing, LP ("Creditor") is accompanied by Debtors' declarations. Debtors are the owners of the subject real property commonly known as 1436 Gateway Drive, Vallejo, California ("Property"). Debtors seek to value the Property at a fair market value of $200,070.00 as of the petition filing date. As the owner, Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

UNIDENTIFIABLE CREDITOR NAMED IN MOTION

Debtor seeks to value the collateral of "Bank of America Home Loans Servicing, LP." However, the court cannot determine from the evidence presented what, if any, legally recognized entity the Debtor asserts is a creditor and whose secured claim is to be valued pursuant to this Motion. The court will not issue orders on incorrect or partial parties that are ineffective. Debtor may always use Federal Rule of Bankruptcy 2004 to aid in finding creditors. FN.1.

FN.1. It appears that the name "Bank of America Home Loans Servicing, LP" may have been a confusion of the servicer's name and the creditor's name for this mortgage. BAC Home Loans Servicing, LP filed a claim for a secured claim on the Property on behalf of Bank of America, N.A. Claim No. 12. If the court were to grant such order, it would be ineffective, subjecting Debtor to years of paying under a plan, only to discover that Debtor still owes that unidentified creditor the full amount of the debt. Such discovery after years of performing under a Chapter 13 Plan would be an unhappy day not only for the Debtor, but her counsel as well – most likely leaving the Debtor unable to either "lien strip" the true creditor's security interest or no having the benefit of paying a reduced secured claim.

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Proof of Claim No. 12 filed by BAC Home Loans Servicing, LP on behalf of Bank of America, N.A. is the claim which may be the subject of the present Motion.

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

Even if the correct creditor had been named, the motion must be denied. The property is only encumbered by a single deed of trust, held by Creditor. This deed of trust secures a claim with a balance of approximately $248,989.60. Creditor's claim is partially under-collateralized. However, because this claim is secured by the Debtors' principal residence, this claim cannot be valued unless the claim was wholly unsecured. *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 denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Alexander and Lucile Carigma ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is denied without prejudice.

42. 10-25465-E-13 LUCLLE/ALEXANDER CARIGMA
SS-7 Scott Shumaker

MOTION FOR COMPENSATION FOR SCOTT SHUMAKER, DEBTORS' ATTORNEY
10-13-14 [95]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Scott Shumaker ("Applicant"), the Attorney for Alexander and Lucile Carigma, the Chapter 13 Debtors ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period September 29, 2014 through October 13, 2014. Applicant has filed a motion to substitute attorney in the case that will be heard on November 18, 2014. Debtors were previously represented by John Harrison, who received $3,500.00 total in fees for his work on Debtor's Chapter 13 case. Applicant has not yet been compensated for any work done in this case.

Applicant provides a task billing analysis and supporting evidence

for the services provided, which are described in the following main categories.

General Case Administration: Applicant and his staff spent 7.2 hours in this category. Applicant assisted Client with the necessary administration to account for one of the joint Debtor's death and file review.

Significant Motions and Other Contested Matters: Applicant and his staff spent 7.1 hours in this category. Applicant prepared motions to continue administration of case after the death of one of the Debtors, including a motion to substitute successor, motion to determine feasibility of further case administration, and motion to waive requirement for completion of financial management course. Applicant also reset a motion to value to correct a service error and prepared a motion for fees.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

case.

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

Benefit to the Estate

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including allowing the case to continue after the death of a debtor and resetting a motion to value. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

“NO-LOOK” FEES

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

> “(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities

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

The Order Confirming the Chapter 13 Plan expressly provides that Debtors' prior attorney, John Harrison, is allowed $3,500.00 in attorneys fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 6. The order confirming the Plan was prepared by Debtors' prior attorney.

If Applicant believes that there has been substantial and unanticipated legal services which have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). He may file a fee application and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an

objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

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

Applicant's declaration states that Applicant has not been compensated for the work he has performed in this case when he began representing Debtors in September 2014.

Applicant could, consistent with Local Bankruptcy Rule 2016-1(c)(3), seek the payment of additional fees for "substantial and unanticipated work" outside of what is included in the agreed to set fee. Applicant sought such additional fees and did not ignore the agreed set fee and Local Bankruptcy Rule 2016-1. In seeking such additional fees, Applicant provided the court with the standard lodestar analysis (even if from reconstructed records), which included a statement as to the benefit of the services to the Debtor and estate.

TRUSTEE'S OBJECTION TO MOTION

David Cusick, the Chapter 13 Trustee, filed an objection to this Motion on October 29, 2014. Dckt. 104. The Trustee does not object to the requested fees, but requests that Applicant specify who performed the work. The Motion and supporting exhibits list hours worked by "Attorney" and "Paralegal." The Trustee assumes that Applicant's office has one attorney, Mr. Shumaker, and one paralegal, Piotr Reysner, who signed the certificate of service in Dckt. 99.

At the hearing, Mr. Shumaker identified the paralegal.....

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Scott Shumaker (Attorney)	1.9	$250.00	$475.00

Paralegal (unnamed)	12.4	$125.00	$1,550.00
Total Fees For Period of Application			$2,025.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of $2,025.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 13 Debtors from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $40.00 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying and postage		$40.00
Total Costs Requested in Application		$40.00

The [number Interim] Costs in the amount of $40.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 13 Debtors from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

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

Fees $2,025.00
Costs and Expenses $ 40.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Scott Shumaker (“Applicant”), Attorney for the Chapter 13 Debtors, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Scott Shumaker is allowed the

following fees and expenses as a professional of the Estate:

Scott Shumaker, Professional Employed by Chapter 13 Debtor

Fees in the amount of $ 2,025.00
Expenses in the amount of $ 40.00,

IT IS FURTHER ORDERED that the fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Chapter 13 Debtors is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

43. 13-25565-E-13 SHERRIE WOLDRIDGE
MRL-1 Mikalah Liviakis

MOTION TO VALUE COLLATERAL OF DEUTSCHE BANK NATIONAL TRUST COMPANY
11-4-14 [51]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Deutsche Bank National Trust Company as Trustee for Morgan Stanley ABS Capital I Inc., Trust 2006-NC4, Chapter 13

Trustee, and Office of the United States Trustee on November 4, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Value secured claim of Deutsche Bank National Trust Company as Trustee for Morgan Stanley ABS Capital I Inc., Trust 2006 ("Creditor") is granted and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Sherrie Woldridge ("Debtor") to value the secured claim of Deutsche Bank National Trust Company as Trustee for Morgan Stanley ABS Capital I Inc., Trust 2006 ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 8683 Littlewood Circle, Elk Grove, California ("Property"). Debtor seeks to value the Property at a fair market value of $289,715.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $447,950.52. Creditor's second deed of trust secures a claim with a balance of approximately $158,730.35. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Sherrie Woldridge ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Deutsche Bank National Trust Company as Trustee for Morgan Stanley ABS Capital I Inc., Trust 2006 secured by a second in priority deed of trust recorded against the real property commonly known as 8683 Littlewood Circle, Elk Grove, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $289,715.00 and is encumbered by senior liens securing claims in the amount of $447,950.52, which exceed the value of the Property which is subject to Creditor's lien.

44. 14-29067-E-13 EARLINE MILES **OBJECTION TO CONFIRMATION OF PLAN BY NATIONSTAR MORTGAGE, LLC**
Mary Ellen Terranella **10-23-14 [22]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 23, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Nationstar Mortgage, LLC, servicer for The Bank of New York Mellon Corporation as Trustee for the Structured Asset Mortgage Investments II, Inc. Mortgage Pass-Through Certificates Series 2006-AR7 ("Creditor") opposes confirmation of the Plan on the basis that Earline Miles' ("Debtor") proposed Plan does not include the pre-petition arrearage due on the mortgage held by Creditor. Debtor's plan states that Debtor is not in default of the plan, although Debtor's pre-petition arrearage owed to Creditor is $3,977.69.

Creditor services a deed of trust secured by Debtor's residence.

The creditor has filed a timely proof of claim in which it asserts $3,977.69 in pre-petition arrearages. Claim No. 5. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

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 Nationstar Mortgage, LLC, servicer for The Bank of New York Mellon Corporation as Trustee for the Structured Asset Mortgage Investments II, Inc. Mortgage Pass-Through Certificates Series 2006-AR7 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.

45. 14-29067-E-13 EARLINE MILES
MET-1 Mary Ellen Terranella

CONTINUED MOTION TO VALUE COLLATERAL OF NATIONSTAR MORTGAGE, LLC
9-17-14 [15]

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

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.
Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Nationstar Mortgage, LLC, and Office of the United States Trustee on September 17, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Nationstar Mortgage, LLC ("Creditor") is denied without prejudice.

The Motion to Value filed by Earline Miles ("Debtor") to value the secured claim of Nationstar Mortgage, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 4605 April Court, Vallejo, California ("Property"). Debtor seeks to value the Property at a fair market value of $290,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

However, the court cannot discern who the actual creditor is on the

second deed of trust. According to Schedule D, the second mortgage is held by "Nationstar Mortgage." However, no proof of claim has been filed, no copies of the note or deed of trust have been provided – in fact, no evidence as to whether or not Nationstar Mortgage is the creditor has been provided to the court at all. As the court has said on numerous occasions, the court will not alter the rights of creditors without ensuring that the real party in interest on a lien is in fact noticed and have the opportunity to object or respond. Here, all the court has is "Nationstar Mortgage" listed on Debtor's Schedule D.

A review of the Proof of Claim No. 1, Nationstar Mortgage, LLC is explicitly listed as the servicer and The Bank of New York Corporation as the creditor. No evidence has been provided otherwise to show a transfer of claim or any documentation that Nationstar Mortgage, LLC is the holder of the claim.

With that minimal disclosure it is clear that (1) the loan servicer is not purporting to be the actual creditor, (2) the loan servicer is making the clear representation that there is a principal, and (3) the least sophisticated consumer on these loans (to borrow a concept from the Federal Fair Debt Collection Practices Act which has been necessarily fashioned by the federal courts to protect consumers from unsavory practices from creditors using third-parties to obtain payment from consumers) knows who is then currently the creditor and who the loan servicer is purporting to bind.

The court, left in the dark as to who is the creditor and how Nationstar Mortgage, LLC is now before this court purporting to be the "Lender" and the creditor (acting as the principal and not the servicing agent). Because of this failure to properly list the actual holder of the lien, the court denies the Motion.

OCTOBER 21, 2014 HEARING

The court continued the hearing to November 18, 2014 in order for Nationstar Mortgage, LLC to establish who the creditor for Debtor's mortgage actually is.

PROOF OF CLAIM 5

On October 23, 2014, Nationstar Mortgage, LLC filed a new proof of claim for Debtor's mortgage. Claim No. 5. This Proof of Claim states that the creditor is The Bank of New York Mellon Corporation as Trustee for Structured Asset Mortgage Investments II Inc. Mortgage Pass-Through Certificates Series 2006-AR7. This claim also includes a copy of the note regarding this mortgage and a copy of the deed of trust for the Property as recorded in Solano County on July 26, 2006. Also attached is a loan modification agreement between BAC Home Loans Servicing, LP and Debtor dated December 29, 2010 and an assignment from MERS as nominee for Security National Mortgage Company, A Utah Corporation (the original lender) to Bank of New York Mellon fka The Bank of New York, as Successor Trustee to JPMorgan Chase Bank, N.A., as Trustee for the Holders of Sami II Trust 2006-AR7, Mortgage Pass-Through Certificates, Series 2006-AR7.

Though Nationstar has not filed supplemental documents in this case,

it has done so in other cases as ordered by the court. Those documents have proven that Nationstar is not the creditor and is not in possession of notes which are endorsed in blank. The court ruling in Donald Irving and Fammie Homes-Irving, Bankr. E.D. Cal. 11-29436. The court incorporates the ruling in that case for the Motion to Approve Loan Modification (DCN: JCW-1) and restates it as follows,

> "Nationstar has also filed the Declaration of Andrew Kempe to explain how it is a creditor in this case. Dckt. 111. His testimony under penalty of perjury states,
>
> A. The Investor for this claim (which the court interprets to mean the owner of the debt) is Federal National Mortgage Association ("Fannie Mae").
>
> B. Nationstar is the loan servicer, for compensation, for the loan upon which the claim is based.
>
> C. Nationstar asserts that it is in possession of the original note, endorsed in blank, through Deutsche Bank National Trust Company.
>
> D. Mr. Kempe states that Deutsche Bank National Trust Company, on behalf of Fannie Mae, is Nationstar's custodian.
>
> Declaration, Dckt. 111.
>
> Mr. Kempe authenticates various documents upon which he bases his testimony under penalty of perjury that Nationstar is a "creditor" to enter into the loan modification as a principal.
>
> Exhibit 4 is identified as the Master Custodial Agreement by which Mr. Kempe testifies under penalty of perjury that Deutsche Bank National Trust Company ("DBNTC") is the custodian for Nationstar. Dckt. 112 at 28-46. Though neither Nationstar nor Mr. Kempe direct the court to any specific language in the Master Custodial Agreement by which DBNTC is obligated to serve as the custodian for Nationstar, the court finds the following provisions (emphasis added) relevant.
>
> A. The Master Custodial Agreement is executed by Fannie Mae, DBNTC, and "Lender." Recitals.
>
> B. Lender is the servicer of mortgage loans pursuant to a contract with Fannie Mae. Recitals.
>
> C. **DBNTC** will maintain custody of the Documents [notes and related documents] "on behalf of, and **as custodial agent for, Fannie Mae**..." Recitals.
>
> D. **DBNTC**'s "custody of the Documents **shall provide**

Fannie Mae with legal possession thereof...." Recitals.

E. The **servicer** is the "party obligated to Fannie Mae **to perform the functions of the 'servicer'** in the Fannie Mae Servicing Guide. Lender is the Servicer." Section 1, ¶ (p).

F. If the servicer is also the custodian [which is not the case for this claim] Servicer must maintain such Documents in an independent custody department. Section 2, ¶ (c).

G. "**Custodian** at all times **acts for the sole benefit of Fannie Mae**." Section 3, ¶ (b).

H. "All Documents are **held solely and exclusively for Fannie Mae**." Section 6, ¶ (a).

I. DBNTC shall "maintain **continuous custody** of all Documents, and in a manner that identifies such Documents as being **held on behalf of Fannie Mae** and **distinguishes them from documents held for** itself or **other parties**." Section 6, ¶ (b)[1].

Id.

Nationstar has also provided a redacted portion of the Limited Power of Attorney which it asserts is the basis for asserting that DBNTC is holding possession of the notes for Nationstar. Exhibit 5, Dckt. 112 at 47. From the portion of the Limited Power of Attorney provided to the court, the following points [emphasis added] can be distilled.

A. Fannie Mae authorizes Nationstar to act in Fannie Mae's name to do limited, specified acts. These acts are as follows.

B. Release the borrower from personal liability following the authorized transfer of the security property. ¶ 1.

C. Full satisfaction and release of **mortgage or deed of trust**. ¶ 2.

D. Partial release or discharge of a **mortgage or deed of trust**. ¶ 3.

E. Modification or extension of a **mortgage or deed of trust**. ¶ 4.

F. Completing and managing the foreclosure process. ¶ 5.

G. Conveyance of properties to FHA, HUD, VA, Rural Housing Authority, or state or private mortgage

insurers. ¶ 6.

H. Assignment or endorsement of **mortgages**, **deeds of trust**, or **promissory notes** to FHA, HUD, VA, Rural House Service, state or private mortgage insurer, or MERS.

Id. Interestingly, most of the powers specifically relate to "mortgages" and "deeds of trust," and in only one part is the power given with respect to "promissory notes."

What Nationstar has proven is that DBNTC is not the custodian for Nationstar, DBNTC does not hold possession of the notes for Nationstar, and Nationstar is not in possession of this, or any notes by virtue of the Master Custodial Agreement.

The court finds it shocking that Nationstar, Mr. Kempe, and Nationstar's attorneys have filed documents and testified under penalty of perjury asserted certain "unassailable fact" which are in direct conflict with the documents filed as exhibits. It is as if Mr. Kempe and Nationstar's attorneys did not bother to read the documents, but merely parrot whatever they were being told as part of "doing their jobs."

If Nationstar is acting as the agent for Fannie Mae, then all they have to do is so disclose in the Loan Modification, and not falsely represent that they are a principal. No good faith reason has been provided for misleading least sophisticated consumers and such consumers' attorneys into thinking that Nationstar is the creditor. Such misrepresentation may well be part of a larger client-servier-attorney conspiracy to defraud consumers and allow some subsequent purchaser to disavow any purported loan modifications by Nationstar and extract more monies from the consumer.

The court will not issue an order which falsely identifies an agent as a principal for a loan modification. The Motion is denied without prejudice to either a loan modification be entered into by the principal or the disclosed agent for the principal with these consumer debtors."

The court will not value a claim prior to ensuring that all proper and necessary parties were served, especially when the relief sought in the motion is seeking to alter the rights of a creditor. Purporting to value a "Claim" of Nationstar Mortgage, LLC may well be a nullity, or force the Debtors into protracted litigation to prove that there was a principal which Nationstar hid from the Debtors.

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 Earline Miles (“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.

46. 11-20868-E-13 ACW-3 — WAYNE WILKINSON AND DENISE ARMENDARIZ, Andy Warshaw — MOTION FOR COMPENSATION BY THE LAW OFFICE OF FINANCIAL RELIEF LAW CENTER FOR ANDY C. WARSHAW, DEBTORS' ATTORNEY, 10-1-14 [214]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 2, 2014. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Andy Warshaw ("Applicant"), the Attorney for Wayne Wilkinson and Denise Armendariz the Chapter 13 Debtors ("Client"), makes a First Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period May 27, 2013 through August 6, 2014. The order of the court approving substitution of Applicant was entered on August 12, 2013, Dckt. 166.

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

General Case Administration: Applicant spent 0.2 hours in this category. Applicant reviewed the ECF activity in the case and requested copies of motion work, but is not requesting compensation for this time.

Significant Motions and Other Contested Matters: Applicant and his staff spent 6.2 hours in this category. Applicant prepared a motion to

approve loan modification and a motion for compensation.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

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

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v.*

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including general case administration and obtaining court approval for a loan modification. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

“NO-LOOK” FEES

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

> “(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”
> ...
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6)."

The Order Confirming the Chapter 13 Plan expressly provides that Debtors' prior counsel is allowed $3,500.00 in attorneys fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 137. The order confirming the Plan was prepared by Debtor's prior counsel.

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

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's]

superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

Applicant's declaration states that he substituted into Debtors' case after their prior counsel could not longer continue with the practice of law. Applicant further states that he and his firm have received no compensation from Debtors or anyone else in connection with this case.

Applicant may, consistent with Local Bankruptcy Rule 2016-1(c)(3), seek the payment of additional fees for "substantial and unanticipated work" outside of what is included in the agreed to set fee. Applicant sought such additional fees and did not ignore the agreed set fee and Local Bankruptcy Rule 2016-1. In seeking such additional fees, Applicant provided the court with the standard lodestar analysis (even if from reconstructed records), which will include a statement as to the benefit of the services to the Debtors and estate.

FEES ALLOWED

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Andy Warshaw (Attorney)	3.5	$300.00	$1,050.00
Melissa Markle (Lead Paralegal)	1.7	$130.00	$221.00
Mark Fleischman (Paralegal)	1.0	$130.00	$130.00
Total Fees For Period of Application			$1,401.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First Interim Fees in the amount of $1,401.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 13 Debtors from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Applicant does not seek the allowance and recovery of costs and expenses in this case at this time.

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

Fees	$1,401.00
Costs and Expenses	$ 0.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Andy Warshaw ("Applicant"), Attorney for the Chapter 13 Debtors, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Andy Warshaw is allowed the following fees and expenses as a professional of the Estate:
>
> Andy Warshaw, Professional Employed by Chapter 13 Debtors
>
> Fees in the amount of $ 1,401.00
> Expenses in the amount of $ 0.00,
>
> **IT IS FURTHER ORDERED** that the fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

47. 14-25670-E-13 DPC-1 | **CHARLES/TAMMY RAETZ** | **C. Anthony Hughes** | **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** | **7-10-14 [31]**

Tentative Ruling: Below is the court's tentative ruling.

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 July 10, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection to Confirmation.

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

1. It appears that the Debtor cannot afford to make the payments or comply with the plan, 11 U.S.C. § 1325(a)(6). Debtors' plan relies on the Motion to Value the Secured Claim of Sierra Central Credit Union, which is set for hearing on July 22, 2014. The matter has been set for an evidentiary hearing on October 16, 2014, at 9:30 am. Debtors' plan does not have sufficient monies to pay the claims in full.

Pursuant to the Stipulation of the Parties, the Evidentiary Hearing has been continued to October 31, 2014. Order, Dckt. 58. Sierra Central Credit Union argues that their appraisers have valued the collateral at $180,000 to $205,000 in value, which leaves value in the property to secure the claim at issue. (Debtors seeking to value the secured claim at $0.00, asserting that the senior lien exhausts the value of the collateral.) Creditor's Hearing Brief, Dckt. 61.

Debtors assert that the property has a value of only $150,000, which is less than the debt secured by the senior lien. Debtors initially provide their own owner opinion of value and are providing the testimony of an appraiser for the Evidentiary Hearing to support their contention that the value is $150,000.

2. The Debtor has a pending Motion to Value the Secured Claim of Wells Fargo Bank that is set to be heard on this date. 11 U.S.C. § 1325(a)(6). Debtor proposes to value the secured claim of WFS Financial in Class 2, but has not filed a motion to value for that claim. The Motion to Value the Secured Claim of Wells Fargo Bank, N.A., CAH-2, has been granted

pursuant to the terms of the Debtors' and that Creditor's stipulation, thus resolving this part of the Trustee's Objection.

3. Trustee argues that the plan is not Debtor's best effort, under 11 U.S.C. § 1325(b). According to the Trustee, Debtor is under the median income with proposed plan payments of $342.00 for 60 months and a 0% dividend to the unsecured creditors. Debtors admitted at the First Meeting of the Creditors held on July 3, 2014, that their 26 year old son listed on Schedule J is employed at Best By full time. The Debtors failed to list son's income on their Schedule I or Form B22C despite listing him on their Schedule J and claiming a household of 3 on Form B22C, Line 24, which states: Son live with debtors. Earns his own money and pays his own expenses.

RESPONSE TO TRUSTEE'S OBJECTION

Debtors request the confirmation hearing to be continued with either the briefing schedules or the evidentiary hearings that will be set in order to determine the value of their property.

Additionally, the Debtor has filed a declaration and response addressing their 26 year old son. The Debtors testify that their 26 year old son lives with them and works at Best Buy. Debtors state that over the past 6 months, they received a total of $100 from their son, but that "this is not regular or expected income and cannot be relied upon." Currently Debtors' son uses his money to pay for his own expenses, therefore Debtors did not list their son's expenses on their Schedule J.

While the Debtors state this in their Declaration, they have stated under penalty or perjury on Schedule J (Dckt 1. At 34) that their son is a dependant. On the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income Debtors state under penalty of perjury that they have a household of three persons and used that household size to support a contention that these two debtors are under median income. Dckt 1 at 53.

The U.S. Trustee chart for two person's median income in California is $62,917 and for a family of three is $66,618.00. http://www.justice.gov/ust/eo/bapcpa/20140501/meanstesting.htm. The Debtors, in not disclosing the additional income for the additional family member that they have taken the "benefit" of in computing the applicable commitment period, have rendered that calculation invalid. If the Debtors want, and have stated under penalty perjury, to assert that they have a family of three for these purposes, then they need to state all of the income that the family of three is generating.

AUGUST 5, 2014 HEARING

The evidentiary hearing for the Motion to Value the Secured Claim of Sierra Central Credit Union has been set for October 16, 2014, at 9:30 am. The court will continue the Trustee's Objection so that the Motion to Value the Secured Claim of Sierra Central Credit Union may be resolved before the

court determines whether the Debtors' plan is or is not confirmable and complies with 11 U.S.C. §§ 1322 and 1325(a).

TRUSTEE'S TRIAL BRIEF

The Trustee filed a brief on September 12, 2014. Dckt. 63. The Trustee notes that the Motion to Value the Secured Claim of Sierra Central Credit Union has not yet been resolved. The motion has been set for an evidentiary hearing on October 31, 2014. The Trustee does not object to his Objection to Confirmation being continued to the next available hearing date after the October 31, 2014 evidentiary hearing.

OCTOBER 31, 2014 HEARING

The hearing on the Objection to Confirmation is continued to allow the court to conduct the hearing on the Motion to Value the claim of Sierra Central Credit Union and issue a ruling thereon.

On October 31, 2014, the court issued an order granting the Motion to Value the claim of Sierra Central Credit Union.

The Plan complies with 11 U.S.C. §§ 1322 and 1325(a), and the Objection is overruled.

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

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

48. 12-31671-E-13 CHRISTIAN NEWMAN

ORDER TO APPEAR RE: PROOFS OF CLAIM NOS. 9 AND 10 AND OBJECTION TO NOTICE OF POST-PETITION MORTGAGE CHANGE 10-10-14 [189]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

The Hearing on the Order to Appear has been continued by Order of the Court (Dckt. 198) to 3:00 p.m. on December 9, 2014.

49. 12-31671-E-13 CHRISTIAN NEWMAN
PGM-6 Peter Macaluso

CONTINUED OBJECTION TO NOTICE OF POST-PETITION MORTGAGE FEES, EXPENSES, AND CHARGES 8-19-14 [180]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

The Objection to Notice of Post-petition Mortgage Fees, Expenses, and Charges is set for further hearing at 3:00 p.m. on December 9, 2014.

50. 14-30571-E-13 FREDERIC LAURIDSEN AND ANGELA MILLA-LAURIDSEN
MRL-1 Mikalah Liviakis

MOTION TO VALUE COLLATERAL OF CITY NATIONAL BANK
11-3-14 [16]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on City National Bank, Chapter 13 Trustee, and Office of the United States Trustee on November 4, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Value secured claim of City National Bank ("Creditor") is granted [and Creditor's secured claim is determined to have a value of $00.00].

The Motion to Value filed by Frederic Lauridsen and Angela Milla-Lauridsen ("Debtors") to value the secured claim of City National Bank ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of the subject real property commonly known as 6107 Kokanee Lane, Pollock Pines, California ("Property"). Debtors seek to value the Property at a fair market value of $220,000.00 as of the petition filing date. As the owner, Debtors' opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

OPPOSITION

Creditor has not filed an opposition.

DISCUSSION

The senior in priority first deed of trust secures a claim with a balance of approximately $280,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $65,000.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Frederic Lauridsen and Angela Milla-Lauridsen ("Debtors") having been presented to the court, and upon review of the pleadings,

evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of City National Bank secured by a second in priority deed of trust recorded against the real property commonly known as 6107 Kokanee Lane, Pollock Pines, 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 in the amount of $280,000.00, which exceed the value of the Property which is subject to Creditor's lien.

51. 10-47375-E-13 SS-3 DAN/JOSELYN HOWARD Scott Shumaker MOTION TO MODIFY PLAN 10-13-14 [52]

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

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

Below is the court's tentative ruling.

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

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

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

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

Dan and Joselyn Howard ("Debtors") filed a Motion to Modify Plan on

October 13, 2014. Dckt. 52. Debtors seek to modify their plan because they have divorced, obtained a final judgment of dissolution, and reside in separate households. Debtors' budgets have changed significantly as a result. Concurrently, Debtor Joselyn Howard will apply to convert her case to a Chapter 7. Only Debtor Dan Howard has supplied a budget with this Motion, since Mrs. Howard will no longer be a party to this Chapter 13.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to this Motion to Confirm Modified Plan on November 3, 2014. Dckt. 58. The Trustee objects on the following grounds:

1. Debtors' modified plan proposes to increase the minimum percentage to unsecured creditors from 2% to 5%, where the plan estimates the total unsecured claims at $119,845.63. The dividend would be $5,992.29. To date, the Trustee has disbursed $7,655.02, which is approximately 6.42%, so $1,662.73 has been disbursed over and above the dividend proposed. The Trustee does not oppose the modified plan percentage as a minimum, provided the Debtors are not attempting to limit prior disbursements.

2. Attorney's fees as proposed in the modified plan are not clear. Under the confirmed plan, $2,000.00 was paid prior to the filing of the case with $1,500.00 paid through the plan. The Trustee has disbursed $1,500.00. Section 2.06 of the proposed modified plan indicates $2,000.00 in attorney's fees were paid prior to filing and refers to the additional provisions for additional fees to be paid through the plan. The additional provisions state that Debtors have filed concurrently a Motion for Additional Attorney's fees. The Trustee cannot locate this motion in the docket for this case and has no way of knowing what the proposed fees are or how it will affect Debtors' plan.

3. Debtors' Motion also states that Joselyn Howard will apply to convert her case to Chapter 7 at the hearing for this motion. The Trustee cannot locate a Motion to Convert or Declaration to Convert within the court docket.

4. Both Debtors' Motion and the Modified Plan state that Joselyn Howard will concurrently file a Motion to Transfer her interest in the family residence to Dan Howard pursuant to the judgment of dissolution. However, Debtors have provided no evidence that a Motion to transfer interest in the residence has been filed.

5. The Trustee is uncertain of the treatment of the Franchise Tax Board. Debtors' modified plan no longer provides for the Franchise Tax Board as a Class 5 unsecured claim entitled to priority. Under the confirmed plan, the Franchise Tax Board is provided for as a Class 5 claim for $1,655.00. The Franchise Tax Board filed a claim on December 29, 2010 fr $1,784.96, of which $1,653.65 is entitled to priority. The

trustee paid the priority portion in full. Debtors' plan no longer provides for this creditor nor does it authorize the payments made by Trustee to this creditor.

6. Debtors' original Schedule I filed October 10, 2010 budgeted $130.00 per month for a 401K loan. Debtors' plan payments under the confirmed plan increased in month 39 by $130.00 from $341.00 to $471.00 due to Debtor's 401K being paid off. Debtors' Amended Schedule I now budgets $463.00 in monthly payments on a 401K loan. It would appear Debtors borrowed additional funds from their 401K retirement account. The Trustee is unable to locate within the court's docket that Debtors filed a motion to borrow additional funds or that they received court permission to borrow these funds.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. However, the modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is not confirmed.

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

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

52. 12-41175-E-13 MALAI KHAMVONGSA — CONTINUED MOTION TO MODIFY PLAN
MMN-3 Michael Noble — 9-2-14 [73]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on September 2, 2014. By the court's calculation, 49 days' notice was provided. 35 days' notice is required.

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

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

Malai Khamvongsa ("Debtor") filed the Motion to Confirm Modified Plan on September 2, 2014. Dckt. 73. The mortgage arrears were about $7,000.00 higher than expected, so the Plan must be modified. The Debtor's income is lower than before she lost her job, her expenses have decreased, and she has a small amount of savings to carry her through the plan.

OPPOSITION

David Cusick, the Chapter 13 Trustee, objects to Debtor's Motion on the basis that:

1. The proposed plan is not Debtor's best effort. Debtor's Declaration is inconsistent with earlier testimony. Dckt. 75. In Debtor's prior declaration filed July 21, 2014, Debtor states that she paid off loans on her retirement and cashed out that retirement for $13,000.00. Dckt. 60.

2. In Debtor's amended declaration filed August 21, 2014, Debtor

states that she paid off loans on her retirement totaling $8,600.00 and received two checks of about $15,658.00 and $5,802, respectively, for cashing out her retirement. Dckt. 64.

3. **Debtor's present declaration states that after she paid off loans on her retirement account, she received $15,658.00 in January and $5,802.00** in February for a total of $21,460.00 on which she will pay taxes. That amount is the net of the $11,128.00 loan paid on the 401k plan and a loan of $6,108.00 she paid on her pension. Dckt. 75.

4. Debtor stated that her retirement was worth $43,000.00 at the time of filing, including the $17,000.00 loan. Dckt. 75. Only $13,000.00 remains in the pension. Dckt. 75. Debtor's Retirement Statement from Bank of America in January 2014 (Exh. K, Dckt. 76) and Debtor's Schedule B also provide figures that conflict with each other and Debtor's declarations. The Trustee is not sure what amount Debtor received in retirement funds or how much the loans were against them.

5. Additionally, Debtor's amended Schedule B appears to be missing page 2. Debtor's prior amended Schedule B was missing page 1. Dckt. 29. Debtor's current declaration states that she used her unemployment benefits to pay for her son's oral surgery, glasses and contacts, and sent $3,986.00 went to her sister to pay off Debtor's car. The declaration also states that Debtor transferred money to her family members for funeral expenses and paid $4,000.00 for a trip to Hawaii in February. This information was not disclosed in any prior declarations.

6. Debtor's modified plan proposed a monthly dividend of "***" for mortgage arrears in Class 1. The additional provisions of the confirmed plan provide for payments of $236.00 per month beginning in month 15 through 43, then $310.00 for months 44 through 60. The additional provisions of Debtor's proposed plan do not address arrears payments.

7. Debtor's Declaration states she started a new job on or around September 8, 2014 as a junior underwriter. Debtor states that her gross income is expected to be $45,000.00 yearly, with similar deductions to her prior job. Debtor's actual income is unclear. The Trustee requests Debtor to supply the Trustee with copies of her tax returns throughout the life of the plan accompanied by six months of pay stubs immediately preceding the filing of the taxes.

OCTOBER 21, 2014 HEARING

At the hearing, the court continued the hearing to November 18, 2014 to afford Debtor an opportunity to respond.

SUPPLEMENTAL FILINGS

Since the October 21 hearing, Debtor has filed two responses to the Trustee's objections to confirmation. In an Opposition to Objection filed hours after the scheduled hearing and its accompanying Declaration, Debtor gives a narrative discussion of the situation surrounding the retirement loan payments. Dckts. 82 and 83. The response states that Debtor's attorney paid more attention to Debtor's income after she was laid off than to Debtor's exempt 401k funds. Debtor allegedly started out with $17,000.00 in equity in her 401k and $6,000.00 in her pension. There was also a loan against $13,000.00 in Debtor's 401k, meaning the account had $30,000.00 in it total (without the loan). Similarly, her pension had a total of $13,000.00 in it, but had a loan against $7,000.00 of that total. Upon being laid off, Debtor was paid $21,460.00 directly deposited into her bank account, split over two installments. The response next says that Debtor's "retirement administrator paid out a check in January and paid off the $11,000 401(k) loan and held back some of the 401(k) funds to pay the pension. After the pension loan of $6,000 was paid a final check was mailed to the Debtor in March. After the loan was paid off, the balance jumped to $13,000 since there was no longer any loan against the fund."

Debtor's response further states that the income listed on Schedule I reflects the single paycheck Debtor has received from her new job. Debtor additionally states that she will correct the mortgage arrears monthly dividend in the order confirming the plan.

On November 4, 2014, Debtor filed a reply to the Trustee's Objections. Dckt. 90. Debtor states that the Trustee does not oppose confirmation as long as Debtor clarifies the amount of mortgage arrears and provides copies of tax returns throughout the life of the plan. Debtor agrees to these conditions.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. However, the proposed modified plan must be Debtor's best effort. 11 U.S.C. § 1325(b). The Trustee's objections indicate that the Debtor has made several inconsistent statements about her expenses and retirement payout. Although Debtor has attempted to set the record straight on the matter, these efforts have not been successful.

In Debtor's Opposition dated October 21, 2014, the Opposition itself is inconsistent. When explaining the application of loan payments after Debtor was laid off, the Opposition glosses over the fact that mere lines before it states that there was a $6,000.00 payment to cover a $6,000.00 loan against her pension, Debtor stated that the pension had a $7,000.00 loan against it, with $6,000.00 in equity left for Debtor. $6,000.00 equity plus a $6,000.00 loan payment only equals $12,000.00, not $13,000.00 as Debtor states the balance of the pension account was after the $6,000.00 payment went through. Debtor has failed to adequately explain this nightmarish retirement loan situation. The Modified Plan is not Debtor's best effort.

Debtor has also failed to state in her modified plan how much the arrears payment in Class 1 will be. This is concerning, because Debtor states in the instant Motion that the reason a modified plan is being proposed is to address the higher-than-anticipated amount of mortgage

arrears. This also indicates that the instant modified plan is not Debtor's best effort.

The court cannot be certain that the modified plan is feasible for Debtor to complete. 11 U.S.C. § 1325(a)(6). Debtor has stated what she expects her income to be at her new job, but she has not supplied evidence supporting her new income. Without this information, the court is not convinced that Debtor will be able to make the plan payments and otherwise comply with her modified plan.

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

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

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

53. 14-25376-E-13 KEVIN/BREE SEARS — CONTINUED MOTION TO DISMISS CASE
AJP-2 Douglas Jacobs — 9-9-14 [55]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on September 10, 2014. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

The court set the Motion for Final Hearing, with written opposition filed.

The court's decision is to grant the Motion to Dismiss and dismiss the case.

Creditor Cory Adams ("Creditor") moves the court to dismiss this Chapter 13 case. Creditor states that he believes that cause to dismiss the case exists as stated in this Court's Findings of Facts and Conclusions of Law set forth in the Civil Minutes of the court entered on August 19, 2014 (Dckt. Nos. 49 and 51).

The Creditor states that the findings below indicate that cause to dismiss exists in this case.

The Creditor objected to confirmation stating the Debtors' report of income, business expenses and other expenses in both the prior Chapter 13 case and this Chapter 13 case are unreliable. Many different statements of each were made by the Debtors without adequate explanation. The Debtor-Husband's report of gross income from his law practice varied greatly over the course of the two Chapter 13 cases. Creditor argues that Joint Debtor Kevin Sears' business expenses were reported to be $2,163 in the prior Chapter 13 case, but became $6,575 in the current Chapter 13 case without adequate explanation.

In the prior Chapter 13 case, Creditor states that Joint Debtor Kevin Sears failed to report the fact he had undertaken a contract to provide Public Defender services to the County of Butte as of February 1, 2013, some four months prior to the first bankruptcy filing. This was not corrected until his amendments to his Schedule I and J were filed October 21, 2013 (Docket No. 63 in Case No. 13-27044, the prior Chapter 13 case).

Creditor also states that the Debtor-Spouse, Bree Lynn Sears, initially reported income from wages or salaries commencing in January 2013. However, the Debtor-Spouse was an independent contractor commencing in early 2013. Creditor states that this fact was not reported nor was the existence of any business reported in the Debtors' Statement of Financial Affairs (Dckt. No. 1).

In this Chapter 13 case, the Debtors filed an amendment to Schedule I 22 and J on August 7, 2014 (Docket No. 48). The figures in the amendment represented a significant departure from the figures included in the schedules filed with the petition.

Creditor states that in their prior Chapter 13 case, Debtors proposed inadequate monthly payments to taxing authorities for estimated income tax. Debtors failed to pay estimated taxes during 2013 or 2014. As a result, the IRS filed a priority tax claim in this case in the amount of $41,918 (Claim No. 3). Of this amount, $27,810.00 was attributable to taxes accruing in 2013. Creditor states that it is unclear whether Debtors have made any estimated tax payments this year, on 2014. Creditor has previously asserted in his objections that Debtors have not demonstrated good faith under 11 U.S.C. § 1325(a)(3).

The court has also previously made findings that Debtors have not accurately reported their income and expenses for their business, provided explanations of the changes being made to their income and expenses, have not provided sufficient tax withholdings or explain the basis for the proposed tax withholding payments, have not produced evidence in support of their responses to objections to their plans. Civil Minutes, Dckt. No. 49.

Additional Facts

The Creditor includes "additional facts" that support its previous objections and contention that the Debtors have not filed this case in good faith. The Creditor claims that the Debtors own a 2007 328(I) BMW automobile, and states that there is minimal equity in the vehicle, if any. The Debtors have two additional unencumbered vehicles which would meet their transportation needs. In the prior Chapter 13, this Court found that the Debtors' choice to retain the BMW and continue making payments does not

automatically make keeping the two other free and clear vehicles the good faith prosecution of a Chapter 13 Plan (Docket No. 95).

Specifically, the court stated the following in its ruling on Debtor's Motion to Confirm Plan filed in his prior Chapter 13 case:

> Under the Second Amended Plan the Debtors choose to pay $4,056.40 a month for their home mortgage (not including property taxes and insurance), and $213.62 a month for their BMW. In addition to the 2007 BMW 328i for which the payment is to be made, the Debtors also own a 2004 Jeep Grand Cherokee and a 2006 Honda Civic, for a family with only two drivers. The Debtors own the Jeep and Honda free and clear of any liens or encumbrances.
>
> The Debtors have not provided the court with the 11 U.S.C. § 707(b)(2)(A) and (B) analysis of how their expenses projected are within the limitations of 11 U.S.C. § 707(b)(2)(A) and (B), nor that they are reasonable projections of their expenses.
>
> This Chapter 13 Plan appears to be driven around one basic principle – justify the Debtors paying monthly mortgage payments of $4,056.40 (current plus arrearage payment), with the additional required $428 property taxes and $107 homeowners insurance – a $4,591.40 monthly housing expense. While the Debtors can choose to make that payment, it does not automatically render the plan feasible.

Civil Minutes, Bankr. E.D. Cal. No. 13-27044, Dckt. No. 95, April 8, 2014. The Creditor continues to assert that the surrender of the BMW would make the monthly payment of $213 available for an additional 17% return to the unsecured creditor class.

In the proposed Plan of Debtor's prior Chapter 13 case, the Debtors proposed to relinquish the BMW automobile. In the newly filed Chapter 13 case, the Debtors proposed to retain it and the other two vehicles. The Creditor states that the Debtors were slow to supply requested information to Creditor regarding both the Debtor-Husband and the Debtor-Spouse's business activity. In discovery requests in the prior case, Creditor claims that the Debtors did not supply copies of their 2013 Federal Income Tax returns.

In this Chapter 13 case, the Creditor renewed his request for such returns as well as the Debtors' business records and bank statements for the past six months. Some, but not all, bank statements were supplied. No business records were supplied. The Debtors responded to discovery requests in the prior Chapter 13 case only after a demand was made by the Creditor. Creditor describes the discovery responses as incomplete.

The Chapter 13 Trustee in the prior case filed his Final Report and Account ii with the Court on August 15, 2014 (Docket No. 126). The report indicates the sum of $15,427.88 was refunded to the Debtors; however, the Debtors' schedules filed at the commencement of this Chapter 13 case did not list any refund or right to receive a refund nor do the Debtors' amended

schedules filed August 7, 2013 (Docket No. 48) disclose a refund or the right to receive the refund.

SEPTEMBER 30, 2014 HEARING

The court continued the hearing to November 18, 2014 for a final decision. Debtors were to file opposition, if any, on or before October 30, 2014. Any replies were to be filed and served on or before November 6, 2014.

DEBTORS' SUPPLEMENTAL REPLY

Debtors filed a reply to Creditor's Motion on October 30, 2014. Dckt. 97. Debtors state that:

1. A portion of Debtor Kevin Sears' monthly income comes from a contract with Butte County to provide public defense services. The contract amount ($11,527.00 per month) is supplemented by private-pay clients that hire Mr. Sears on occasion for defense work. The amount received through private-pay clients fluctuates from month-to-month, depending on how many clients hire Mr. Sears. Accordingly, Mr. Sears' office expenses fluctuates, depending on the number of investigators he hires and other office supply expenses that change depending on how many private clients Mr. Sears has at a time. The amounts listed on the Schedules in this case were accurate averages of both Mr. Sears' income and expenses for the time. Debtors further state that although Creditor noted that the gross income reported in Mr. Sears' prior case was different than that reported in the instant case, this is because solo practice law firms generally fluctuate in income and expenses from month-to-month and year-to-year.

2. Debtors' counsel erroneously left off Mrs. Sears' income from the Statement of Financial Affairs and her bank accounts from Schedule B. An amendment was filed to correct this.

3. Debtors further state that although their tax liability for 2013 was $27,810.00, this is unlikely to occur this year or again in the future. Debtors assert that 2013 was an extraordinarily good year for Mr. Sears' income, not a normal or average year. Debtors expect their tax liability to be around $15,000.00 to $20,000.00 in a normal year. Debtors have planned to set aside $1,600.00 per month for taxes, which should be sufficient to pay an average year's liability.

4. Debtors are making monthly payments on a 2007 BMW 328i, Mr. Sears' vehicle. Debtors also have a 2006 Honda Civic which is paid for and is driven by Mrs. Sears. Debtors also have a third car registered under their name and paid for, a 2004 Jeep Grand Cherokee driven by their adult daughter in San Diego. Debtors state that the fair market value of the BMW is $11,348.00 and the monthly payment is $181.43. Mr. Sears' offices are in Chico, but Butte County's criminal matters are handled in Oroville, where the county jail is located. Mr.

Sears makes several trips to Oroville per week, averaging 40 miles per trip. Debtor needs a reliable vehicle to make these trips.

5. Creditor claims he has not received Debtors' 2013 tax return or business records as requested. Debtors' counsel immediately forwarded the documents to Creditor's counsel after receiving the request on July 17, 2014. Exh. B, Dckt. 101.

6. Debtors state that they received $15,427.88 from the trustee at the conclusion of their prior case on July 7, 2014. Debtors have set this money aside to pay taxes, if necessary. Had the money been received prior to the filing of the instant case on May 21, 2014, Debtors would have listed the sum on Schedule B and exempted it on Schedule C. Debtors assert this money is not part of the estate.

7. Debtors state that they have filed the instant case in good faith. Their prior case "got off to a rocky start" and was dismissed. Debtors have since resolved the issues that lead to the prior case being dismissed and are working diligently to confirm a plan.

CREDITOR'S SUPPLEMENTAL REPLY

Creditor filed a reply on November 6, 2014. Dckt. 103. Creditor states that:

1. Debtors have only alleged that their income and expenses are accurate as reported. They do not provide particulars about actual gross income from private-pay clients beyond the Butte County contract. Debtors have only provided their 2013 Federal Income Tax Return and three months of Mrs. Sears' bank accounts, but no accounts or financial reporting for Mr. Sears' law practice. Creditor has been unable to verify Debtors' estimates and the fluctuations in income and expenses cast doubt on Debtors' estimates.

2. Debtors allege that their counsel's oversight caused Mrs. Sears' income not to be reported on the original schedules. Creditor asserts that Debtors are educated people and signed the petition under penalty of perjury, so the omission is significant.

3. Debtors state that 2013 was an unusual year, but they do not provide any 2014 year-to-date income and expenses to support this. The declarations were signed and dated October 27, 2014. Financials for the first three quarters of the year for the law practice should be available to demonstrate the projected gross income, net income, and taxable income for 2014. Creditor notes that Debtors' Schedule C reports income of $144,476.00 described as "extraordinary income." Debtors' Schedules I and J disclose Mr. Sears' contract payment of $11,527.00 and $3,835.00 gross from private pay and Mrs.

Sears' income at $2,846.00. If these figures are accurate, Debtor's income in 2014 would exceed that of 2013 and the projected tax withholding would be inadequate. Debtors provided a copy of an IRS voucher for the first quarter of 2014 indicating an estimated tax payment of 6,953.00. Exh. A, Dckt. 104.

4. Creditor questions Debtors' thoughts regarding vehicles, since allowing Debtors' daughter to use a paid-for vehicle is well-meant, but not necessarily appropriate given Debtors' financial situation.

5. Creditor alleges that Debtors have failed to supply six months of business records, including bank account records, for Debtors' law practice to either Creditor or the Chapter 13 Trustee.

6. Creditor disagrees with Debtors' assertion that the $15,427.88 from the prior case is not part of the estate in this case. Additionally, Creditor asserts that Debtors have not accounted properly for where these fund are and what will happen to the amounts not used to pay taxes, as proposed.

7. Creditor finally asserts that the foregoing shows that Debtors cannot demonstrate good faith and the case should be dismissed.

DISCUSSION

The court has previously discussed the arguments that Creditor raises as grounds in favor of dismissal, pursuant to 11 U.S.C. § 1307(c)(1), of the present case. On August 19, 2014, the court heard and considered the objections to confirmation of the Debtors' first proposed Plan, filed on May 21, 2014, and addressed the deficiencies raised in the objections brought forth by Creditor Cory Adams and the Chapter 13 Trustee to the Debtors' plan. Dckt. Nos. 49 and 31.

In considering the evidence and issues presented by the Trustee and Creditor, the court noted that Debtors' replies to the concerns raised were unsubstantiated by testimony and evidence filed by the debtors, and discrepancies arising from Debtors' schedules, reporting of business income and expenses, Debtors' tax liabilities, and the secured claims filed by the Creditor and the Internal Revenue Service in this case. As a result of the myriad of issues presented, and the Debtors' prolonged inability to resolve these issues in the context of their previous and current case, the court questioned Debtors' good faith effort in the prosecuting a plan of reorganization based on the totality of circumstances of Debtors' case.

In the court's ruling on the objection filed by Creditor to Debtors' first proposed plan in Debtors' current case, the court noted the following:

> Second, a review of the docket shows that Debtors filed amended Schedules I and J on August 8, 2014. Dckt. 48. No explanation has been provided as to why these amendments have been made so soon after the filing of the original

schedules, especially in light of the fact that Debtors are repeat filers (E.D. Cal. Bankr. Case No. 13-27044 filed May 23, 2013 and dismissed May 18, 2014 for failure to confirm a plan) and that Debtor Kevin Sears is a highly educated professional (lawyer).

Third, a review of Schedule I, as amended, states that both debtors receive wages and salary. Kevin Sears lists monthly gross wages, salary and commissions from Kevin Sears Attorney at Law in the amount of $11,527.00 per month and Bree Sears lists $2,846.00 per month from IT Support/Web Design (self employed). See Dckt. 48. Debtors have not disclosed a business for Debtor Bree Spears as required by Question 10 of the Statement of Financial Affairs. Furthermore, it does not appear either debtor has provided for withholdings.

Furthermore, it appears that both debtors are self-employed, and therefore not receiving "wages or salary." See Dckt. 48, Part 1. The court notes that on the amended Schedule I, income from real property or operation of business for Debtor Kevin Sears jumps to $3,835 from the original Schedule I amount of -$2,740. See Original Schedule I, Dckt. 1; Amended Schedule I, Dckt. 48. No explanation has been provided as to the nature of this drastic change. The court cannot reconcile the changes in expenses reported on the prior Schedule J and the amended Schedule J without an explanation from the Debtors.

Fourth, the court has computed a rough tax estimate as to Debtors, based on the figures provided in their schedules, starting with the Debtor's net income (subtracting business expenses) of $149,524. Without deducting for interest payments, property taxes or exemptions, the federal income tax would be approximately $29,000.00 and state income tax would be approximately $11,000.00. As Debtors are both self-employed, self-employment taxes (Social Security) and other applicable programs (such as disability) would also have to be accounted for. The court estimates that approximately $18,000 would be appropriate for self-employment tax. Debtors have only set aside $1,600 a month for taxes for a total of $19,200 per year. See Dckt. 48. The court computes that the Debtors would have to reduce their taxable income roughly by $50,000 for income taxes to total approximately $20,000 (the amount Debtors have accounted for). Furthermore, even if Debtors have $50,000 in deductions and exemptions, they are still short approximately $20,000 for the estimated self-employment tax.

The IRS priority claims for 2011 taxes in the amount of $5,822, for 2012 taxes in the amount of $7,286, and for 2013 taxes in the amount of $27,810 for a total priority debt of $41,918. Thus, it appears that just the federal taxes for the Debtors are running approximately $27,000.00 a

year (which is higher than the court's snapshot) based on the 2013 taxes. There is no basis shown that a $1,600.00 set aside per month for taxes is credible.

Civil Minutes, Dckt. No. 49. The concerns outlined by the court in its previous rulings, regarding Debtors' schedules, calculation of tax liabilities, disclosure of business expenses and income, and more, have not been addressed by the Debtors in their failure to amend their schedules in accordance with the court's orders.

The court previously ruled, when ruling on the objections filed by Trustee and the Creditor in opposition to the confirmation of Debtors' previously proposed plan, that Debtors have proposed plans in bad faith as measured by the factors set forth in In Re *Warren*, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))).

The court has noted Debtors' repeated failures in accurately reporting their income and expense for their respective businesses, providing an explanation of the drastic changes made to their budgets and schedules, to provide sufficient tax withholdings or explain the figure provided for in the schedules, or provide any evidence in support of their responses to the objections of the Chapter 13 Trustee and creditors.

AMENDED CHAPTER 13 PLAN AND MOTION TO CONFIRM

In reviewing the Docket the court finds a First Amended Chapter 13 Plan having been filed by the Debtors on September 23, 2014. Dckt. 75. This appears to have coincided with the current Motion to Dismiss and the Motion to Dismiss filed by the Chapter 13 Trustee on September 17, 2014.

The proposed First Amended Plan provides for the plan to be funded with $24,348.00 through September 2014, and then for monthly plan payments of $5,916.56 a month for the remaining 56 months of the Plan. The Plan payments shall be used to pay (1) Debtors' counsel $6,000.00 in fees, (2) the Chapter 13 Trustee fees, (3) $3,255.02 current monthly mortgage payment on the Debtors' residence, (4) $850.61 arrearage payment ($51,037.00 total arrearage) on the loan secured by the Debtors' residence, (5) $181.43 payment for the Debtors' 2007 BMW 328i, (6) $41,919.00 priority claim owed to the Internal Revenue Service, (7) $6,7858.07 priority claim owed to the California Franchise Tax Board, and (8) a 10% dividend on general unsecured claims (stated to be $75,957.00).

Schedule E filed by the Debtors states that the Federal and State priority tax claims are for the 2011, 2012, and 2013 tax years. While the Proof of Claim filed by the Franchise Tax Board (Proof of Claim No. 6) indicates that the tax obligation is spread over the three tax year period, the Internal Revenue Service Claim (Proof of Claim No. 3) discloses that over 66% of the tax debt, $27,810.00, is for the 2013 tax year. The Debtors failed to pay the 2013 taxes while they were enjoying the benefits of being in their prior bankruptcy case (13-27044, filed on May 23, 2013 and dismissed May 18, 2014).

Kevin Sears, the Debtor, has filed his declaration in support of the Motion to Confirm the First Amended Plan. Dckt. 74. In it he states under

penalty of perjury that the prior bankruptcy case was filed so that they could "catch up" on their delinquent house payments. Further, that the prior case failed because they miscalculated the amount of the arrearage.

He further testifies that in 2013 he obtained a contract with butte County to handle some public defender matters. He did not have a "good handle" on these finances when the Debtors filed their first bankruptcy case. In the first bankruptcy case the Debtors schedules were inaccurate because the Debtors did not have "a good handle" on what Mr. Sears would net from his private practice legal work.

When the First Meeting of Creditors was filed in the current case, Mr. Sears testifies that "the trustee noticed that the original filed schedule 'b' failed to include a couple of my business accounts for my law practice." Mr. Sears further testifies that this failure to disclose the assets was "purely an oversight," and when the Trustee advised the Debtors of this deficiency they immediately amended the Schedules.

Mr. Sears further testifies that "in our haste to get this case filed and a plan prepared, we neglected to accurately reflect my wife's business on the Statement of Financial Affairs."

The Debtor's recollection as to why the first Chapter 13 Case was dismissed is inaccurate, or incomplete at the least. The court expressly found that the Debtors were not prosecuting the first Chapter 13 case in good faith.

> "From reviewing the opposition to the Motion to Dismiss, the court concludes that this case is not being actively prosecuted in good faith. Rather, it appears that the Debtors have not come to grips with the reality of being a debtor. The plan being proposed consists mainly of the Debtors maintaining their current lifestyle and not paying creditors (other than $4,056.40 to live in their current home and $269.00 to pay their non-dischargeable delinquent taxes). The inability to accurate state income and expenses is not credible, as a persons average expenses do not fluctuate with income. Rather, this testimony indicates that the Debtors made up the expense number to fit the plan they so desired to prevent the foreclosure on their home."

Civil Minutes, 13-27044 Dckt. 115. In ordering the case dismissed, the court noted that the dismissal of that case might be what was necessary for the Debtors to come to grips with economic reality and their duties as Chapter 13 Debtors. *Id.* From a review of the filing in this case, the continuing "misstatements" and "inaccurate statements" by the Debtors, which are corrected only when "caught" by the Trustee, reflect that the Debtors just don't understand (or are willing to understand) the minimal obligations of debtors – be honest, be truthful, and prosecute your case in good faith.

It is clear that Debtors have continued in their plan focused on keeping their house, irrespective of the cost, continuing to drive a BMW (irrespective of the two Debtors owning two other cars free and clear of any liens), while not explaining where all of the unpaid tax monies from 2013

have been diverted (in excess of $30,387 combined unpaid state and federal taxes, Proofs of Claims Nos. 3 and 6) while the Debtors were safely ensconced in the prior Chapter 13 case.

In the prior Chapter 13 case the Debtors stated under penalty of perjury that their monthly expenses, exclusive of the mortgage to be paid through the proposed Chapter 13 Plan, were $7,934.50 a month. Amended Schedule J, 13-27044 Dckt. 63. Debtor Kevin Sears now testifies under penalty of perjury that his income was $144,673.00 in 2013. Dckt. 74. Though not disclosed on the Statement of Financial Affairs, Amended Schedule I states that Co-Debtor Bree Sears has additional income of $34,152.00 a year Dckt. 48. Combined, the court projects that in 2013 Debtors had $178,825.00 in income, which averages $14,902.00 a month. After deducting the $7,934.50 in expenses (without regard as to whether they are reasonable), the Debtors had $6,097.50 in monies left over. This is greater than the $4,707.53 plan payment (original Plan, 13-27044 Dckt. 5), $4,781.60 plan payment (first amended plan, *Id.* Dckt. 25), $5,281.61 plan payment (third amended plan, *Id.* Dckt. 60) in 2013.

The unpaid tax monies have just "disappeared" from the bankruptcy estate in the prior case or in this case. Additionally, upon the closing of the prior bankruptcy case the Chapter 13 Trustee refunded $15,427.88 to the Debtor. Trustee's Final Report, 13-27044 Dckt. 126. The Debtor only paid $40,669.79 into their plan, *Id.*, which over 11 months of the plan averages only $3,697.25. This $15,427.88 does not appear to be accounted for in Schedule B either as monies received (in a bank account) or as an account receivable (if not yet disbursed by the Chapter 13 Trustee when this second bankruptcy case was filed three days after the prior case was ordered dismissed).

Rather than having learned from the failure of the prior case, Debtors continue to manifest the intention and belief that the bankruptcy laws exist so that they can maintain the lifestyle they want, pay only the claims they want, spend money as they want, not account for the monies of the estate, and avoid any "inconveniences" that accompany obtaining the extraordinary relief available under the bankruptcy laws.

Debtors have decided that it is important for them to make payments of $4,105.63 a month to maintain their residence lifestyle in a home in which there is a negative ($68,502.29) in equity. Schedule A, Dckt. 1, and Proof of Claim No. 8. While they may so do, it is not an excuse for failing to then properly provide for other claims and make the necessary adjustments in their other spending.

Even though they own two cars free and clear, the Debtors believe that they in good faith want to divert monies so that they can have and drive a third car, the BMW, for the two of them. Though they were protected in the prior bankruptcy case, the Debtors failed to pay $30,000.00 in income taxes and are unable to explain where that $30,000.00 was diverted to by the Debtors. Even though they had been in a prior bankruptcy case for a year, when filing the present case the financial information was rife with errors and material non-disclosures. Though receiving more than $15,000.00 back from the Chapter 13 Trustee from the prior case, those monies have just "disappeared."

Movant has thrown in a request that the court issue an injunction enjoining the Debtors from filing another case for an unspecified period of time. Such injunctive relief must be requested pursuant to an adversary proceeding. Fed. R. Bankr. P. 7001. Congress in some respects has addressed this issue in the provisions of 11 U.S.C. § 362(c)(3) and (4), as well as 11 U.S.C. § 109(g).

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

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

54. 14-25376-E-13 DPC-2 KEVIN/BREE SEARS Douglas Jacobs

CONTINUED MOTION TO DISMISS CASE
9-17-14 [65]

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

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, Debtor's Attorney, and Office of the United States Trustee on September 17, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to grant the Motion and Dismiss the Chapter 13 case.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Dismiss on September 17, 2014. Dckt. 65.

MOTION

The Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on August 19, 2014.

DEBTORS' REPLY

Debtors filed a reply to Trustee's instant motion on September 29, 2014. Dckt. 77. Debtors state that a First Amended Plan and Motion to Confirm was filed on September 23, 2014 and set for confirmation hearing on November 25, 2014. Debtors state that the reason for the delay in filing a plan was due by the continuing uncertainty and variance of the Debtors' income and expenses. The Debtors argue that the recently filed amended plan explains any discrepancies in accounting and provides accurate information to answer the Trustee's and the court's concerns.

OCTOBER 15, 2014 HEARING

Because there is a pending Motion to Dismiss filed by Creditor Cory Adams set for a continued hearing at 3:00 p.m on November 18, 2014 (Dckt. 82), the court continues the Trustee's instant Motion to Dismiss to 3:00 p.m. on November 18, 2014 to be heard in conjunction with Creditor Cory Adams' motion.

DISCUSSION

Though the court has determined that dismissal of the current case pursuant to the motion of Cory Adams is proper, the Trustee's motion provides a separate and independent basis for dismissing the case. The Trustee seeks dismissal for the failure of the Debtors to prosecute this Chapter 13 case. This bankruptcy case was filed on May 21, 2014. It's not the Debtors' first bankruptcy case. The prior case was filed on May 23, 2013 and dismissed on May 18, 2014. Tying the two cases together, the Debtors have existed in the protection of Chapter 13 for seventeen months without being able to confirm a Chapter 13 Plan.

As opposed to most Debtors, these Debtors are professionals and have a substantial monthly income. Debtors 2013 income was $144,476.00. Statement of Financial Affairs, Question 1, Dckt. 48. While obtaining that income and being in the protective cocoon of Chapter 13, the Debtors failed to pay $30,000.00 of income taxes. Schedule I lists the Debtors having $18,208 in monthly gross wage income and an net business income ($3,835 net business income) . *Id.* at 10-11.

Notwithstanding these advantages, the Debtor have failed to prosecute the case. Debtors have been afforded multiple fair opportunities to confirm a plan that complies with the Bankruptcy Code. They have failed, merely using the Bankruptcy Code to tie the hands of creditors while the Debtors maintained their lifestyle and continued to incur more debt.

Cause exists to dismiss this bankruptcy case.

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

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

55. 14-28078-E-13 DPC-1 GUADALUPE GONZALEZ Julius Engel

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
9-17-14 [16]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 17, 2014. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Guadalupe Gonzalez's ("Debtor") Plan relies on a future motion to value. Debtor proposes to value the secured claim of Consumer Portfolio, but has not yet filed a motion to value collateral. Debtor's Plan does not have sufficient monies to pay the claim in full and should be denied confirmation.

2. Debtor's Plan fails to indicate in section 2.06 whether the Debtor proposes to pay attorney's fees in accordance with

Local Bankruptcy Rule 2016-1(c) or whether the Debtor will be filing and serving motions for fees in accordance with 11 U.S.C. §§ 329 and 330.

3. Debtor's Plan also indicates that attorney's fees total $2,000.00, $500.00 of which was paid prior to filing. Dckt. 5 This information conflicts with Debtor's Rights and Responsibilities, filed August 8, 2014 (Dckt. 7), which indicates that attorney's fees total $4,000.00 with $500.00 being paid prior to filing.

4. While the plan appears to propose to pay the attorney $3,500.00 through the plan under Local Bankruptcy Rule 2016-1(c), the Disclosure of Compensation of Attorney for Debtor (Dckt. 1) appears to list in item 6 that the attorney services do not include some serviced required under Local Bankruptcy Rule 2016-1(c), such as relief from stay actions. The Trustee believes that the attorney is effectively opting out of Rule 2016-1(c) and will oppose attorney's fees being granted under that section.

5. The Debtor has failed to list all debts on her schedules. Debtor lists on Schedule J $219 per month for rental of a TV and refrigerator. At her Meeting of Creditors, Debtor indicated that she pays Rent to Own for the television and refrigerator. The Trustee requests the schedules be amended to add Rent to Own as a creditor on either Schedule D or G.

OCTOBER 21, 2014 HEARING

The court continued the hearing to November 18, 2014 for a final decision on the Motion.

DISCUSSION

The Trustee's objections are well-taken. While the first objection concerning the motion to value is overruled because it was granted on October 12, 2014, the Objections cast doubt on whether Debtor will be able to make her plan payments. A plan cannot be confirmed if the Debtor cannot make plan payments. 11 U.S.C. § 1325(a)(6). Additionally, the plan may not be Debtor's best effort, given the inconsistencies regarding the way in which she will pay her attorney's fees and her failure to disclose all of her debts.

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

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

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

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

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

56. 12-24180-E-13 JOJIE GOOSELAW
PGM-4 Peter Macaluso
MOTION TO MODIFY PLAN
10-6-14 [137]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 6, 2014. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy 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.

Jojie Gooselaw ("Debtor") filed the Motion to Modify Chapter 13 Plan on October 6, 2014. Dckt. 137. Debtor seeks to modify her plan after losing her job at Kaiser in April 2014. Debtor has missed 3.29 payments and now proposes that the total amount of missed payments ($3,050.00) be forgiven and plan payments going forward will be $925.00 per month beginning in October 2014.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor have filed evidence in support of confirmation, including updated Schedules I and J. 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 6, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

57. 14-28881-E-13 DPC-1 CURTIS/LORRA DARLING Mikalah Liviakis

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 10-22-14 [35]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on October 22, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Curtis and Lorra Darling ("Debtors") are $300.00 delinquent in plan payments to the Trustee to date. The next scheduled payment of $300.00 is due October 25, 2014. Debtors have paid $0.00 into the plan to date.

2. Debtors' Plan proposes to avoid the lien of Arrow Financial/Central Portfolio Control, and the Motion to Avoid Lien was granted on October 7, 2014. Dckt. 34. The Trustee is unsure if the treatment of this creditor in Class 2C is proper, given that Debtors plan to sell the property in

question and retain the net proceeds, while avoiding the lien.

3. Debtor has filed a Motion to Sell Real Property set for hearing on November 4, 2014. The Trustee filed his concerns about the same in a response to that Motion regarding the retention of net funds by Debtors.

The Trustee's concerns regarding the Debtors retaining net proceeds following the sale of the property encumbered by Arrow Financial's avoided lien appear to have been resolved. In the court's civil minutes for the hearing on the Motion to Sell, the court ordered the Trustee to hold the net proceeds from the sale and not disburse them until further court order. The objections related to the avoidance of Arrow Financial's lien and the sale of property are no longer grounds to deny confirmation.

However, Debtors' delinquency in plan payments indicates that Debtors may be unable to make plan payments or otherwise comply with the plan. In order to be confirmed, the plan must be feasible. 11 U.S.C. § 1325(a)(6). This is grounds to sustain the objection.

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

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

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

58. 13-26582-E-13 PGM-1 — VENIAMIN FURSOV AND ALLA FURSOVA-TIMOFEYEVA — Peter Macaluso — MOTION TO MODIFY PLAN — 10-10-14 [49]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 10, 2014. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

Veniamin Fursov and Alla Fursova-Timofeyeva ("Debtors") filed a Motion to Modify Chapter 13 Plan on October 10, 2014. Dckt. 49. Debtors' car was totaled in an accident, causing an increase in auto and gas expenses for Debtors. Debtors are modifying their plan to ensure that they can make plan payments.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an Objection to the Motion on November 3, 2014. Dckt, 55. The Trustee objects on the basis that Debtors state in their Declaration that their expenses have increased for auto and gas, their income has stayed the same. Debtors' statement of income filed October 10, 2014 shows Debtors' income at $5,524.71. Dckt. 52. This does not match the amount shown on Debtors' statement of income filed June 27, 2014, which shows income of $18,950.84. This difference is significant

and Debtors have not explained the reduction.

DECLARATION OF VENIAMIN FURSOV IN REPLY TO TRUSTEE'S OBJECTION

Debtor Veniamin Fursov filed a declaration in response to the Trustee's objection on November 11, 2014. Dckt. 58. Mr. Fursov states that his gross income has changed because his truck is getting older and frequently breaks down. In order to repair it, he must stay home from his job and lose income. Mr. Fursov further states that his truck does not meet emissions standards in California and he will either have to buy a new truck or move to another state to operate it and generate income.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Debtor's statement of income accompanying the instant Motion shows that Debtors' income has decreased by $13,426.13. Absent an adequate explanation from the Debtors as to how this drastic decrease in income has arisen, the court does not believe the Debtors' modified plan has been proposed in good faith. Debtor's Declaration in Reply begins to explain the circumstances surrounding the decrease in income, but cannot explain the nearly three-quarters reduction in Debtors' income. This is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

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

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

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

59. 14-27984-E-13 ROSE RODRIGUEZ
DPC-1 Dale Orthner

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P CUSICK
9-10-14 [17]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on September 10, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

60. Rose Rodriguez ("Debtor") failed to appear at the First Meeting of Creditors held on September 4, 2014. Debtor is required to attend the meeting under 11 U.S.C. § 343 and the Debtor has not presented any evidence to the court as to why she failed to appear. The Meeting was continued to October 30, 2014 at 10:30 am.

61. Schedule I in part calls for a monthly contribution from "wife's aunt" in the amount of $1,200.00 on line 8h. No evidence has been provided to the Trustee that Debtor is receiving the room rental income and the Statement of Financial Affairs fails to disclose any income from the Debtor's aunt. The Plan does not pay unsecured creditors what they would receive in the event of a Chapter 7. The Debtor's non-exempt equity totals $170,251.00 and the Debtor is proposing a 0% dividend to unsecured creditors. The Debtor is married and her spouse is not included in the bankruptcy. The Debtor has failed to file a Spousal Waiver for the use of California State Exemptions under the California Code of Civil Procedure § 703.140.

The Trustee does request that the Objection to Confirmation be

continued until after the Continued First Meeting of Creditors in hopes that the Debtor will be able to resolve the Trustee's objection.

OCTOBER 7, 2014 HEARING

The court will afford the Debtor the opportunity to address these objections at the Continued First Meeting of Creditors and continues the hearing to 3:00 p.m. on November 18, 2014.

OCTOBER 30, 2014 CONTINUED MEETING OF CREDITORS

Upon the court's review of the Trustee's report for the Meeting of Creditors held on October 30, 2014, it appears that Debtor and her counsel again failed to appear. November 3, 2014 Docket Entry Report.

DISCUSSION

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

The continued meeting of creditors will be held on October 30, 2014, after the hearing date for this Objection to Confirmation.

The Trustee further objects that the Plan does not pay unsecured creditors at least the amount they would receive under a Chapter 7. This is grounds to deny confirmation. 11 U.S.C. § 1325(a)(4). The Debtor's non-exempt equity does in fact appear to be $170,251.00. With such a large amount of non-exempt equity, it appears that a 0% dividend to unsecured creditors is substantially less than what the creditors would receive under a Chapter 7. Additionally, Debtor has failed to account for rental income and has not filed the appropriate waivers to allow her to use the exemptions allowed under California Code of Civil Procedure § 703.140, as it appears she has attempted to do. This indicates that the proposed Plan does not represent Debtor's best efforts under 11 U.S.C. § 1325(b).

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

62. 14-29184-E-13 RAVEN TRAMMELL
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-22-14 [20]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on October 22, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

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

1. Raven Trammell ("Debtor") has failed to provide the Trustee with a tax transcript or copy of her Federal Income Tax Return for the most recent pre-petition tax year for which a return was required, or a written statement that no such document exists. This was required seven days before the First Meeting of Creditors. 11 U.S.C. § 521(e)(2)(A).

2. Debtor has also failed to proved the Trustee with employer

pay advices for the received in the 60 day prior to filing the petition. 11 U.S.C. § 521(a)(1)(B).

3. Debtor has failed to list a plan term between 36 and 60 months in section 1.03 of Debtor's proposed Plan. Without this, the Trustee cannot determine whether the Plan is feasible.

4. Debtor listed debts from Sacramento County Superior Court, GC Services, and CalPERS in Class 5 of the Plan. It appears that these debts are unsecured and should be provided for in Class 7 of the Plan.

5. Debtor's petition states that she had filed a prior case, but listed the case number as unknown. A review of court records shows that Debtor's prior case is Case No. 12-29725.

6. Debtor testified at the First Meeting of Creditors that she has a retirement account. This account was not disclosed on Schedule B.

7. Debtor's Schedule C is not completely filled out. Schedule B lists personal property as a computer, stereo, TVs, video game system, living room furniture, compact discs, women's clothing, and a 2007 Pontiac G6. Schedule C does not properly list this property. Schedule C lists wages, disability/public health benefits, food, clothing, appliances, furnishings, vacation credits, public retirement, financial aid to students, and worker's compensation. No values of claimed exemptions are listed on Schedule C.

8. Item 1 of the Statement of Financial Affairs lists income of $26,914.00 from "Employment-State of California Department of Consumer Affairs" and does not indicate any date. The form calls for gross year-to-date income and the income received the two years prior to filing.

The Trustee's objections are well-taken. Debtor's failure to properly complete her schedules and plan indicate that this Plan may not be Debtor's best effort under 11 U.S.C. § 1325(b). Additionally, Debtor's failure to file her tax returns and pay advices with the Trustee violates section 521. Failing to comply with other provision in the Bankruptcy Code is also grounds to deny confirmation of the plan. 11 U.S.C. § 1325(a)(1).

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

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

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

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and

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

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

63. 12-27387-E-13 ERROL/MELANI LAYTON
MET-5 Mary Ellen Terranella
MOTION TO APPROVE LOAN MODIFICATION
10-13-14 [115]

Final Ruling: No appearance at the November 18, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 13, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Errol and Melani Layton ("Debtors") seeks court approval for Debtor to incur post-petition credit. JPMorgan Chase Bank, N.A. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce Debtor's mortgage payment from the current $3,145.00 a month to $2,372.84 a month. The modification will create a new principal balance of $420,164.02, set the loan's maturity date to June 1, 2054, and the interest rate will be fixed at 4.625%.

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

modified terms.

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition to this Motion on October 16, 2014.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Errol and Melani Layton having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the court authorizes Errol and Melani Layton ("Debtors") to amend the terms of the loan with JPMorgan Chase Bank, N.A., which is secured by the real property commonly known as 106 Suisun Court, Vacaville, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion, Dckt. 118.

64. 11-32689-E-13 SNM-4 JOSE CHAPA AND ESTHER SWENSEN-CHAPA Stephen Murphy

CONTINUED MOTION TO MODIFY PLAN 8-7-14 [57]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, all creditors, parties requesting special notice, all creditors, and the Office of the United States Trustee on August 7, 2014. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

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

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

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

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

SEPTEMBER 16, 2014 HEARING

The court continued the hearing to November 18, 2014 because the Debtor had been ill and Debtors' counsel was working with Debtor to cure the

defaults under the plan.

Nothing further has been filed since the hearing.

DISCUSSION

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

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

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

65. 12-41091-E-13 REBECCA GAGE MOTION TO MODIFY PLAN
PGM-3 Peter Macaluso 10-14-14 [46]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 14, 2014. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

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

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

Rebecca Gage ("Debtor") filed the Motion to modify Chapter 13 Plan on October 14, 2014. Dckt. 46. Debtor suffered a job-related injury that has left her 35% disabled and unable to perform her job as a deputy sheriff. She has been unable to secure another job because of her pending disability retirement and the fact that she is still considered an employee of the Sacramento County Sheriff's Department. The modified plan will forgive Debtor's three missed payments and the plan payment will be $225.00 per month beginning October 2014 for 39 months until the plan's completion.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an Objection to the Motion on November 3, 2014. Dckt. 52. The Trustee objects on the basis that Debtor's statement of expenses filed December 7, 2012 (Dckt. 1) lists an amount of $5,216.20. Debtor's newly filed statement of expenses on October 14, 2014 shows that Debtor's expenses have changed by $1,729.80. Debtor has

failed to explain this change.

DECLARATION OF DEBTOR IN RESPONSE TO TRUSTEE'S OBJECTION

Debtor filed a declaration in response to the Trustee's Objection on November 10, 2014. Dckt. 55. Debtor states that her expenses have changed because her boyfriend moved in with her (who had been previously unable to pay rent or work due to cataracts) and because two of her three children live with her full-time.

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Here, Debtor has provided grounds for the Plan to be modified. Though it took the opposition of the Trustee, Debtor has now provided information concerning why and how her expenses have changed.

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 First Modified Chapter 13 Plan filed on October 14, 2014, is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

66. 14-27793-E-13 ROMY OSTER
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
10-14-14 [29]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on October 14, 2014. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection as moot.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on several grounds. Dckt. 29. However, each of Trustee's objections are now moot.

The court granted the Chapter 13 Trustee's Motion to Dismiss at the hearing on November 12, 2014. The case being dismissed renders the Trustee's objections to confirmation of Debtor's plan moot.

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

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

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

IT IS ORDERED that, the case having previously been dismissed, the Objection to Confirmation the Plan is overruled as moot.

67. 14-27793-E-13 JCW-1 ROMY OSTER Pro Se OBJECTION TO CONFIRMATION OF PLAN BY NATIONSTAR MORTGAGE, LLC 10-16-14 [37]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Chapter 13 Trustee on October 16, 2014. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection as moot.

Nationstar Mortgage, LLC ("Creditor") opposes confirmation of the Plan on the basis that the Plan does not accurately state the arrearages owed to Creditor and the Plan does not provide for ongoing monthly mortgage payments to Creditor. Dckt. 37. However, each of Creditor's objections are now moot.

The court granted the Chapter 13 Trustee's Motion to Dismiss at the hearing on November 12, 2014. The case being dismissed renders the Creditor's objections to confirmation of Debtor's plan moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by Nationstar Mortgage, LLC having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that, the case having previously been dismissed, the Objection to Confirmation the Plan is overruled as moot.