UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

December 16, 2014 at 3:00 p.m.

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1. 12-29400-E-13 RICHARD/ROBIN NURSE — MOTION TO MODIFY PLAN
DCR-3 Darrel Rumley — 11-10-14 [48]

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, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 10, 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.

Richard and Robin Nurse ("Debtors") filed the instant Motion to Confirm First Modified Plan on November 10, 2014. Dckt. 48. Debtors are seeking to amend their plan in the following manner: payments averaging $1,168.97 for 29 months (Debtors have paid a total of $33,900.00 through October 2014) and $10000 per month for the remaining 31 months of plan payments. Said plan is estimated to pay 19% to general unsecured.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 2, 2014. Dckt. 56. The Trustee objects on the following grounds:

1. The modified plan may not be proposed in good faith, 11 U.S.C. § 1325(a)(3). Debtors' plan payment under the confirmed plan is $1,300.00 with no less than 42% to unsecured creditors, where claims totaling $133,486.73 have ben filed including Debtors' second deed of trust which has been valued. Debtors' Amended Schedule I (Dckt. 53) reflects a combined monthly income of $5,403.64, where Debtors' prior Schedule I (Dckt. 1) reflected $5,677.41, a reduction of $273.77.

Debtors' Amended Schedule J reflects monthly expenses of $4,473.95 leaving a monthly net income of $929.69. Debtors' modified plan proposes a plan payment of $33,900.00 through October 2014 (month 29 where Debtors' petition was filed May 16, 2012), then $100.00 for 31 months with 19% to unsecured creditors with no secured or priority creditors remaining to be paid.

The Trustee is uncertain Debtors' proposed decrease in the plan payment by $1,200.00 is justified considering the reduction in their income is only $273.77. The Trustee is uncertain the modified plan is proposed in good faith and requests a copy of Debtors' 2012 and 2013 Federal and State tax returns.

2. Debtors' Schedule J budgets $40.00 for homeowner's insurance when Debtors' prior Schedule J indicates taxes and insurance are included in the mortgage payment.

DEBTORS' RESPONSE

The Debtors first respond that since the Debtors are funding the plan with Social Security benefits, how much or how little of those benefits they fund the plan with cannot be a grounds for determining that a plan is not in good faith. Citing *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013). The Debtors now deciding to reduce the portion of Social Security benefits being used to fund the plan to $100.00 is their choice. Essentially, creditors earlier received a "bonus" (as phrased by the court) of the Debtors voluntarily using a portion of their Social Security benefits to fund the Plan. Response, Dckt. 59.

DISCUSSION

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

The Trustee's objections are well-taken. While the Debtors argue that under *In re Welsh,* 711 F3d 1120 (9th Cir. 2013),the Ninth Circuit has concluded that social security benefits are not required to be part of debtor's calculation of disposable income under 11 U.S.C. § 707(b)(2)(A)(I) as part of the "good fath" analysis under § 1325, that is not the end of the inquiry.

Here, Debtors have a Plan which binds them and the Creditors in this case. They now seek to modify it pursuant to 11 U.S.C. § 1329.

To begin with, the "Motion" filed by the Debtors fails to comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 – the motion must state with particularity the grounds upon which the relief is requested. The Motion merely says that the Debtors are decreasing their plan payments. No reason is given and no grounds are provided that it is proper under 11 U.S.C. § 1329.

The Debtors provide a declaration in which they provide their layperson findings of fact and conclusions of law. They conclude that their plan complies with applicable law. They make the finding of fact and conclusion of law that they plan is proposed in good faith and not by any means forbidden by law. Debtors make their personal finding of fact and conclusion of law that "unsecured creditors" will receive at least as much under the plan as they would through a Chapter 7 liquidation. Debtors make a conclusion of law that the plan provides to pay creditors pursuant to § 1325(a)(5)(B). The Debtors' personal findings and conclusions continue, without providing the court with any evidence for the court to make the necessary findings and conclusions.

Debtors do state that they have had a reduction in income and increase in expenses. Exhibit A, Dckt. 53, is a Schedule I form in which Debtors state their current income. "Debtor 2" lists gross income of $4,083.00. On Schedule I, Exhibit 1, filed in this case "Spouse" list income of $4,192.78. After deductions and withholding, "Spouse" shows withholding and deductions of ($1,199.37). On Exhibit A "Debtor 2" has deductions of ($1,288.36), in addition to the gross income being slightly lower.

On Exhibit A Debtor lists income of $1,411.00 in Social Security Income and $1,198.00 in retirement income. On Schedule I Debtor lists $1,479.00 in Social Security Income and $1,205.00 in retirement income.

The Expenses listed on Schedule J, Dckt. 1, and on Exhibit A are generally consistent, with there being an increase in the mortgage payment. It appears that there is a double counting of property insurance, it being in the monthly payment and also listed as a separate expense on Exhibit A.

While the court could speculate as to why confirmation of a modified plan is proper, it will not do so. It may be that the expenses listed on Schedule J and Exhibit A are not reasonable, and in reality are higher, the Debtors needing to use more of the Social Security money to pay the expenses. Or it may be that the Debtors have come into other assets and believe that not only should they not provide those assets to creditors, but to cut back on what they promised, and had the court confirm, in the existing plan. It may well be that these Debtors had in place a scheme at the start of this case to propose a plan which looked facially in good faith, lull creditors into a false sense of security, and then after a year or two "slip in" an modified plan which guts the confirm plan. That raises significant good faith issues.

The court does not, and cannot, address the 11 U.S.C. § 1329 elements for confirming a modified plan because (1) the Debtors have failed to state the grounds upon which such relief is sought and (2) has not presented the court with competent, admissible, credible evidence (Fed. R. Evid. 601, 602, 901) from which the court can make the necessary findings of fact and conclusions of law. For the court to confirm this proposed modified plan it would be nothing more than a rubber stamp for the Debtors.

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 Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied without prejudice.

2. 10-38904-E-13 DBJ-2 DONALD/JACQUELINE HEDRICK Douglas Jacobs MOTION TO MODIFY PLAN 10-21-14 [41]

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 (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 21, 2014. By the court's calculation, 56 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.

Donald and Jacqueline Hedrick ("Debtors") filed the instant Motion to Modify Plan on October 21, 2014. Dckt. 41. Debtors state that they are modigying their plan because of a reduction in income. Debtor Donald Hendrick has been diagnosed as permanently disabled and now receives social security in the amount of $1,157.00 per month.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 1, 2014. Dckt. 47. The Trustee objects on the following grounds:

1. The Debtors' modified plan proposes to reduce the percentage to unsecured creditors from 7.07% to 0% where the Trustee has disbursed approximately 14.25%. Debtors' proposed modified plan does not authorize payments made to unsecured creditors under the confirmed plan.

2. The Debtors' proposed modified plan proposes to reclassify creditor Beneficial Home Mortgage from a class 4 secured claim paid directly by the Debtors or third party to a class 2C secured claim reduced to $0.00 based on value of collateral. Beneficial Home Mortgage filed a proof of claim on October 12, 2010, Claim #7, for $48,061.71 claiming no security although a note and deed of trust were attached.

Debtors have not filed a motion to value regarding this creditor who based on the claim appears secured. A stipulation between Beneficial Home Mortgage and Debtors was filed January 13, 2012 (Dckt. 36) where the creditor agreed to have their lien against the Debtors treated as unsecured and agreed to remove the lien once Debtors successfully completed their plan and received a discharge. Debtors agreed to repay the creditor as an unsecured debt and the parties acknowledged that the repayment of debt was settled pursuant to the terms of the stipulation. The Trustee is unable to locate an order granting relief pursuant to 11 U.S.C. § 506(a) pursuant to the parties stipulation within the court docket.

3. Debtors' declaration fails to comply with 28 U.S.C. § 1746 in that it does not declare under penalty of perjury that the statements made are true and correct, but rather states, "if called as a witness, we could and would competently testify to the facts contained in this Declaration."

DEBTORS' RESPONSE

Debtors filed a response to the Trustee's objection on December 8, 2014. Dckt. 50. The Debtors address the Trustee's objections in the following manner:

1. The Trustee points out that the new plan fails to authorize payments previously made by the Trustee. The Debtors state that this was merely an oversight and can be corrected in an order granting the modification.

2. The Trustee suggests that there is no order authorizing the

stipulation for the treatments of the second deed of trust. An order has been filed based on the stipulation and should clear this issue.

3. The Trustee suggests that the Debtors' declaration is improper since it does not state that it is file d"under penalty of perjury." But, although the concluding paragraph - where such statement is normally found - does not so state, the penultimate paragraph - no 13- reads exactly that the Debtors are filing the declaration of perjury as required by law.

DISCUSSION

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

Here, the Trustee's objections are well-taken. While the Trustee's first and third objection can easily be corrected through an order and the filing of an amended declaration, the Trustee's second objection raises an issue concerning the treatment of Beneficial Home Mortgage. The Debtors in their response say that an order "has been filed," but no such order is yet on the court's docket. Without relief being granted pursuant to 11 U.S.C. § 506(a), the plan cannot be confirmed.

While Debtors and Creditor have entered into some form of an agreement, with is not in connection with a pending contested matter or adversary proceeding, that does not mean the court rubber stamps whatever is said by the parties. From reviewing the Stipulation, at no point does it state that the parties agree that the value of the secured claim of Beneficial Home Mortgage is $0.00 pursuant to 11 U.S.C. § 506(a). It merely states that Beneficial Home Mortgage has agreed with the Debtors that some lien it has against the Debtors (the court is unsure how a creditor has a "lien against a living person") is an unsecured lien. The court does not understand what is an "unsecured lien," as liens are security for obligations. It is not common for a lien to be secured by a lien.

Beneficial Home Mortgage agrees to remove the unidentified lien (which is apparently "against debtors") when the Debtors successfully complete their Chapter 13 Plan and obtain a discharge. The court has no idea of what "lien" would be released, and quite possibly it is not a lien against any "property of the debtor" or "property of the estate."

Then, Debtors appear to stipulate that they owe Beneficial Home Mortgage $48,061.71. The court cannot tell if this Stipulation, and some order entered thereon, is intended to be an allowance of the claim, which Creditor intends to use as a shield against any party in interest who might want to challenge the claim.

The court can well imagine the attorneys for the parties say, "come on judge, you know what we mean, it isn't as if this is a federal case or something. We meant to say,

A. To resolve a motion by the Debtors pursuant to 11 U.S.C. § 560(a) to value the secured claim of Beneficial Home Mortgage, which is secured by a second deed of trust recorded against real property commonly known as 3144 6th Street, Biggs, California, ("Secured Claim') the Parties agree that the secured claim has a value of $0.00 for any plan treatment in

this bankruptcy case. The Parties agree that the balance of the claim of Creditor shall be treated as an unsecured claim under the bankruptcy plan.

B. Upon the valuation of Creditor's secured claim at $0.00 pursuant to 11 U.S.C. § 506(a), the Debtors will not object to Proof of Claim No. 7 filed by Creditor.

C. The Parties Stipulate to the court entering an Order valuing Creditor's Secured Claim at $0.00.

D. Creditor agrees, without limitation or alternation of obligations arising under the Bankruptcy Code, applicable state law, or contractually, to reconvey the Deed of Trust for the Secured Claim upon completion of Debtors' bankruptcy plan.

There is no motion to value pursuant to 11 U.S.C. § 506(a) that has been filed. There is no motion to approve a compromise (Fed. R. Bankr. P. 9016). There is no proceeding by which an order is requested from the court (Fed. R. Bankr. 9013). All that exists is the ambiguous "Stipulation" between the parties.

The court is not inclined, as 2014 comes to an end, to merely issue orders because parties request them on an *ex parte* basis – no appropriate motion or application filed. The Stipulation is not even filed as a Stipulation For Treatment of Secured Claim as Provided in Proposed First Modified Chapter 13 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.

3. 14-23504-E-13 SHERMAN/MAXINE THOMPSON MOTION TO CONFIRM PLAN
SJS-3 Scott Johnson 10-28-14 [70]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 28, 2014. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

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

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

Maxine Thompson ("Debtor") filed the instant Motion to Confirm First Amended Plan on October 28, 2014. Dckt. 70. Debtor states that the purpose of the amended plan is to increase the monthly administrative expenses purusant to Section 2.07. The Debtor has also amended her Chapter 13 plan to decrease the amount owed and monthly dividend for secured creditor Safe Credit Union in Class 2A based upon its Proof of Claim No. 3-1.

Debtor has added the secured claim of creditor Wells Fargo Bank to Class 2A to address a nominal amount of pre-filing mortgage arrears in Claim 12-1 and provided for its treatment in the Additional Provisions. Debtor has also amended her Schedule D to remove Unifund CCR Partners and replace it with secured creditor Northstar Capital Acquisition Assignee of Wells Fargo Financial in Class 2C. Debtor states that she has already filed a Motion to Void Lien. Based upon the Proof of Claim filed by Wells Fargo Bank (Claim 12-1), Debtor has a new mortgage payment commencing May 1, 2014 of $1,603.76. Debtor has amended the monthly contract installment amount in Class 4 to match

this new payment. The Debtor has reduced the priority amount owed to the California Franchise Tax Board to $339.08 based upon the Franchise Tax Board's Proof of Claim No. 6-1. The Debtor has increased the priority amount owed to the Internal Revenue Service to $30,161.80 based upin the Internal Revenue Service's Proof of Claim No. 2-1.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 1, 2014. Dckt. 81. The Trustee objects on the following grounds:

1. The Debtor has failed to re-set the hearing on the Motion to Avoid Lien. The Debtor cannot make the payments under the plan or comply with the plan, 11 U.S.C. § 1325(a)(6). The Debtor's Motion to Avoid Lien of Northstar Capital Acquisition (DCN SJS-2) was heard and denied by the court on September 30, 2014 and the Debtor has failed to re-set the hearing date. Dckt. 63.

DISCUSSION

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

The Trustee's objection is well-taken. The Debtor's Motion to Avoid Lien was denied at the September 30, 2014 hearing. Dckt. 63. Because the proposed plan requires that the Northstar Capital Acquisition lien is avoided, the denial of the motion makes the proposed plan unfeasible and cannot be confirmed.

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

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

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

4. 14-30007-E-13 MITCHELL WHITE
DPC-1 Michael Hays

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-20-14 [18]

Final Ruling: No appearance at the December 16, 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, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 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 Trustee filed a notice of withdrawal of the objection on December 10, 2014.

The court's decision is to overrule the Objection.

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

1. Debtor has not complied with 11 U.S.C. § 1325(a)(2). On October 7, 2014, the court issued an Order Approving Payment of Filing Fees in installments. Dckt. 6. According to the Order, installments are due November 6th and December 8th, 2014, and January 5th and February 6th, 2015. Debtor has paid the first installment of $77.00 due on November 6, 2014.

A review of the docket shows that on November 25, 2014, the Debtor made a final installment payment of $233.00 in connection with the Order Approving Payment of Filing Fees. Therefore, because all installment payments have been made, the Trustee's objection is overruled.

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

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

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

Chapter 13 Plan filed on October 7, 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.

5. 11-24420-E-13 FRANK SCHRODEK AND JOANNE DE LA TORRE
PGM-6 Peter Macaluso
MOTION TO SELL
11-14-14 [141]

Final Ruling: No appearance at the December 16, 2014 hearing is required.

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, parties requesting special notice, and Office of the United States Trustee on November 14, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property 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 to Sell Property is granted.

Frank Schrodek and Joanne De La Torre ("Debtors") filed the instant Motion to Sell *Nunc Pro Tunc* on November 14, 2014. Dckt. 141.

The Bankruptcy Code permits the Chapter 13 Debtors to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to sell the "Property" described as follows:

a. 2004 Peter Built Truck

Debtors state that the Property was to be sold and proceeds were to be used to pay creditor with the claim secured by the Trust in full in the amount of $7,482.00. When the case was filed, Debtors owed $14,322.00 on the Property, pursuant to the claim filed by P-Fund, Inc. The Debtor states that they conducted a cash-sale to an innocent third party because the vehicle cannot be driven in California past December 31,2013, absent special modification of the

emissions, which are estimated to be $18,000.00 to $20,000.00, and due to a shoulder injury that the Debtor sustained which prohibits further driving. The purchaser was Jonathan Breon. The purchase price was $15,000.00 with no warranty and titling to be recorded in the name of Jeb Transportation, LLC, 1104 W. Havens Ave., Mitchell, South Dakota. Debtor states that during the life of the confirmed plan, the Debtors paid $6,849.93 through the Trustee to P-Fund, Inc. The Debtors have amended Schedule B and C to reflect the value of the Property (Dckt. 87).

Debtors then argue that a *nunc pro tunc* order is appropriate in this situation because the Motion is intended to correct the omission of various facts which are personal in nature, and which the omission thereof has and will correct an injustice, would have been timely but for these exceptional circumstances concerning both Debtors' health, age, and life expentency.

Debtor Frank Schrodek is 75 years of age and Debtor Joanne De La Torre is in her eighties. Debtor Frank Schrodek has been the sole breadwinner in the family and suffered a shoulder injury. While it was thought to be healing, given the age of Debtor Frank Schrodek , this became impossible. The Debtors state that, in a panic, Debtor Frank Schrodek attempted to get permission for a sale. It was denied because Debtor Frank Schrodek failed to explain the full situation to counsel, whom failed to present the facts to the court, ultimately ending in a denial of the motion.

The Debtors then state that, still in a panic, and with Debtor Joanne De La Torre's health ailing, Debtor Frank Schrodek made a wrong decision, sold the vehicle for a sum that he was not likely to obtain again if the sale fell through, received the balance owed on the vehicle, and the post-petition equity that had been paid through the Trustee, and bought products for his home and for the comfort of his nearly bedridden wife. Debtors argue that while the acts of Debtor Frank Schrodek are not sought to be without consequences, Debtor Frank Schrodek paid an additional $2,025.00 from the sale proceeds to the Trustee, thereby paying for the post-petition equity twice.

In conclusion, the Debtors argue that due to the factual circumstances of the Debtors and the fact that Debtor Frank Schrodek had $232.00 in equity in the Property at the time of filing, and had paid $6,849.00 through the Trustee, leaving a balance of $7,482.07, which the Debtors has paid directly, makes a nunc pro tunc order appropriate.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to Debtors' instant Motion on December 2, 2014. Dckt. 155. The Trustee states that Debtor Frank Schrodek sold the Property for a reasonable value considering the repairs needed to make the vehicle legal in California. The Trustee has provided a current listing of vehicles for sale that are also 2005 Peterbilt 387's, and while these prices are vehicles currently for sale, this is at least some evidence of the likely value of the Peterbilt which corroborates the Debtors' estimates.

Most if not all of the sale funds have been accounted for by the Debtors. While the Debtors have not even given an estimate of the cost of the new CPAP, new walker, or prescription bills (Dckt. 143, pg.2, lines 12-13), the Debtors neglected to explain that the creditor received $6,226.09 from the sale

proceeds (Claim No. 4-1, filing by Trustee on May 30, 2014), leaving only $3,898.91 of the proceeds not specifically accounted for by the Debtors. The Trustee notes that a new CPAP could easily be $300.00 to $500.00 or more (Exhibit 2), and the Debtors have made $800.00 in eight $100.00 monthly payments since April 2014 from their social security income which is otherwise exempt – leaving no more than $2,498.91 in proceeds unaccounted for, about the equivalent of one month's social security income for the Debtors (Dckt. 71, pg.4).

While the Debtors did breach the plan by the sale, and while the creditor was also bound by the terms of the order confirming, the Trustee states that if the court finds the individual components reasonable, the Trustee asks that the court approve the transaction.

DISCUSSION

The facts surrounding this prior sale are unique to the Debtors. As the Debtors state in the Motion, they improperly executed a sale of the Property without previously getting authorization from the court. It is imperative that debtors abide by the Bankruptcy Code in order to ensure that their cases are not endangered by acting outside the authorization of the Bankruptcy Code or their confirmed plan.

Here, the Debtors, after receiving a denial of the initial attempt at selling the Property, took it upon themselves to improperly sell the Property without fully considering the potential ramifications such a sale will have on their bankruptcy – notwithstanding having actual knowledge that the court had denied their request to sell the property.

This case has a sordid history, with Counsel attempting to use the illness of Joanne De La Torre as an excuse for Frank Schrodek's intentional, wilful, knowing violation of the Bankruptcy Code. Notwithstanding how Debtors' counsel wants to package it, it has been demonstrated on multiple occasions now that Frank Schrodek was, and quite possibly is, going to do what he wants, when he wants, and without regard to the law. On prior occasions Debtors' Counsel has offered flimsy, transparent schemes as to how Mr. Schrodek was "atoning for his mistake," which amount to little more than Mr. Schrodek taking the money to purchase personal items and at some later date, interest free, may pay monies back to the estate for payment to creditors.

While it is clear that the court has not found Mr. Schrodek's excuses or Debtors' Counsel's willingness to throw them at the court to be proper, it appears that the Chapter 13 Trustee is satisfied that the estate has been compensated for the diversions of monies. Relying on the Trustee's recommendation and findings, the court grants the Motion and brings this unsavory portion of the case to an end. Nobody, the court included, is better for what has transpired in this case.

The Sale is approved, with the authorization to sell given retroactively to the date of the sale.

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 Sell Property filed by Frank Schrodek and Joanne De La Torre, 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 Frank Schrodek and Joanne De La Torre, the Chapter 13 Debtors, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Jonathan Breon or nominee ("Buyer"), the Property commonly known as 2004 Peter Built Truck ("Property"), on the following terms:

1. The Property shall be sold to Buyer for $15,000.00.

2. The authorization to sell is given retroactively to the Date of the Sale to Mr. Breon, the Debtors having sold the Property without court authorization and it having been removed from the State.

6. 14-30723-E-13 NICOLE FUEHRER
SG-1 Shareen Golbahar

MOTION TO AVOID LIEN OF SPRINGLEAF FINANCIAL SERVICES, INC.
11-17-14 [15]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on November 17, 2014. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the nonpurchase-money, nonpossessory lien of Springleaf Financial Services, Inc. ("Creditor") against property of Nicole Fuehrer ("Debtor") commonly known as Gateway laptop and Samsung 40" LED television (the "Property").

Debtor asserts that the Creditor holds a security interest in household goods as collateral for a nonpurchase money, nonpossessory loan of money. The Creditor filed a Proof of Claim No. 1 in the amount of $2,855.97. The attachment to the Proof of Claim No. 1 is a Loan Agreement and Disclosure Statement which lists the value of the Property as a combined $3,000.00.

Pursuant to the Debtor's Schedule B, the subject Property has an approximate value of $1.00 as to the value of the Gateway laptop and $1.00 as to the Samsung 40" LED television as of the date of the petition. Debtor states that the valuation of each is proper because the Gateway laptop broke in January 2014 and the Samsung 40" LED television broke in March 2014. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(3) in the amount of $1.00 for each piece of Property on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the lien of Springleaf Financial Services, Inc., Proof of Claim No. 1, against the property commonly known as Gateway laptop and Samsung 40" LED television, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

7. 13-34624-E-13 DEBRA RANDELL **MOTION TO CONFIRM PLAN**
MWB-6 Mark Briden **10-29-14 [136]**

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 29, 2014. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

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

Debra Randell ("Debtor") filed the instant Motion to Confirm Fourth Amended Plan on October 29, 2014. Dckt. 136.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 1, 2014. Dckt. 145. The Trustee objects on the following grounds:

1. Plan exceeds 60 months. The Plan proposes the following plan payments: $2,000.00 for 4 months; $0.00 for 2 months; $2,100.00 for 5 months; $3,755.00 for 49 months with a 0% dividend to unsecured creditors. The total amount to be paid into the Plan is $202,495.00 and the Debtor is proposing to pay Green Tree Servicing in full in Class 2 at $300,000.00 with 6.875% interest.

2. Improper treatment to creditor. The Debtor is proposing to pay Green Tree Servicing's First Deed of Trust in Class 2 of the Plan in full. The Debtor has attached Exhibit A which is copy of the Hamp Trial Period Plan Notice dated August 9, 2014. The trial period payments begin September 1, 2014 in the amount of $1,679.26 and continue through November 1, 2014.

It is not clear to the Trustee if the Debtor has made these payments directly to the creditor as the payment is scheduled to be paid on November 25, 2014 by the Trustee in the amount of $1,679.26. The Debtor has not listed this amount on Schedule J as an expense. It does not appear that Green Tree Servicing, or Flagstar Bank which appears to be the creditor, has filed a secured claim to date and the Trustee cannot disburse the payment to this creditor without a claim being filed. Flagstar Bank's motion for relief (DCN PD-1) was heard and granted on July 22, 2014.

3. The Debtor filed an amended Schedule B on June 23, 2014 and added "Cause of action against Flag Star Bank for gross negligence in servicing loan modification" and valued this asset at $320,000.00. The Debtor also added "cause of action against First Financial of California for gross negligence in representing debtor in loan modification with Flag Star Bank" and valued this asset at $12,000.00. The Debtor did not exempt these assets on Schedule C, therefore the non-exempt equity totals $332,000.00. The Trustee did not originally believe that these assets had value, and if they have value, the Debtor must pay the value to unsecured. As the Debtor's declaration in support of this motion states that the Debtor has received a Hamp Trial Period Plan Notice from Green Tree Servicing LLC, not Flagstar Bank. The Debtor has listed Green Tree Servicing in Class 2 of the Plan, however it appear that Flagstar is listed on Schedule D and the Debtor has not amended Schedule D to provide Green Tree Servicing's address. The Debtor advised the Trustee's office on September 24, 2014 that she was suing Flagstar Bank.

GREEN TREE SERVICING LLC'S OPPOSITION

Green Tree Servicing, LLC filed an opposition to the instant Motion on December 2, 2014. Dckt. 151. Green Tree Servicing, LLC objection on the following grounds:

1. Green Tree Servicing, LLC is the holder of a claim secured only by a security interest in real property commonly known as 5658 Mountain View Dr., Redding, California, which is the Debtor's principal residence. The total amount due and owing on the Promissory Note is approximately $417,869.42 and the pre-petition arrearage amount owed is approximately $94,287.18. FN. 1.

FN.1. There exists a question of whether Green Tree Servicing, LLC is a creditor, as that term is defined by 11 U.S.C. § 101(10). In other cases it has appeared, and serve the valuable function of a loan servicer. While the agent for the creditor, a loan service is not the creditor. In another case a loan servicer contended that it was in "possession" of the note endorsed in blank because it was being held by a custodian "for the servicer." When the Custodial Agreement was produced, it clearly stated that the custodian held the note solely for Fannie Mae. No evidence has been presented why or how Green Tree Servicing, LLC is the "creditor" in this case. Though it may "only" be the loan servicer for the creditor, as that creditor's agent, Green Tree Servicing, LLC has standing to appear and make sure that the claim is properly provided for in this bankruptcy case.

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2. The Debtor's Plan lists Green Tree's claim in Class 2. Because Green Tree is the holder of a claim secured by the Debtor's principal residence and the Plan does not provide for payment of Green Tree's pre-petition arrears, the Plan does not satisfy 11 U.S.C. § 1325(a)(5)(B).

DISCUSSION

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

The Trustee's and Green Tree Servicing LLC's objections are well-taken. As the Trustee's objections, a review of the plan does show that the proposed plan would exceed 60 months. To the Trustee's second objection, the treatment of the first deed of trust is uncertain. The proposed plan has Green Tree Servicing LLC listed as a Class 2 creditor, intended to be paid through the Plan by the Trustee. However, there is no proof of claim filed in connection with the first deed of trust and the court, like the Trustee, is unsure if the Debtor has paid Green Tree Servicing LLC on her own under the Hamp Trial Period Plan Notice. The treatment of the creditor is uncertain and suggests that the plan is not feasible. To the Trustee's third objection, the Debtor may in fact fail the liquidation analysis based on these causes of actions listed that the Debtor did not exempt.

As to Green Tree Servicing, LLC's objections, the creditor holds a deed of trust secured by the Debtor's residence. The creditor, or its loan servicer, has not filed a proof of claim but asserts $94,287.18 in pre-petition arrearages in its objection. Merely because an attorney argues something for his client, absent evidence the court does not accept the attorney's finding of fact as that of the court's. FN.2.

FN.2. The court is mystified as to how well-known, experienced attorneys who represent creditor could "forget" to present evidence to support their arguments. Many times when the evidence is presented, it turns out the attorney's arguments (based on what their client tells them to say) was in "error."

The court has no evidence that any arrearage exists. Debtor and Debtor's counsel have filed a Plan and motion, which are subject to Federal Rule of Bankruptcy Procedure 9011 in which they do not state any arrearage. This may be because they believe that any arrearage has been cured through a promised HAMP loan modification. The Motion to approve a loan modification was denied without prejudice. Civil Minutes, Dckt. 153.

On December 10, 2014, the Debtor and her Counsel filed an Ex Parte Application to dismiss this Chapter 13 case. Dckt. 155. This demonstrates and intention not to prosecute this proposed plan. The court notes that this is the Debtor's third Chapter 13 Plan since 2011. The first case, 10-53182, was filed on December 21, 2010, and dismissed on April 29, 2011. The second case, 12-38694, was filed on October 22, 2012 and dismissed on December 2, 2013. This case was filed on November 15, 2013. The Debtor has existed in Chapter 13 bankruptcy cases for three years without successfully prosecuting a Chapter

13 Plan. The Debtor has been represented by the same attorney in all three cases.

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.

8. 10-33235-E-13 EILEEN GOMEZ
SS-3 Scott Shumaker

OBJECTION TO CLAIM OF WELLS FARGO FINANCIAL NATIONAL BANK, CLAIM NUMBER 1
10-30-14 [49]

Final Ruling: No appearance at the December 16, 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 October 30, 2014. By the court's calculation, 47 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

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

The Objection to Proof of Claim Number 1-1 of Wells Fargo Financial National Bank is sustained and the claim is disallowed in the amount of $9,292.30 claimed to be secured.

Eileen Gomez, the Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Wells Fargo Financial National Bank ("Creditor"), Proof of Claim No. 1-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $9,292.30. Objector asserts that the claim fails to allege or prove a valid security interest. Specifically, the Objector argues that nowhere on the billing statement is there any indication that the claim is secured nor as to what property itt would be secured by. On the second page of the attached billing statement, the "Interest charge Calculation" has the amount of the claim listed as "SPECIAL RATE Transaction Date: Jun 18, 2009" with the annual percentage rate at 9.90%. Objector states that there is no indication what this means or whether it is indicated a secured claim. Objector argues that the Creditor does not provide any evidence to support a secured claim. Objector highlights that the Proof of Claim states that the security interest is for "items purchased from Systems Paving, Inc," without providing a description of these "times" or how those "items" are

secured. Objector asserts that the claim is in fact for an unsecured debt through a Visa card.

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 Objector's argument is well-taken. A review of the Proof of Claim No. 1, shows that the Creditor listed the claim as partially secured in the amount of $9,292.30. However, a review of the attached billing statement makes no reference to how or why that amount would be secured. The billing statement states, in bold lettering, "HOME PROJECTS VISA" and "Offered by Wells Fargo Financial National Bank." Nowhere in the billing statement is there any information that would even indicate a secured claim. Without evidence or explanation of how this claim, which appears to be an unsecured Visa claim, is secured, the Objector's argument is persuasive.

Based on the evidence before the court, the creditor's claim is disallowed in the amount of $9,292.30 claimed to be secured. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Wells Fargo Financial National Bank, Creditor filed in this case by Eileen Gomez, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 1-1 of Wells Fargo Bank Financial National Bank is sustained, and the claim is disallowed as a secured claim. No objection was made to the claim as an unsecured claim.

9. 14-30135-E-13 JULIE COLLIS-DAVIS
DL-1 David Foyil

OBJECTION TO CONFIRMATION OF PLAN BY SACRAMENTO MUNICIPAL UTILITY DISTRICT
10-31-14 [19]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on October 31, 2014 and November 14, 2014. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Sacramento Municipal Utility District ("SMUD") opposes confirmation of the Plan on the basis that:

1. The Plan does not comply with 11 U.S.C. § 1325(a) because it does not provide for SMUD's secured claim. SMUD filed a Proof of Claim in accordance with Fed. R. Bankr. P. 3001(f) on October 23, 2014 in the amount of $2,048.09. Proof of Claim No. 2-2. SMUD states that the secured claim arises from a purchase-moan loan by SMUD to Debtor for goods whcih became fixtures.

SMUD's objections are well-taken. SMUD asserts a claim of $2,048.09 in this case. The Debtor's Schedule D, estimates the amount of the creditor's claim as $7,000.00 and indicates it is secured on the Debtor's real property commonly known as 8225 Greenland Court, Citrus Heights, California.

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

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

(1) provide a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A),
(2) provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan, 11 U.S.C. § 1325(a)(5)(B), or
(3) surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

However, these three possibilities are relevant only if the plan provides for the secured claim.

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.

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

10. 14-30135-E-13 JULIE COLLIS-DAVIS
DPC-1 David Foyil

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-20-14 [27]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 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.

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

1. Filing fees not paid. Debtor has not complied with 11 U.S.C. § 1325(a)(2). On October 10, 2014, the court issued an Order Approving Payment of Filing Fees in installments. Dckt. 6. According to the Order, installments are due November 10th and December 9th, 2014 and January 8th and February 9th, 2015. Debtor has paid the first installment of $77.00 due on November 10, 2014.

2. No Motion to Value Collateral. The Debtor cannot make payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6). The Debtor

proposes to value the secured claim of First Horizon on a second deed of trust on Debtor's residence, but has failed to file a Motion to Value Collateral to date.

3. Secured debts not provided for. Debtor's plan fails to provide for the debt of Nationstar Mortgage on a first deed of trust on Debtor's residence. Debtor lists this debt on Schedule D. Dckt. 1, pg. 11. Debtor testifies at the First Meeting of Creditors held on November 13, 2014 that the first mortgage payments are current.

Debtor's plan also fails to provide for the secured debt of SMUD. Debtor lists this debt on Schedule D. Dckt. 1, pg. 12. The creditor has filed a Proof of Claim No. 2-3 and an Objection to Confirmation. Dckt. 19. While treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment may indicate that Debtor either cannot afford the plan payments because of additional debts, or that the Debtor wishes to conceal the proposed treatment of a creditor.

4. Section 6 of the plan indicates that additional provisions are appended to the plan, yet none are attached. Dckt. 7.

The Trustee's objections are well-taken. A review of the docket shows that the Debtor has not paid the December installment payment. As to the Trustee's second objection, the Debtor has filed a Motion to Value Collateral of First Horizon on December 2, 2014, which is scheduled to be heard on January 13, 2015. Dckt. 31. However, since no motion has yet been granted, the plan is not feasible since the plan is predicated on the granting of the Motion to Value.

As to the Trustee's third objection, the Trustee alleges that the plan is not feasible, *See* 11 U.S.C. § 1325(a)(6), and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of SMUD's and Nationstar Mortgage's matured obligations, which is secured by the Debtor's residence.

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

(1) provide a treatment that the debtor and secured creditor agree to, 11 U.S.C. § 1325(a)(5)(A),
(2) provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan, 11 U.S.C. § 1325(a)(5)(B), or
(3) surrender the collateral for the claim to the secured creditor, 11 U.S.C. § 1325(a)(5)(C).

However, these three possibilities are relevant only if the plan provides for the secured claim.

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 SMUD's and Nationstar Mortgages secured claims, raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). This is reason to sustain the objection.

The Trustee's fourth objection may have been a scrivener's error, but again raises doubts on the feasibility of the Debtor's proposed 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.

11. 10-46636-E-13 JOSEPH/KIMBERLY OLIVA — MOTION TO MODIFY PLAN
CAH-1 C. Anthony Hughes — 11-3-14 [108]

Final Ruling: No appearance at the December 16, 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 November 3, 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.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on November 3, 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.

12. 10-53637-E-13 G./KATHLEEN ULBERG MOTION TO MODIFY PLAN
JGD-8 John Downing 11-10-14 [184]

Final Ruling: No appearance at the December 16, 2014, hearing is required.

The case having previously been dismissed for failure to make plan payments on December 4, 2014 (Dckt. 194), the Motion to Modify Plan is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Modify Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

13. 13-30838-E-13 KENRICK CHEUNG **MOTION TO MODIFY PLAN**
RJ-1 Richard Jare **10-24-14 [49]**

Final Ruling: No appearance at the December 16, 2014 hearing is required.

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

Correct Notice NOT Provided. The Debtor has failed to provide for a Proof of Service. Therefore, the court cannot determine if correct notice has been 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.

Kenrick Po Cheung ("Debtor") filed the instant Motion to Modify Chapter 13 Plan on October 24, 2014. Dckt. 49.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 2, 2014. Dckt. 54. The Trustee objects on the following grounds:

1. The Debtor is delinquent $200.00 under the proposed plan. The plan states: "$200 for each of the first 12 months and thereafter the sum of $100 per month." Dckt. 52. The case was filed on August 16, 2013, and 15 payments have come due under the plan; payments totaling $2,700.00 have become due under the propesed modified plan. The Debtor has paid the Trustee $2,500.00 with the last payment of $100.00 posted November 10, 2014.

DEBTOR'S RESPONSE

Richard Jare, Debtor's counsel, filed a reply to Trustee's objection on December 7, 2014. Dckt. 57. Mr. Jare replies that an error occurred in his office and a Certificate of Service of the Motion and supporting pleadings cannot be provided to the court. Debtor "consents" to the court denying the present motion.

DISCUSSION

First, since the Debtor has failed to provide a Proof of Service for the court to determine whether proper notice has been given, the Motion is denied without prejudice.

Second, the Debtor is delinquent by $200.00 under the proposed plan, the modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a) and 1329 and is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied without prejudice and the proposed Chapter 13 Plan is not confirmed.

14. 11-44540-E-13 MERCEDES PEREZ **MOTION TO MODIFY PLAN**
DN-7 Dan Nelson **11-6-14 [165]**

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 November 6, 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.

Mercedes Perez ("Debtor") filed the instant Motion to Modify Plan on November 6, 2014. Dckt. 165.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. The amount of the plan payment is to be increased to $720.00 starting November 2014; and

B. The time for payments is to be decreased to 49 month;

C. The reason for said modification is that debtor has retired to take care of her parents and her income and expenses have changed so she can afford the increased payment.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on November 20, 2014. Dckt. 171. The Trustee objects on the following grounds:

1. Plan not completed. The Debtor failed to complete paragraph 2.15 of the plan. The dividend to unsecured creditors is blank and the amount of unsecured claims is blank. Additionally the Trustee notes the section for Class 2 creditors is completed incorrectly.

2. Reduced plan term. Debtor's modified plan proposes to reduce the commitment period from 60 months to 36 months. Debtor's Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, Form B22C, (Dckt. 7) indicates Debtor is under median income and the commitment period is 3 years. Debtor's Motion and Declaration, however, provide no reason for the redicution in plan term.

3. The motion and declaration are not sufficient. The Motion to Confirm Modified Plan may not comply with the requirements of Fed. R. Bankr. P. 9013 because it does not plead with particularity the grounds upon which the request releif is based. The declaration filed in support of hte Motion to Confirm does not appear to provide sufficient evidence to prove all the components of 11 U.S.C. § 1325(a).

4. The Plan is not feasible. According to the trustee's calculation the plan takes 51 months to complete. The Debtor has included in Class 2C Sacramento Tax Collector/Residence for $15,800.00 at 18% interest with a monthly dividend of $381.00. No motion to value has been filed. The creditor filed a secured claim for $15,955.61. The Trustee has disbursed $8,326.87 in principal and $6,790.08 in interest per the confirmed plan.

DISCUSSION

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

First, the Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states: that the amount of the plan payment is to be increased to $720.00 starting November 2014; that the time for payments is to be decreased to 49 month; and that the reason for said modification is that debtor has retired to take care of her parents and her income and expenses have changed so she can afford the increased payment. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to

allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Second, as to the remaining objections of the Trustee, they are each additional grounds to deny confirmation. The plan submitted by the Debtors is incomplete, specifically paragraph 2.15. Similar to the Debtor's failure to plead with particularity under Fed. R. Bankr. P. 9013, the Debtor failed to explain the reduction in the plan term, bringing the feasibility of the plan into question. Lastly, there appears to be no pending Motion to Value to explain why the Debtor has Sacramento Tax Collector/Residence at $15,800 in the plan when the creditor filed a secured claim for $15,955.61. This once again brings into question the feasibility and viability of the plan.

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

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

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

15. 14-29448-E-13 BILLY GORBET
DPC-2 Michael O Hayes

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-20-14 [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, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 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.

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

1. Filing fees not paid. Debtor has not complied with 11 U.S.C. § 1325(a)(2). On September 22, 2014, the court issued an Order Approving Payment of Filing Fees in installments. Dckt. 6. According to the Order, installments are due October 22nd, November 21st, and December 22nd, 2014 and January 20th, 2015. Debtor has paid the first and second installments of $77.00 due on October 22, 2014, and November 21, 2014.

2. Section 6 of the plan indicates Debtor expects to qualify for a mortgage loan modification on his residence, and that the mortgage arrears will be forgiven or deferred by this modification. Debtor does not indicate how the modification will provide for the arrears, or how the plan is to treat the mortgage if the modification is denied. Debtor proposes a monthly adequate protection payment of $1,202.48 through the plan to Caliber Home Loans. After providing an example template on terms of a plan that deal with loan modification, the Trustee states that, as drafted, Debtor's plan does not properly provide for the secured claim.

3. No spousal waiver. The Debtor has claimed exemptions under C.C.P. § 703.140(b), and appears married based on the Statement of Current Monthly Income, form 22C (Dckt. 1, pg. 37), although the spouse has not joined in the petition. California Code of Civil Procedure § 701.140(a)(2) requires the Debtor to file a Spousal Waiver, signed by the Debtor and Debtor's Spouse, for use of the claimed exemptions. The Trustee has not found any such waiver filed with the court after a review of the court record. The Trustee's Objection to Exemption (DPC-1) is set for hearing on January 13, 2015.

The Trustee's objections are well-taken. The Trustee's first objection is overruled because on November 21, 2014, the Debtor paid the installment fee. However, as to the Trustee's second and third objection, the court finds that they are both grounds to sustain the objection. A review of the plan shows that the plan relies on a loan modification that has not yet been approved. Without the loan modification approved, the secured claim is not properly provided for and the plan is not feasible. Additionally, there does not appear to be a Spousal Waiver filed. Therefore, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

16. 14-29448-E-13 BILLY GORBET
PD-1 Michael O. Hayes

OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK TRUST, N.A.
11-17-14 [19]

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 November 17, 2014. By the court's calculation, 29 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.

U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust ("Creditor") opposes confirmation of the Plan on the basis that:

1. Debtor's Chapter 13 plan cannot be confirmed because it does not provide for the full value of Creditor's claim. The Debtor's plan does not properly provide for the cure of Creditor's pre-petition arrears. Creditor's claim for pre-petition arrears is in the total amount of $58,825.80. See Proof of Claim No. 1. However, the Debtor's Chapter 13 plan only lists the arrears in the amount of $51,872.86 and further fails to provide for Creditor's pre-petition arrears under the assumption that the Debtor will be approved for a

loan modification. Creditor argues that the plan fails to satisfy 11 U.S.C. § 1325(a)(5)(B)(ii).

2. Debtor's Chapter 13 plan cannot be confirmed because it does not promptly cure Creditor's pre-petition arrears as required under 11 U.S.C. § 1322(b)(5). Creditor's secured claim consists of $58,825.80 in pre-petition arrears, however, Debtor's plan provides for the cure of only $51,872.86 in arrears and does not propose to cure any arrears at all. Debtor will have to increase his monthly payment through the Chapter 13 Plan to Creditor to approximately $980.43 in order to cure Creditor's pre-petition arrears over a period not to exceed sixty months.

3. Debtor's Chapter 13 plan cannot be confirmed because it is not feasible. Debtor's Schedule J indicates that the Debtor has disposable income of $1,365.00 per month. However, the Debtor will be required to increase the monthly ongoing post-petition payment to $1,251.89 and increase the plan payments to $980.43 in order to provide for a prompt cure of the pre-petition arrears owed to Creditor in sixty months as required by 11 U.S.C. § 1322(b)(5). As the monthly payment sufficient to cure Creditor's pre-petition arrears exceeds the Debtor's monthly disposable income, the Debtor lacks sufficient monthly disposable income with which to fund the plan. Debtor has stated that he anticipates being approved for a loan modification, which will cure all arrears and thus make the plan feasible. However, the Debtor does not provide a timeline of when a complete loan modification application will be submitted, what action will be taken if the loan modification application is denied, or how soon after a denial the Debtor will amend his Chapter 13 plan to provide for Creditor's claim. In fact, to date, Creditor has no record of a loan modification application being received by Debtor.

The Creditor's objections are well-taken. The Creditor's first and second objection both concern the Debtor's failure to provide for the pre-petition arrears. The objecting creditor holds a deed of trust secured by the Debtor's residence. The creditor has filed a timely proof of claim in which it asserts $58,825.80 in pre-petition arrearages. 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.

As to the Creditor's third objection, a review of the plan shows that the plan relies on a loan modification that has not yet been approved. Without the loan modification approved, the Creditor's secured claim is not properly provided for and the plan is not feasible. With the entire plan riding on the approval of an alleged loan modification but without having any evidence of one being sought by the Debtor, the plan is not feasible.

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

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

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

The Objection to the Chapter 13 Plan filed by the U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

17. 13-35754-E-13 WSS-4 MATTHEW/ARIANA VICKERS W. Steven Shumway MOTION TO VALUE COLLATERAL OF LAKE WILDWOOD ASSOCIATION 11-4-14 [46]

Final Ruling: No appearance at the December 16, 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, Creditor, parties requesting special notice, and Office of the United States Trustee on November 4, 2014. By the court's calculation, 42 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 Lake Wildwood Association ("Creditor") is granted and Creditor's secured claim is determined to have a value of $00.00.

The Motion to Value filed by Matthew and Ariana Vickers ("Debtors") to value the secured claim of Lake Wildwood Association ("Creditor") is accompanied by Debtor Matthew Vickers's declaration. Debtors are the owner of

the subject real property commonly known as 14169 Chestnut Court, Penn Valley, California ("Property"). Debtors seeks to value the Property at a fair market value of $150,000.00 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 $209,589.00. Creditor's homeowner's association lien secures a claim with a balance of approximately $4,751.55. Therefore, Creditor's claim secured by a homeowner's association lien is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments/payments in the secured amount of the claim] 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 Matthew and Ariana Vickers ("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 Lake Wildwood Association secured by a homeowner's association lien recorded against the real property commonly known as 14169 Chestnut Court, Penn Valley, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $150,000.00 and is encumbered by senior lien securing claim in the amount of $209,589.00, which exceeds the value of the Property which is subject to Creditor's lien.

18. 11-48055-E-13 CURTIS HEIGHER
PLC-6 Peter Cianchetta

OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE AND/OR MOTION FOR COMPENSATION FOR PETER CIANCHETTA, DEBTOR'S ATTORNEY(S)
11-14-14 [84]

Final Ruling: No appearance at the December 16, 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, Creditor, and Office of the United States Trustee on November 14, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Objection to Notice of Mortgage Payment Change is sustained.

Curtis Heigher ("Debtor") filed the instant Objection to Notice of Mortgage Payment Change and Request for Attorney's Fees [CCP 1717] on November 14, 2014. Dckt. 84.

Debtor states that Wells Fargo Bank, N.A. filed Proof of Claim No. 7 on April 4, 2012 where they claimed an arrearage existed at the time of the bankruptcy filing. The escrow shortage they listed was $5,122.96 as of the petition date. No escrow analysis was attached to Wells Fargo Bank, N.A.'s claim.

On October 13, 2014, Wells Fargo Bank, N.A. filed a Notice of Payment Change. The documents submitted with their Notice of Mortgage Payment Change state there was an escrow shortage on March 13, 2013 of $8,572.82. No explanation is offered as to the application of payments between the date the petition was filed, December 1, 2011 and March 13, 2013 to explain how a post-petition escrow shortage could have ballooned from zero (the original Proof of Claim listed $5,122.96 as a shortage which is being paid through the plan) to $8,572.82 when all of the payments have been made on Wells Fargo Bank, N.A.'s Class 1 claim by the Chapter 13 Trustee.

Since taxes are approximately $5,000.00 per year, a shortage of $8,572.82 could not be possible with the current escrow payment of $402.21 per month. Assuming the Trustee made the payments from January 1, 2012 to March 13, 2013, that would equate to 14 escrow payments of $402.21 for a total of $5,630.94, more than adequate to pay the approximately $5,000.00 that became due during that time and in no way could now equal a shortage of $8,572.82.

None of this very large discrepancy is explained or reconciled between the Wells Fargo Bank, N.A.'s Proof of Claim and the Notice of Mortgage Payment Change. Further, the Debtor argues that nowhere in the Proof of Claim nor the Notice of Payment change is sufficient detail for the Debtor to have an expert analyze the amounts to determine the proper escrow amount. Debtor contends that he has sufficiently should substantial discrepancies in the analysis related to the requested Notice of Payment Change.

Debtor further contends that the inconsistencies are the result of per-petition arrearage amounts not being properly credited in the analysis which result in the pre-petition arrearage also being paid post-petition, thereby resulting in a duplicate payment. The deed of trust only provides for payment of collection fees in to protect their security interest as stated in paragraph 7 and 28 of the deed of trust note attached to Proof of Claim 7.

Debtor additionally requests that the court grant reasonable attorney's fees pursuant to California Civil Code § 1717.

REVIEW OF THE PROOF OF CLAIM AND NOTICE OF MORTGAGE PAYMENT CHANGE

The court begins with Proof of Claim No.7-1 and the attachment thereto.

Wells Fargo Bank, N.A. filed Proof of Claim 7-1 on April 4, 2012. In the Proof of Claim, Wells Fargo Bank, N.A. asserts the following Claim:

A. Amount of Claim.....$316,180.82

B. Amount of Arrearage.....$ 9,980.76

C. Interest Rate, Variable.....3.75%

The Attachment to Proof of Claim No. 7-1 is a copy of the proof of claim form and the Mortgage Proof of Claim Attachment [B 10, Attachment A]. This Attachment provides the following information.

PART 1: PRINCIPAL AND INTERESTS AS OF PETITION DATE

A. Principal.....$306,493.10

B. Interest Rate.....3.750%

C. Interest Due (8/15/11-12/01/11)...$ 3,408.68

D. Total Principal and Interest.....$309,901.78

PART 2: PRE-PETITION FEES, EXPENSES, AND CHARGES

E. Late Charges.....$ 768.74

F. NSF Fee (1 check).....$ 15.00

G. Escrow Shortage/Deficiency.....$ 5,122.96

H. Total Pre-petition Fees/Expenses/Charges.....$ 5,906.70

PART 3: AMOUNT NECESSARY TO CURE DEFAULT

I. Installment Payment Includes Escrow Dep.

J. *Creditor states "Unable to file an Escrow Statement"*

K. 3 Installments due, $1,358.02 each.....$4,074.06

L. Pre-petition Fees/Expenses/Charges.....$5,906.70

M. Current/Upcoming Payments

12/15/2011.....$1,358.02

02/15/2012.....$1,364.99

No escrow statement has been filed and Proof of Claim No. 7-1 has not been amended to add an Escrow Statement showing what comprises the $5,122.96 Shortage.

Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change on October 13, 2014. The Notice states the following:

1. Date of payment change: 11/15/2014

2. No change in the Principal and Interest Payment

3. Escrow Payment to increase from $402.21 to $422.54.

4. New Total Payment (P/I/Escrow)..... $1,859.23

ANNUAL ESCROW ACCOUNT DISCLOSURE STATEMENT
ATTACHED TO NOTICE OF MORTGAGE PAYMENT CHANGE

PART 1 - HOME LOAN PAYMENT

	New Monthly Home Loan Payment	Current Monthly Home Loan Payment
Minimum Payment	$1,436.69	$1,117.43
Escrow Payment	$414.24	$402.21
Shortage Payment or Overage Credit	$8.30	$114.85

Credit Line and/or Disability Payment	$.00	$.00
Total Monthly Payment	$1,859.23	$1,634.49
New Payment Effective Date	11/15/14	

From a review of this part, it appears that there has been a change in the loan payment, not the escrow (by any significant amount) of $319.26.

PART 3 ANTICIPATED ESCROW DISBURSEMENTS

5. Taxes.....$4,970.92

6. New Monthly Escrow Amount.....$ 414.24

7. Part 1: Escrow Account Payment Adjustment:

   a. Current escrow payment: $402.21

   b. New escrow payment: $422.54

On its face, the change in escrow payment is modest, $20.33.

In the Objection, Debtor states that the Notice of Monthly Mortgage Payment Change shows an escrow shortage of ($8,572.28), directing the court to review Exhibit 2 (Dckt. 88) filed by Debtor in with the Objection. Debtor merely states that the "Notice" so states, not providing the with an indication where this information is or how it corresponds to the above information in the Notice. Actually, this information is in the Annual Escrow Account Disclosure Statement attached to the Notice.

As stated above, the Annual Escrow Account Disclosure Statement provides for an increase of the escrow payment from $402.21 to $414.24. It also states that the Shortage Payment is reduced from $114.85 to $8.30. However, the real increase is in the "Minimum Payment" for the principal and interest. Debtor fails to question, or address, this increase.

The ($8,572.82) Escrow Shortage is show on Section 6, YOUR ESCROW ACCOUNT HISTORY FOR THE PAST 12 MONTHS, of the Annual Escrow Account Disclosure Statement which is attached to the Notice. It states the following:

A. End of 02/2013 Escrow Balance.....($6,566.77)
B. Projected Positive Balance as of 03/2013...($2,011.03)

This yields the ($8,572.82) amount cited by Debtor.

C. This Report then shows the actual payments made during the period 03/2013 through 10/2014, which total $13,351.09.

D. As of 10/2014 the negative escrow balance is reduced, after application of all the payments to only ($599.84). Under the Confirmed Chapter 13 Plan, Dckt. 5, the Debtor is making $154.68 payments for the pre-petition arrearage.

E. Section 5 of the Annual Statement, titled, YOUR ESCROW ACCOUNT PROJECTION FOR THE NEXT 12 MONTHS, states that monthly escrow payments of $414.23 a month will total $4,970.88, and the property taxes to be paid from escrow will be $4,970.92.

F. Section 5 states that just based on those payments, the escrow account will begin with a negative ($599.84) balance and then end the 12 months period with a negative ($599.88) balance. It projects that the ending balance should be a positive $2,899.68.

From reviewing Sections 5 and 6 of the Annual Escrow Account Disclosure Statement attached to the Notice of Mortgage Payment Change, it is clear that substantial payments have been applied by Wells Fargo Bank, N.A. to reduce the escrow arrearage to only ($599.84) as of 10/2014.

Proof of Claim 7-1 lists an arrearage of ($9,980.76). No objection to Proof of Claim 7-1 and the arrearage amount was filed. The Debtor began plan payments in January 2012. As of February 2013, the Debtor made fourteen payments of $158.68 toward the pre-petition arrearage. That totals $2,221.52. The "simple" math based on the Proof of Claim Arrearage is,

Pre-Petition Payment Arrearage.....($3,408.68)

Pre-Petition Escrow Arrearage.....($5,122.96)

Late Charges/NSF Fee.....($ 783.74)

The "ballooning" of the "post-petition" escrow arrearage appears to be a combination of the pre-petition arrearage and the projected future escrow payments to be funded from the to be made monthly installment payments and the arrearage payments under the plan. In fact, reviewing Section 5 shows the application of such payments, with the arrearage being reduced to ($599.84) – a statement that the Debtor chooses to ignore.

DISCUSSION

While the Debtor asserts that there is not sufficient "detail" for an "expert" to analyze the Notice and Escrow Analysis, no effort has been made to do so by the Debtor or Debtor's Counsel. Instead, the Opposition merely states - "Hey, the 03/2013 Escrow Balance is ($8,572.82.) and that ain't right." No effort is to provide the testimony of an expert who said that he or she could not analyze the report. No disclosure is made by the Debtor that the actual 2013-2014 application of payments reduced the escrow arrearage to ($599.84) and whether Debtor asserted that this ($599.84) was incorrect.

The Objection as stated by Debtor has little merit. It is true that the Annual Escrow Statement begins with an unexplained number. It is also true that Wells Fargo Bank, N.A. has never provided the court and Debtor with an accounting of what comprises the original ($5,122.96) pre-petition escrow arrearage. But Debtor has never objected to that pre-petition escrow arrearage portion of the claim. (It appears that this is approximately one year of property taxes.)

CHANGE IN MONTHLY MINIMUM PAYMENT

In his Opposition Debtor ignores the increase in the Minimum Monthly Payment on his loan (principal and interest) to $1,436.69 from $1,117.43. The notice of Monthly Mortgage Payment Change affirmatively states that there will be no increase in the principal and interest payment for an interest change. It states that the monthly escrow payment will increase by $20.33 to $422.54 from $402.21. It further states that there will be no other payment change in the Debtor's monthly mortgage payment. Notice of Monthly Mortgage Change, filed October 13, 2014.

Though given no thought by the Debtor, it appears that the "error" which would be objectionable is that the Minimum Monthly Payment is changed on the Annual Escrow Account Disclosure Statement when on the Notice of Mortgage Payment Change Wells Fargo Bank, N.A. states under penalty of perjury that the only change is the $20.33 increase in the monthly escrow payment and that there are no other changes.

The court sustains the Objection for all amount in excess of a total current monthly payment of $1,531.67 ($1,117.43 Minimum Payment and $414.24 Escrow Payment).

Attorneys' Fees

Debtor's request for attorney's fees under California Civil Code § 1717, the Debtor has not stated with particularity under Local Bankr. R. 9013 to justify such relief. As shown below, merely citing California Civil Code § 1717 does not state a statutory basis for the award of legal fees.

In support for attorney fees, the Objection states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

> A. California Civil Code Section 1717 provides for attorney fees for the prevailing party whenever there is an attorney fee provision, there has been notice and a hearing, wherein the reasonable attorney's fees shall be fixed by the Court.

The Objection does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 for attorneys' fees because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states the code section. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the

pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

CALIFORNIA CIVIL CODE § 1717 IS NOT A STATUTORY GRANT OF ATTORNEYS' FEES

In the Motion Debtor states, 'California Civil Code Section 1717 provides for attorney fees for the prevailing party whenever there is an attorney fee provision, there has been notice and a hearing, wherein the reasonable attorney's fees shall be fixed by the Court." Debtor then requests that the court award attorneys' fees pursuant to section 1717. This incorrectly states the provision of California Civil Code § 1717, which in pertinent part states [emphasis added],

§ 1717. Contract provision for attorney fees and costs

(a) In any action on a contract, **where the contract specifically provides that attorney's fees and costs**, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

The Debtor does not identify any term of any contract which specifically provides that attorney's fees or costs shall be awarded. No contract is identified as being applicable. It may be that Debtor will contend that it is simple for the court to just infer that any note or deed of trust will have an attorneys' fee provision. The court's response is that it is even simpler for the Debtor to identify the specific contractual attorneys' fee clause upon which he assets this right.

THE LEGAL SERVICES PROVIDED FOR THE OBJECTION

DO NOT WARRANT LEGAL FEES

While the Debtor filed a document titled "Objection," it did little to state an objection. On its face, it clearly ignored the application of payments and the reduction of the escrow arrearage to ($599.84). Debtor also ignored the obvious error with the increase of the Minimum Monthly Payment when on its face the Notice of Monthly Mortgage Payment Change states under penalty of perjury that there is no change other than the same increase in the monthly escrow amount.

In substance, Debtor off-loaded work from his attorney to the court to figure out where relevant information is located. Debtor has made no effort to have an independent accountant or loan officer (some "expert") review the information and provide a coherent, economically sound, analysis for the court. Debtor's argument that no expert could figure it out is not persuasive. This is not to say that Wells Fargo Bank, N.A. has made its analysis as clear as it could be, but it is not nearly as opaque as Debtor seeks to make it. The court will not award Debtor attorneys' fees to compensate his attorney for making work for the court.

In many situations the court would order the creditor to appear and answer several questions. How and why the Minimum Monthly Payment amount was increased when the Notice states under penalty of perjury it was not? Why the creditor never provided the amendment to the proof of claim to provide an accounting of the pre-petition escrow arrearage? Why the creditor ignored this Objection and failed to respond. However, this court has also expended more than an appropriate amount of time having to review this for the Debtor. To *sua sponte* create more work would just distract the court from addressing issues which the parties clearly and properly identify the issues, analyze the information, and present clear arguments.

While the court has disallowed a portion of the mortgage payment increase, that ruling had nothing to do with the issues raised by the Debtor. It was left to the court to find, analyze, and figure out what occurred with the Notice. It is telling that the exhibits do not include a clear, professional letter from Debtor's counsel to Wells Fargo Bank, N.A. and Creditor's counsel identifying the error, nothing that the increase in the Minimum Monthly Payment appears to be a typographical error, and requesting the response.

The request for attorneys' fees 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 Objection to Notice of Mortgage Payment Change 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 Objection to Notice of Mortgage Payment Change filed on October 14, 2014 by Wells Fargo Bank,

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

IT IS FURTHER ORDERED that Debtor's request for attorneys' fees is denied.

IT IS FURTHER ORDERED that Austin P. Nagel, counsel for Wells Fargo Bank, N.A. for other matters in this case, shall transmit a copy of this Order and the Civil Minutes from the December 16, 2014, to the appropriate senior officer at Wells Fargo Bank, N.A. to address (1) any errors in the Notice of Mortgage Payment Change.

The Clerk of the Court shall send an informational copy of this Order and the Civil Minutes to Austin P. Nagel, Esq., 111 Deerwood Rd. #305, San Ramon, CA 94583, counsel for Wells Fargo Bank, N.A. on other matters in this case.

The Clerk of the Court shall send an informational copy of this Order and the Civil Minutes to Nickolaus A. McLemore; Brice, Vander Linden & Wernick, PC, P.O. Box 829009; Dallas, TX 75382-9909; the person signing Proof of Claim No. 7-1 for Wells Fargo Bank, N.A.

19. 13-29155-E-13 DPC-2 | JERRY DESCHLER AND SALLY HUI-DESCHLER, Lucas Garcia | TRUSTEE'S MOTION TO RECONSIDER AND VACATE CIVIL MINUTE ORDER 11-5-14 [79]

Final Ruling: No appearance at the December 16, 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, and Office of the United States Trustee on November 5, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Reconsider and Vacate Civil Minute Order 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 Reconsider and Vacate Civil Minute Order is granted.

David Cusick, the Chapter 13 Trustee, filed the instant Motion to Reconsider and Vacate Civil Minute Order on November 5, 2014. Dckt. 79.

The Trustee states that Jerry and Sally Deschler ("Debtors") had a Motion to Confirm First Amended Plan that was heard and granted by Final ruling on Octover 28, 2014. Dckt. 76. The court issued an order granting the Motion to Confirm on November 2, 2014. Dckt. 2. The Trustee filed an objection to the Debtors' Motion to confirm on October 14, 2013. Dckt. 73. However, the court's pre-hearing dispositions from the October 28, 2014 calendar stated "Final Ruling. Local Rule 9014(f)(1) Motion - No Opposition Filed."

The Trustee states that the Trustee's objections remain unresolved with respect to the Florida rental property where no order valuing the claim of Wells Fargo Bank has been entered (Proof of Claim No. 2) and no explanation has been produced for the double-counting of the rental expense where the mortgage is to be paid inside the plan. The Trustee requests that the court vacate the Civil Minute Order filed on November 2, 2014 granting the Debtors' Motion to Confirm Plan and reconsider the ruling on the Debtors' Motion, based on the Trustee's objection filed on October 14, 2014.

WELLS FARGO BANK, N.A. JOINDER

Wells Fargo Bank, N.A. ("Creditor") filed a joinder to the Trustee's instant Motion on November 18, 2014. Dckt. 83. Wells Fargo Bank, N.A. states:

1. At the time of the Civil Minute Order granting plan confirmation, Debtors and Creditor were actively engaged in correspondence to schedule an appraisal on the Property to determine valuation.

2. Creditor needs an appraisal of the Property to determine its value. Creditor did not want to file a frivolous objection to confirmation as there was currently no evidence of value.

3. Debtor and Creditor have experienced some setback with the scheudling of the appraisal of the Property due to its out of state location and scheudles of various parties including the renters, the appraiser, and the property management company.

4. Creditor did not believe confirmation would be granted as no Motion to Value has yet been filed and thus no order has been entered determining value.

5. Creditor's counsel and Debtors; counsel have a good working relationship and have remained in touch regularly in this case and except to have the appraisal done as soon as possible after which Debtors' counsel has agreed to file the Motion to Value and subsequently refile a motion to confirm plan.

6. In the interest of judicial economy, Creditor has not filed its own Motion for Reconsideration and rather, hereby joins the Trustee's Motion.

APPLICABLE LAW

Pursuant to Fed. R. Civ. P. 60(b), made applicable here by Fed. R. Bankr. P. 9024, grounds for relief from a final judgement, 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.

Fed. R. Civ. P. 60(b). Here, Movant the only grounds which apply, and which Movant seems to raise, are (b)(1) and (b)(6).

Rule 60(b)(1)

To qualify for equitable relief under Fed. R. Civ. P. 60(b)(1), the movant must demonstrate that he or she has a meritorious defense *and* that one of the four conditions for relief – mistake, inadvertence, surprise, or

excusable neglect – applies. *Engleson v. Burlington N.R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992). Furthermore, "[n]either ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1)." *Id.* (citations omitted)*; see, e.g., Smith v. Stone*, 308 F.2d 15, 18 (9th Cir. 1962) (attorney's failure to follow ordinary court procedure and rules was not excusable inadvertence or neglect under Rule 60(b)); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990) (if failure to submit evidentiary materials is solely due to attorney's carelessness, then it would be an abuse of discretion for the court to grant Rule 60(b) relief); *Lomas and Nettleton Co. v. Wiseley*, 884 F.2d 965, 967 (7th Cir. 1989) (district court would abuse its discretion in granting Rule 60(b) relief on the basis of an attorney's negligent mistake).

In considering whether neglect is "excusable," the court should take into account all relevant circumstances, including the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within reasonable control of the movant, and whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993). The determination is at bottom an equitable one. *Id.* Furthermore, the proper focus is upon whether the neglect of the debtor *and* their counsel was excusable, as clients are held accountable for the acts and omissions of their attorneys. *Id.* at 397.

DISCUSSION

Unfortunately, this Motion arises under the circumstances of multiple parties making inadvertent errors that led to the oversight of Trustee's opposition.

To begin, the Trustee does not state with particularity on what grounds the court should grant the Motion. However, the court will consider the motion under Fed. R. Civ. P. 60(b), specifically Fed. R. Civ. P. 60(b)(1). The Trustee should not rely on the court to state grounds or construct arguments for him. It has been done only in this case in light of the potential harm to the Debtors if the order is not vacated.

The Motion states that Trustee's objection to the Motion to Confirm was not considered by the court. It appears this stems from the Trustee using an incorrect Docket Control Number and docket entry for his opposition to the Motion to Confirm. When the opposition was filed, it was entered on the docket as "Trustee's Objection to Confirmation of Plan" under Local Bankr. R. 3015-1(c) as compared to a responsive opposition to an existing motion. A review of the docket and the filing of the opposition shows that the Trustee's office filed the opposition as an Objection to Confirmation which is different than an opposition to a Motion to Confirm.

This error was compounded by the Trustee's office using the Docket Control Number "LBG-002" instead of the Docket Control Number "LBG-2." While the court does note that in Debtors' Motion to Confirm Debtors' counsel does list the Docket Control Number as "LBG-002," the case managers, pursuant to the Clerk's office instructions and procedures, delete the excessive "0"s. This is why on the docket the Motion is linked with Docket Control Number "LBG-2." The Trustee's office, unlike private-practice attorneys, do not have to go

through case managers to have their motions or responses docketed. Without this safeguard, mistakes such as this can and occasionally do happen.

The court relies on Docket Control Numbers to ensure that all pleadings and responses are considered when making a ruling and why it is required under Local Bankr. R. 9014-1(c). Given that some dockets contain thousands of entries, Docket Control Numbers prevent the court from having to mine through thousands of documents to determine which, if any, are connected with a pending motion.

Here, there was a "perfect storm" of oversights that led to the Trustee's objection not being considered. The unique circumstances surrounding this oversight fall directly withing Fed. R. Civ. P. 60(b)(1)'s purview as justification to vacate the order. The oversight of the Trustee's objections due to improper filing on the docket is a mistake which justifies the equitable relief of vacating the order.

Wells Fargo Bank, N.A., which had no opposition to the Motion to Confirm, files a "Joinder" to the Trustee's Motion. The court cannot identify how Federal Rule of Civil Procedure 19 and Federal Rule of Bankruptcy Procedure 7019 and 9014 (which does not incorporate Rule 7019 into the Contested Matter Practice) allow Wells Fargo Bank, N.A. to make itself a co-movant for this Motion. Possibly it is merely stating that it supports the Motion.

The Debtors have not filed an opposition to the Motion. They may well have realized that confirmation of a plan may well have freed up Wells Fargo Bank, N.A. to seek relief from the stay to foreclose on the property.

Therefore, finding that the Trustee has a colorable meritorious defense and the order was issued improperly due to a mistake, the court grants the Motion and vacates the Civil Minute Order filed on November 2, 2014 granting the Debtors' Motion to Confirm Plan (Dckt. 76) and the Order (Dckt. 78). The court orders that the Motion to Confirm (dckt. 68) be reset for hearing at 3:00 p.m. on January 27, 2014.

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

ORDER VACATING CHAPTER 13 CONFIRMATION ORDER
AND
RESTORING HEARING ON MOTION TO CONFIRM TO THE CALENDAR

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

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

IT IS ORDERED that the Motion is granted and the Civil Minute Order filed on November 2, 2014 granting the Debtors' Motion to Confirm Plan (Dckt. 76) and the Order (Dckt. 78) are vacated.

IT IS FURTHER ORDERED that the Motion to Confirm (Dckt. 68) be reset for hearing at 3:00 p.m. on January 27, 2014.

20. 13-32861-E-13 JAMES/BETH FRY — MOTION TO CONFIRM PLAN
PGM-2 Peter Macaluso — 5-15-14 [66]

Final Ruling: No appearance at the December 16, 2014 hearing is required.

Local Rule 9014-1(f)(1) 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 May 15, 2014. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

The court's decision is to continue the hearing on the Motion to Confirm the Amended Plan to 3:00 p.m. on February 3, 2015.

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

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

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

Rehab Group but the Declaration does not indicate any changes to the Debtors income.

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

DEBTOR'S RESPONSE

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

TRUSTEE'S RESPONSE

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

JULY 1, 2014 HEARING

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

AUGUST 5, 2014 HEARING

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

SEPTEMBER 9, 2014 HEARING

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

Additionally, on this same hearing date, the court denied Debtors' Motion to Approve their Loan Modification, on the basis that the Motion does not identify the responding lender does not set forth the relief requested with the particularity required by Federal Rule of Bankruptcy Procedure 9013. The court has noted that it cannot grant relief against a respondent who is unidentified, or against a respondent whose identity is ambiguous. Fed. R. Bankr. P. 9013. In their Motion filed on August 12, 2014, the Debtors fail to identify the lender who has allegedly entered into an agreement to modify their home loan, rendering the court unable to issue an order affecting the rights of a specified party. The motion was also denied on the basis that a motion that is ambiguous about the respondent cannot give reasonable notice and opportunity for hearing to the party against whom relief is sought. Fed. R. Bankr. P. 9014(a). Motion to Approve Loan Modification, PGM-4.

OCTOBER 21, 2014 HEARING

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

NOVEMBER 5, 2014 ORDER

On November 5, 2014, the court issued an order resetting the hearing on the instant Motion to December 16, 2014 at 3:00 p.m. Dckt. 121.

DISCUSSION

The court continues the hearing to February 3, 2015 at 3:00 p.m. to be heard in conjunction with the Order to Appear.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Confirm the Plan is continued to 3:00 p.m. on February 3, 2015.

21. 13-32861-E-13 JAMES/BETH FRY **MOTION TO APPROVE LOAN**
PGM-5 Peter Macaluso **MODIFICATION**
9-23-14 [108]

Final Ruling: No appearance at the December 16, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Green Tree Servicing, LLC, Ocwen Loan Servicing, LLC, Wells Fargo Bank, N.A., Debtor, Chapter 13 Trustee, and Office of the United States Trustee on September 23, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for 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 Loan Modification is continued to 3:00 p.m. on February 3, 2015.

The Motion to Approve Loan Modification filed by James and Beth Fry ("Debtors") seeks court approval for Debtors to incur post-petition credit. Green Tree Servicing ("Green Tree"), 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 $806.58 a month to $797.63 a month. The modification will create a new principal balance of $109,774.61 and set the interest rate at 5.125%.

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

However, the court cannot determine from the evidence presented what, if any, legally recognized entity is the creditor to be bound by this Motion. Green Tree is a servicing company, not the real secured creditor. 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.

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

that the true parties appear in federal court to have their rights and interests determined, and the relief they seek issued.

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

If the court were to approve this loan modification, it would be ineffective, potentially subjecting Debtor to years of paying under a plan, only to discover that Debtor still owes an as yet unknown creditor the full amount of the debt. Such discovery after years of performing under a Chapter 13 Plan would be an unhappy day not only for the Debtor, but his counsel as well – most likely leaving the Debtor unable to have the benefit of paying a reduced secured claim. The modified plan cannot be approved without the proper documentation showing that Green Tree has the authority to modify loans on behalf of the true creditor.

CONTINUATION OF HEARING

This court on prior occasions has ordered Greet Tree Servicing, LLC and its attorneys to appear and address whether it was the actual creditor in the bankruptcy case or the loan servicer. It has been presented to the court that Green Tree Servicing, LLC is the loan servicer. This court has ordered Green Tree Servicing, LLC to accurately identify the creditor on all proofs of claims and pleadings filed in bankruptcy cases nationwide. Further, that Green Tree Servicing, LLC not misrepresent that a claim has been transferred to it when Green Tree Servicing, LLC merely acquires the loan servicing rights from another loan servicer.

The several cases and orders issued thereon by this court include the following.

Edwin and Cynthia Crane
Case No. 11-27805

In the *Crane* Case Green Tree Servicing, LLC filed a proof of claim stating that it was a creditor holding a secured claim. The court issued an order to show cause why this court should not order it to file an amended proof of claim correctly identifying the creditor (rather than misidentifying the loan servicer, Green Tree Servicing, LLC, as the creditor) and why this court should not transmit this matter to the United States District Court for consideration of punitive sanctions. Order to Show Cause, Dckt. 76, filed October 7, 2011.

In responding to the Order to Show Cause, Green Tree Servicing, LLC confirmed that it is the loan servicer and not the creditor. In the court's Civil Minutes from the November 8, 2011 hearing on the Order to Show Cause, the court addressed the response as follows:

"On November 4, 2011, Green Tree filed a supplemental response. Dckt. 108. In this response Green Tree states that it was not intending to hide the identify of the creditor and attached copies of various documents relating to Residential Funding, LLC, LaSalle Bank, N.A., Wells Fargo Bank, N.A., and Bank of America, N.A. as having involvement with the claim. Further, that Green Tree has a power of attorney from Bank of America, N.A. which allows it to file the proof of claim for Bank of America, N.A. Green Tree further contends that Bank of America, N.A., though undisclosed as the creditor, could be served through Green Tree as the agent for Bank of America, N.A.

The supplemental response misses the mark. The court's concern is that the method used by Green Tree fails to disclose the creditor, thereby precluding the debtor and parties in interest from ever serving the creditor with process or contested matters. Merely saying that someone is an agent for a purpose does not elevate them to an agent for all purposes. Further, Fed. R. Bank. P. 7004(h) provides a very specific method by which a federally insured financial institution, such as Bank of America, N.A., must be served. That does not include sending process or contested matters to a loan servicer.

Green Tree directs the court to review the limited power of attorney attached to the amended proof of claim. This was attached as one of the 130 pages of the amended proof of claim. However, in reading the limited power of attorney, it expressly states that it is limited to 10 enumerated transactions, none of which are to serve as the agent for service of process for Bank of America, N.A. The transactions identified relate to documentation concerning the deed of trust, providing notices and statements, accepting deeds in lieu of foreclosure, release of the deed of trust, assignment of the deed of trust, modification or re-recording of the deed of trust, and subordination of the deed of trust. The limited power of attorney is not effective for anything other than these enumerated items, which do not include being Bank of America, N.A.'s agent for service of process."

After several hearings on the Order to Show Cause the court was led to believe by Green Tree Servicing, LLC and its counsel that such misidentifications would not occur and Green Tree Servicing, LLC would comply with the Bankruptcy Code, Bankruptcy Rules, and Federal Rules of Civil Procedure, not misidentify the actual parties (such as the creditor), and present the court with the real party in interest with a case or controversy (the claim) in the bankruptcy case.

Pursuant to the Order to Show Cause the court issued an order which requires the following of Green Tree Servicing, LLC,

"IT IS ORDERED that Green Tree Servicing, LLC shall correctly identify the creditor, as defined in 11 U.S.C. § 101 (10), in each bankruptcy case for which Green Tree Servicing,

> LLC provides claim filing services for its clients. Green Tree Servicing, LLC shall not list itself as the creditor unless it is the holder of all legal rights to enforce the claim in its own name, as the assignee for collection, or as the holder of a power of attorney for another and is the agent for service of process for all purposes for any other person who holds any legal rights to enforce the claim. Any proofs of claim shall have attached to them documentation of the assignment, power of attorney, and general agent for service of process for any claims for which Green Tree Servicing, LLC asserts it is a creditor."

Order; 11-27805, Dckt. 124, filed February 14, 2012.

The law firm representing Green Tree Servicing, LLC in the Order to Show Cause proceedings was Malcolm ◆ Cisneros. The individual attorneys appearing were William G. Malcolm, Donald W. Robinson, and Nathan F. Smith (the same individual signing the proof of claim in the current case filed by Frey). See Response to Order to Show Cause and supporting pleadings, 11-27805, Dckts. 82, 83, 84, 85, 86, 87, 88, 89, and 108.

John W. and Susan Jones
Case No. 11-31713

In the *Jones* case the court issued an Order to Show Cause for Green Tree Servicing, LLC to address the basis upon which it was the creditor with a secured claim in the *Jones* case as asserted in the Transfer of Claim which it filed. Order to Show Cause; 11-31713, Dckt. 97. Green Tree Servicing, LLC filed a Response stating that filing a document identifying Green Tree Servicing, LLC was a "mistake." It was asserted that such filing was not intended to mislead the court, debtors, or other creditors as to the identity of the creditor. Further, that such misidentification was not done to foster defective service of process and insulate the creditor from orders and judgments being issued from this, and other, federal courts. Response; 11-31713, Dckt. 100.

The persons testifying in response to the Order to Show Cause in Jones included Nathan F. Smith. Declaration; *Id.*, Dckt. 101. He also is the attorney who signed the Response to the Order to Show Cause. Herschel Hoyt, a Recovery Bankruptcy Supervisor at Green Tree Servicing, LLC, testified that only the servicing for the claim was transferred to Green Tree Servicing, LLC. Declaration; *Id.*, Dckt. 102. Mr. Hoytt testifies that he directed the "Transfer of Claim" Notice be prepared and filed, stating that he now (as of providing the declaration in March 2012) recognizes the error. He further states that (and Green Tree Servicing, LLC) recognizes that Green Tree Servicing, LLC should file a request for notice so that it receives copies of pleadings, not file false documents which misrepresent that Green Tree Servicing, LLC is a creditor when it is not.

The court, accepting as honest, truthful, and good faith the statements under penalty of perjury and the arguments advanced by Mr. Smith and Malcolm ◆ Cisneros, the court discharged the order to show cause, believing that no corrective sanctions (or punitive sanctions by the District Court) were necessary to prevent this misrepresentation from occurring in the future.

CONTINUANCE FOR GREEN TREE SERVICING, LLC AND MALCOLM ◆ CISNEROS ATTORNEYS TO APPEAR

There being no basis for Green Tree Servicing, LLC, a loan servicing company, being a creditor in this case shown with Proof of Claim No. 5, the court finds it necessary to continue this hearing and issue a new Order to Show Cause. If Green Tree Servicing, LLC was not the creditor when Proof of Claim No. 5 was filed, then it appears that it was violating the prior order of this court, as well as making false statements under penalty of perjury in the proof of claim. Further, by perpetrating such fraud in the "Loan Modification," it could well be that Green Tree Servicing, LLC is actively participating with its creditor clients to mislead consumers into thinking that they have entered into bona fide loan modification. Then when advantageous the creditor (or primary, secondary, tertiary, or more remote assignee debt buyer), such as an increase in the value of real estate, the actual creditor could deny the loan modification, assert that Green Tree Servicing, LLC was never authorized to make the modification, and demand more money from the consumer under the threat of taking away the consumer's home. By that time, Green Tree Servicing, LLC could have been "wound down," all of the profits generated disbursed, and be nothing but a shrunken, withered husk from which no recovery could be made for the consumer because of Green Tree Servicing, LLC's "unauthorized conduct."

NOVEMBER 5, 2014 ORDER

On November 5, 2014, the court issued an order resetting the hearing to December 16, 2014 at 3:00 p.m.

DISCUSSION

The court continues the hearing to February 3, 2015 at 3:00 p.m. to be heard in conjunction with the Order to Appear.

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 James and Beth Fry having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Approve the Loan Modification Agreement is continued to 3:00 p.m. on February 3, 2015.

22. 13-32861-E-13 JAMES/BETH FRY ORDER TO APPEAR
RHS-1 Peter Macaluso 11-5-14 [123]

Final Ruling: No appearance at the December, 16 2014 hearing is required.

The Order to Appear was served by the Clerk of the Court on Debtors' attorney, Creditor, United States Trustee, and other such other parties in interest as stated on the Certificate of Service on November 5, 2014, 2014. The court computes that 41 days' notice has been provided.

The court's decision is to continue the hearing to 3:00 p.m. on February 3, 2015.

The court issued an Order to Appear on November 5, 2014. Dckt. 123.

ORDER TO APPEAR

The court has been presented with a Motion to Approve a Loan Modification between James and Beth Marie Fry, the consumer Debtors, and Green Tree Servicing, LLC. Motion, DCN: PGM-5, Dckt. 108. The document titled "Loan Modification Agreement" is provided as Exhibit A, Dckt. 111, which makes the following representations and statements:

a. "THIS INFORMATIONAL NOTICE IS NOT AN ATTEMPT TO COLLECT A DEBT. IF YOUR LOAN WAS DISCHARGED IN BANKRUPTCY WITHOUT A REAFFIRMATION, GREEN TREE IS NOT ATTEMPTING TO COLLECT OR RECOVER THE DISCHARGED DEBT AS YOUR PERSONAL LIABILITY."

b. The Loan Modification Agreement is between the Debtors and "Green Tree Servicing LLC ('Lender')."

c. The amount payable under the Note and Security instrument is $109,774.61, and a payment schedule is specified.

d. The Loan Modification Agreement is executed by Green Tree Servicing, LLC as "Lender," and does not purport to enter into the Loan Modification Agreement as the agent of any other person.

This court on prior occasions has ordered Green Tree Servicing, LLC and its attorneys to appear and address whether it was the actual creditor in the bankruptcy case or the loan servicer. It has been presented to the court that Green Tree Servicing, LLC is the loan servicer – not the Creditor, as defined in 11 U.S.C. § 101(10) and (5) to whom the obligation is owed. This court has ordered Green Tree Servicing, LLC to accurately identify the creditor on all proofs of claims and pleadings filed in bankruptcy cases nationwide. Further, this court ordered that Green Tree Servicing, LLC not misrepresent that a claim has been transferred to it when Green Tree Servicing, LLC merely acquires the loan servicing rights from another loan servicer.

Several of the cases and orders issued thereon by this court include the following:

Edwin and Cynthia Crane
Case No. 11-27805

In the Crane case, Green Tree Servicing, LLC filed a proof of claim stating that it was a creditor holding a secured claim. The court issued an Order to Show Cause why this court should not order Green Tree Servicing, LLC to file an amended proof of claim correctly identifying the creditor (rather than misidentifying the loan servicer, Green Tree Servicing, LLC, as the creditor) and why this court should not transmit this matter to the United States District Court for consideration of punitive sanctions. Order to Show Cause, Dckt. 76, filed October 7, 2011.

The law firm representing Green Tree Servicing, LLC in the Order to Show Cause proceedings was Malcolm ◆ Cisneros. The individual attorneys appearing were William G. Malcolm, Donald W. Robinson, and Nathan F. Smith (the same individual signing the proof of claim in the current case filed by Frey). See Response to Order to Show Cause and supporting pleadings, 11-27805, Dckts. 82, 83, 84, 85, 86, 87, 88, 89, and 108.

In responding to the Order to Show Cause, Green Tree Servicing, LLC confirmed that it is the loan servicer and not the creditor. In the court's Civil Minutes from the November 8, 2011 hearing on the Order to Show Cause, the court addressed the response as follows:

> On November 4, 2011, Green Tree filed a supplemental response. Dckt. 108. In this response Green Tree states that it was not intending to hide the identify [sic.] of the creditor and attached copies of various documents relating to Residential Funding, LLC, LaSalle Bank, N.A., Wells Fargo Bank, N.A., and Bank of America, N.A. as having involvement with the claim. Further, that Green Tree has a power of attorney from Bank of America, N.A. which allows it to file the proof of claim for Bank of America, N.A. Green Tree further contends that Bank of America, N.A., though undisclosed as the creditor, could be served through Green Tree as the agent for Bank of America, N.A.
>
> The supplemental response misses the mark. The court's concern is that the method used by Green Tree fails to disclose the creditor, thereby precluding the debtor and parties in interest from ever serving the creditor with process or contested matters. Merely saying that someone is an agent for a purpose does not elevate them to an agent for all purposes. Further, Fed. R. Bank. P. 7004(h) provides a very specific method by which a federally insured financial institution, such as Bank of America, N.A., must be served. That does not include sending process or contested matters to a loan servicer.
>
> Green Tree directs the court to review the limited power of attorney attached to the amended proof of claim. This was attached as one of the 130 pages of the amended proof

> of claim. However, in reading the limited power of attorney, it expressly states that it is limited to 10 enumerated transactions, none of which are to serve as the agent for service of process for Bank of America, N.A. The transactions identified relate to documentation concerning the deed of trust, providing notices and statements, accepting deeds in lieu of foreclosure, release of the deed of trust, assignment of the deed of trust, modification or re-recording of the deed of trust, and subordination of the deed of trust. The limited power of attorney is not effective for anything other than these enumerated items, which do not include being Bank of America, N.A.'s agent for service of process.

Civil Minutes, 11-27805, Dckt. 111.

In their Response, Green Tree Servicing, LLC advised the court that while the promissory note in the Crane case was endorsed in blank, "[p]ursuant to a Custodial Agreement between Residential Funding Company, LLC, LaSalle Bank, N.A., as Indenture Trustee, and Wells Fargo Bank, N.A., the Note is in the physical possession of Wells Fargo Bank. See Walz Declaration, pg. 3, ¶ 6, Id. Dckt. 88. The original note is being delivered to M ◆ C and will be maintained in M ◆ C's fireproof safe pending the hearing." Motion to Vacate Order to Show Cause, Id. Dckt. 82.

As this court has addressed previously, such a statement and testimony by Michelle Walz, a "Bankruptcy Supervisor for Green Tree Servicing, LLC," admits that Green Tree Servicing, LLC is not in physical possession of the notes when it files claims or executes loan modifications. Rather, when it's legal ability to present itself as a "creditor" was in question, Green Tree Servicing, LLC and its attorneys attempted to create an artifice to mislead the court into thinking that Green Tree Servicing, LLC actually took possession of notes endorsed in blank from its clients, and as such, entitled to exercise the rights of, compromise the rights of, and suffer negative judgments as to the rights of, the actual creditor who had given possession of bearer paper to Green Tree Servicing, LLC. As demonstrated by the evidence presented in the Crane Case, it did not have possession of the note.

After several hearings on the Order to Show Cause, the court was led to believe by Green Tree Servicing, LLC and its counsel that such misidentifications would no longer occur. Green Tree Servicing, LLC stated it would comply with the Bankruptcy Code, Bankruptcy Rules, and Federal Rules of Civil Procedure, not misidentify the actual parties (such as the creditor), and present the court with the real party in interest with a case or controversy (the claim) in the bankruptcy case.

Pursuant to the Order to Show Cause the court issued an order which requires the following of Green Tree Servicing, LLC:

> IT IS ORDERED that Green Tree Servicing, LLC shall correctly identify the creditor, as defined in 11 U.S.C. § 101 (10), in each bankruptcy case for which Green Tree Servicing, LLC provides claim filing services for its clients. Green Tree Servicing, LLC shall not list itself as the creditor unless it is the holder of all legal rights to enforce the claim in its own name, as the assignee for collection, or as the holder of

> a power of attorney for another and is the agent for service of process for all purposes for any other person who holds any legal rights to enforce the claim. Any proofs of claim shall have attached to them documentation of the assignment, power of attorney, and general agent for service of process for any claims for which Green Tree Servicing, LLC asserts it is a creditor.

Order; Case No. 11-27805, Dckt. 124, filed February 14, 2012.

John W. and Susan Jones
Case No. 11-31713

In the Jones case, the court issued an Order to Show Cause for Green Tree Servicing, LLC to address the basis upon which it was the creditor with a secured claim in the Jones case as asserted in the Transfer of Claim which it filed. Order to Show Cause; Case No. 11-31713, Dckt. 97. Green Tree Servicing, LLC filed a Response stating that filing a document identifying Green Tree Servicing, LLC was a "mistake." It was asserted that such filing was not intended to mislead the court, debtors, or other creditors as to the identity of the creditor. Further, that such misidentification was not done to foster defective service of process and insulate the creditor from orders and judgments being issued from this, and other, federal courts. Response; Case No. 11-31713, Dckt. 100.

The persons testifying in response to the Order to Show Cause in Jones included Nathan F. Smith. Declaration; Case No. 11-31713, Dckt. 101. He also is the attorney who signed the Response to the Order to Show Cause. Herschel Hoyt, a Recovery Bankruptcy Supervisor at Green Tree Servicing, LLC, testified that only the servicing for the claim was transferred to Green Tree Servicing, LLC. Declaration; Case No. 11-31713, Dckt. 102.

Mr. Hoytt testifies that he directed the "Transfer of Claim" Notice be prepared and filed, stating that he now (as of providing the declaration in March 2012) recognizes the error. He further states that (and Green Tree Servicing, LLC) recognizes that Green Tree Servicing, LLC should file a request for notice so that it receives copies of pleadings, not file false documents which misrepresent that Green Tree Servicing, LLC is a creditor when it is not. He testified under penalty of perjury,

A. Bank of New York Mellon f.k.a. The Bank of New York, as successor trustee to JPMorgan Chase, as Trustee on behalf of the Certificateholders of the CWHEQ, Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-H ("BONY"), is the creditor.

B. On October 1, 2011, servicing obligations of the BONY claim were transferred from BAC Home Loan Servicing, LLC (called the defined term "BOA" in the declaration) to Green Tree Servicing, LLC.

C. "On December 9, 2011, I directed that a Transfer of Claim ('TOC') be filed by Green Tree in the Debtors' Bankruptcy Case. The TOC was filed due to the transfer of servicing obligations from BOA to Green Tree; however, the TOC errantly states that the claim evidence by the POC [proof of claim] was transferred

to Green Tree. In fact, the claim was not transferred to Green Tree. Rather, only the servicing obligations on behalf of the BONY were transferred to Green Tree. The filing of the TOC was a mistake...."

D. "The filing of the TOC was in error, and I apologize to the Court and to the Debtors for its filing. Green Tree should have filed a Request for Special Notice to ensure that it would receive service of pleadings filed the Bankruptcy Case, not a Transfer of Claim."

Declaration, Case No. 11-31713, ¶¶ 4, 5, 7, 8.

The court accepted as honest, truthful, and in good faith the statements under penalty of perjury and the arguments advanced by Mr. Smith and Malcolm ◆ Cisneros, and the testimony under penalty of perjury by Mr. Hoytt. The court discharged the order to show cause, believing that no corrective sanctions (or punitive sanctions by the District Court) were necessary to prevent this misrepresentation from occurring in the future.

RESPONSE AND HEARING REQUIRED FOR GREEN TREE SERVICING, LLC AND MALCOLM ◆ CISNEROS CONCERNING PROOF OF CLAIM NO. 5

There has been no basis presented for Green Tree Servicing, LLC, a self admitted loan servicing company, presenting itself as the "creditor" in this case for the obligation which is the basis for Proof of Claim No. 5. The Deed of Trust attached to Proof of Claim No. 5 identifies the "Lender" (as the defined term in the Deed of Trust) to be GMAC Mortgage Corporation DBA ditech.com. The Note attached to Proof of Claim No. 5 states that the "Lender" (defined term in the Note) is GMAC Mortgage Corporation DBA ditech.com. The Note has a blank endorsement, ("Pay to the Order of" with no name completed). No testimony or documentation has been provided that Green Tree Servicing, LLC is in possession of various notes endorsed in blank for this client or other clients. A copy of an unrecorded Corporate Assignment of Deed of Trust (with various non-consumer appearing information redacted with a marker) is attached to Proof of Claim No. 5. This unrecorded Assignment of Deed of Trust states that Mortgage Electronic Registration Systems, Inc., as Nominee for GMAC Mortgage, assigns the Deed of Trust to Green Tree Servicing, LLC (and what appears to be another entity whose name is redacted out with a marker). See Cervantes v. Countrywide Home Loans, Inc. et. al., 656 F.3d 1034 (9th Cir. 2011); Seidell v. Tuxedo Land Co., 216 Cal. 165, 170 (1932); Carpenter v. Longan, 83 U.S. 271, 274 (1872); and Cal. Civ. Code § 2936 (concerning the inability to separate the lien from the person who is owed, or has the right to enforce, the debt). FN.1.

FN.1. Notwithstanding what has long been the law in California, in one case Green Tree Servicing, LLC wrongly argued that it was the "creditor," stating,

> In response to the Court's concerns regarding the nature of Green Tree's interest in the property, Green Tree submits that the subject deed of trust was assigned to Green Tree on December 3, 2011. Therefore, Green Tree is a creditor, as defined by § 101(10) and has standing to bring the Motion [for relief from the automatic stay].

In re Matthew and Kristi Separovich, E.D. Cal. Case No. 11-42848; Response to Order to Show Cause, Dckt. 49. While a loan servicing company may have standing to bring a motion for relief from the automatic stay so that the servicing company, its' principal (the creditor), and successors in interest may enforce lien rights, such standing does not a "creditor" make.

The court finds it necessary to order Green Tree Servicing, LLC, and the attorneys at MALCOLM ◆ CISNEROS to appear and present evidence of Green Tree Servicing, LLC to be the creditor for Proof of Claim No. 5 and the right to modify, in its own name and not in the representative capacity of the creditor, the Note as provided in the Loan Modification Agreement.

If Green Tree Servicing, LLC was not the creditor when Proof of Claim No. 5 was filed, then it appears that it was violating the prior order of this court as well as making false statements under penalty of perjury in the proof of claim. Further, by perpetrating such fraud in the "Loan Modification," it could well be that Green Tree Servicing, LLC is actively participating with its creditor clients to mislead consumers into thinking that they have entered into bona fide loan modification. Then, when advantageous the creditor (or primary, secondary, tertiary, or more remote assignee debt buyer), such as an increase in the value of real estate, the actual creditor could deny the loan modification, assert that Green Tree Servicing, LLC was never authorized to make the modification, and demand more money from the consumer under the threat of taking away the consumer's home. By that time, Green Tree Servicing, LLC could have been "wound down," all of the profits generated disbursed, and be nothing but a shrunken, withered husk from which no recovery could be made for the consumer because of Green Tree Servicing, LLC's "unauthorized conduct."

The conduct of a bona fide loan servicer acting as the agent for the principal, the creditor, is a very simple and basic concept. All that the loan servicer has to do is identify the principal in the Loan Modification Agreement and then execute the Loan Modification Agreement for the creditor clearly stating the loan servicer's agent status. Such conduct is routine in commercial transactions every day. That Green Tree Servicing, LLC and the attorneys at MALCOLM ◆ CISNEROS appear to be actively working to hide the identity of the creditor could well appear to indicate a well-conceived scheme to defraud the consumer debtors, creditors, and the federal court.

The court ordered that:

> **IT IS ORDERED** that a hearing shall be conducted on December 16, 2014 at 3:00 p.m. to consider evidence and arguments concerning whether Green Tree Servicing, LLC is a creditor, as defined in 11 U.S.C. § 101(10) and (5), in this bankruptcy case.
>
> **IT IS FURTHER ORDERED** that Green Tree Servicing, LLC shall,
>
> A. On or before November 26, 2014, file and serve on Debtors' counsel, the U.S. Trustee, and the Chapter 13 Trustee,
>
> 1. Copies of all documents by which Green Tree Servicing, LLC asserts that it has

transferred or received any interests or rights in the obligation which is the basis for Proof of Claim No. 5 (a copy of which is attached to this Order as Addendum A).

2. Testimony provided by a person or persons with personal knowledge (Fed. R. Evid. 601, 602) to authenticate all documents produced, the transfer or transfers of any interests, who has been in possession of the promissory note upon which the obligation for Proof of Claim No. 5 is based, and the dates such person was in possession, the dates possession was transferred.

3. If Green Tree Servicing, LLC asserts that it is the person entitled to enforce the Note as the holder of bearer paper, provide competent, admissible evidence of: (1) when it took possession of the specific note for this claim and its regular business practices for and with its clients (identifying the clients) when it takes possession of the endorsed in blank notes (or other bearer paper); (2) the clients from whom it has taken possession of such Note; (3) the number of such Notes which it took in its possession since 2013, with the number of notes identified for each calendar month; (4) how long Green Tree Servicing, LLC has or did retain possession of such Notes; and (5) where such Notes are stored and who, for Green Tree Servicing, LLC, is in possession of such Notes.

B. Appear (No Telephonic Appearances Permitted) at the December 16, 2014 hearing, with counsel of its choice, through a Senior Green Tree Servicing, LLC Managing Member with personal knowledge of Proof of Claim No. 5, the obligation upon which Proof of Claim No. 5 is based, whether Green Tree Servicing, LLC asserts any interest in the obligation upon which Proof of Claim No. 5 is based, and whether the obligation to be modified as requested by the Debtors and Green Tree Servicing, LLC is an obligation to which Green Tree Servicing, LLC is a party or asserts any legal or equitable interest in or rights thereto.

IT IS FURTHER ORDERED that Green Tree Servicing, LLC, and each of them, shall bring with it and produce in open court on December 16, 2014, the original documents of all copies which are filed in court pursuant to this Order.

IT IS FURTHER ORDERED that William G. Malcolm and Nathan F. Smith, and each of them, individually and as representatives of the MALCOLM ◆ CISNEROS Law Firm, shall,

A. On or before November 26, 2014, file and serve on Debtors' counsel, the U.S. Trustee, and the Chapter 13 Trustee,

1. Copies of all documents and legal authorities by which they assert that the execution and filing of Proof of Claim No. 5 by Nathan F. Smith, an attorney with MALCOLM ◆ CISNEROS Law Firm, was,

a. True and correct;

b. Accurately identified the creditor, as defined in 11 U.S.C. § 101(10) and (5);

c. Was a warranted statement that Green Tree Servicing, LLC was such "creditor" based on existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and

d. Was made based on a reasonable determination that have evidentiary support.

B. Appear (No Telephonic Appearances Permitted) at the December 16, 2014 hearing, in person.

IT IS FURTHER ORDERED that on or before December 8, 2014, any reply or response shall be filed and served on Debtors' counsel, the U.S. Trustee, the Chapter 13 Trustee, Green Tree Servicing, LLC, and MALCOLM ◆ CISNEROS Law Firm.

The Clerk of the Court shall serve copies of this Order on:

A. The United States Trustee, Region 17
Sacramento Division, Attn: Antonia Darling, Esq.

B. David Cusick, Chapter 13 Trustee

C. Peter G. Macaluso, Esq.
7311 Greenhaven Dr. #100
Sacramento, CA 95831

D. Green Tree Servicing, LLC
Attn: Managing Member - Service of Process
1400 Landmark Towers
345 St. Peter St.
St. Paul, MN 55102

E. Green Tree Servicing, LLC

Attn: Managing Member - Service of Process
P.O. Box 6154
Rapid City, SD 57709

F. Green Tree Servicing, LLC
Attn: Managing Member - Service of Process
P.O. Box 0049
Palatine, IL 60055

G. William Malcolm, Esq.
Malcolm & Cisneros
2112 Business Center Dr., 2nd Flr.
Irvine, CA 92612

H. Nathan F. Smith, Esq.
Malcolm & Cisneros
2112 Business Center Dr., 2nd Flr.
Irvine, CA 92612

GREEN TREE SERVICING LLC'S RESPONSE

Green Tree Servicing LLC and MALCOLM ◆ CISNEROS Law Firm filed a response to the court's Order on November 26, 2014. Dckt. 128.

In the response, the parties state that Green Tree is a creditor in this case because it is the holder of the endorsed promissory note and is entitled to payment on the Note. Green Tree argues that the Debtors' loan was acquired from GMAC by FNMA with the servicing right retained by GMAC. The loan was owned by FNMA as of January 31, 2013, when Green Tree purchased the right to service the Debtors' loan from GMAC. Effective February 1, 2013, the right to collect payments from the Debtors pursuant to the note and Deed of Trust were transferred to Green Tree pursuant to an Asset Purchase Agreement dated January 31, 2013 between GMAC Mortgage, LLC and Residential Funding Company, LLC as sellers, and Green Tree, Walter Investments Management Corp., and Ocwen, as purchasers. The Note is located at Ally Bank in Waterloo, Iowa, where it has been held since Green Tree acquired the servicing rights from GMAC on January 31, 2013. Ally Bank is a document custodian who maintains the Note in secure facility on behalf of Green Tree.

Green Tree also states that it is contractually entitled to modify the terms of the Debtor's Note and deed of trust pursuant to a Limited Power of Attorney whereby FNMA appointed Green Tree as its true and lawful attorney-in-fact via a Limited Power of Attorney between Green Tree and FNMA. Pursuant to the Limited Power of Attorney "FNMA appointed Green Tree as its true and lawful attorney-in-fact, and in FNMA's name, place and stead and for its use and benefits, to execute, endorse, and acknowledge all documents customarily and reasonably necessary and appropriate for," among other things, "4. The modification or extension of a mortgage or deed of trust." Dckt. 132, Exhibit 5. Green Tree further argues that the Servicing Guide provides for authorization to modify since it provides that "[t]he servicer is authorized to execute legal documents related to. . . mortgage loan modifications. . . for any mortgage loan for which it. . .is the owner of record." Dckt. 132, Exhibit 7.

DISCUSSION

The court discerns from Green Tree's response that they are alleging two situations in which they are authorized to enter into loan modifications: (1) under the Limited Power of Attorney Agreement with FNMA; and (2) as the holder of the endorsed promissory note.

The Limited Power of Attorney Agreement (Dckt. 132, Exhibit 5) states Green Tree is the lawful Attorney-in-Fact for FNMA "in its name, place and stead and for its use and benefits, to execute endorse, and acknowledge all documents customarily and reasonably necessary and appropriate for:. . . 4. The modification or extension of a mortgage or deed of trust." The Limited Power of Attorney itself acknowledges that the mortgage or deed of trust is different from the promissory note it secures. See Paragraph 8 of Limited Power of Attorney which states [emphasis added], "the assigmentor endorsement of mortgages, deeds of trust, **or promissory notes** to [FMHA and other identified entities]...." Exhibit 5, Dckt. 132.

However, the Limited Power of Attorney does not state that Green Tree has the authorization to modify the underlying obligation. Instead, it merely states that it may modify the security instruments of the underlying obligation. The same holds true for the Servicing Guide, which only addresses the security instrument and not a modification of the underlying obligation.

Even if the court were to so broadly interpret the power of attorney and ignore the difference between a promissory note and a mortgage or deed of trust, Green Tree exercises the power of attorney in the name of, and as the agent of, FNMA.

The court is once again left questioning whether Green Tree, in fact, has the authority to enter into a loan modification when the Limited Power of Attorney and the Servicing Guide only discuss the security instruments themselves but not the underlying obligation.

As to Green Tree's other ground of alleged authorization – that Green Tree is the Creditor because it is the holder of the endorsed promissory note – the court is concerned as to whether Green Tree is the actual holder. Green Tree does not provide the custodial agreement between Ally Bank and Green Tree stating that Ally Bank is holding the note on behalf of Green Tree. Additionally, Green Tree does not provide an explanation of how GMCA assigned its interest in the Deed of Trust to Green Tree when the only rights GMCA had as of September 9, 2013 were the residual servicing rights after GMCA sold the loan to FNMA. Green Tree does not provide sufficient explanation how there was a transfer of the loan to Green Tree, outside of what appears to be the servicing rights, to define Green Tree as a "creditor" to enter into loan modifications on behalf the true holder of the loan.

Green Tree has provided the court with an Exhibit 6, Dckt. 132, titled "A2-1-04 Note Holder Status for Legal Proceedings Conducted in Servicer's Name (11/12/2014),which states,

Ownership and Possession of Note by Fannie Mae

"Fannie Mae may have direct possession of the note or a custodian may have custody of the note. If Fannie Mae

possesses the note through a document custodian, **the document custodian has custody of the note for Fannie Mae's exclusive use and benefit.**"

Id., Emphasis Added. This document further states that Temporary Possession of the note is given to the Servicer by Fannie Mae "upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in foreclosure, bankruptcy, probate, or other legal proceedings." *Id.* Further, that the custodian's possession of the note is the constructive possession of the note by the servicer, with the servicer authorized to enforce the note in the servicer's name.

This documents indicate that there may be a procedure by which the custodian may be holding the documents for Fannie Mae, and then maybe they don't hold the documents for Fannie Mae. Nobody from Fannie Mae has testified that "possession" of the Note has been transferred to Green Tree Servicing, LLC. Further, nobody from Fannie Mae has testified that it is no longer in possession of any notes whenever Green Tree Servicing, LLC files a proof of claim, a motion, or any other pleading in a bankruptcy case, irrespective of the duration of that case. (In a Chapter 11 case, such "possession" of a note could go on for decades.)

The court denies Green Tree's request to discharge the Order. The court continues the hearing to 3:00 p.m. on February 3, 2015. The court, in addition to the court's prior Order to Appear, further orders on or before January 16, 2014, Green Tree Servicing, LLC to file copy of the custodial agreement with Ally Bank and supplemental pleadings providing an explanation of how the custodial agreement asserts that Ally Bank is holding the Note on behalf of Green Tree Servicing, LLC.

IT IS ORDERED that the hearing shall be continued to February 3, 2015 at 3:00 p.m.

IT IS FURTHER ORDERED that Green Tree Servicing, LLC shall,

A. On or before January 15, 2015, file and serve on Debtors' counsel, the U.S. Trustee, and the Chapter 13 Trustee,

1. Copies of all documents concerning the custodial agreement between Green Tree Servicing, LLC and Ally Bank.

2. Testimony provided by a person or persons with personal knowledge (Fed. R. Evid. 601, 602) to authenticate all documents produced.

3. If Green Tree Servicing, LLC is not the party in which Ally Bank is holding the Note and Deed of Trust on behalf of, provide competent, admissible evidence of: (1) how Green Tree is asserting that Ally Bank is holding the Note and Deed of Trust for Green Tree Servicing on its behalf; and (2) how

Federal National Mortgage Corporation are not the true and correct holder of the Debtors' Note and Deed of Trust.

B. Appear (No Telephonic Appearances Permitted) at the February 3, 2015 hearing, with counsel of its choice, through a Senior Green Tree Servicing, LLC Managing Member with personal knowledge of Proof of Claim No. 5, the obligation upon which Proof of Claim No. 5 is based, whether Green Tree Servicing, LLC asserts any interest in the obligation upon which Proof of Claim No. 5 is based, and whether the obligation to be modified as requested by the Debtors and Green Tree Servicing, LLC is an obligation to which Green Tree Servicing, LLC is a party or asserts any legal or equitable interest in or rights thereto.

IT IS FURTHER ORDERED that Green Tree Servicing, LLC, and each of them, shall bring with it and produce in open court on February 3, 2015, the original documents of all copies which are filed in court pursuant to this Order.

IT IS FURTHER ORDERED that on or before January 23, 2015, any reply or response shall be filed and served on Debtors' counsel, the U.S. Trustee, the Chapter 13 Trustee, Green Tree Servicing, LLC, and MALCOLM ◆ CISNEROS Law Firm.

23. 14-29361-E-13 WALT SCHAEFER
DPC-1 Douglas Jacobs

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-20-14 [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, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 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.

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

1. Debtor is $1,512.30 delinquent in plan payments to the Trustee to date and the next scheduled payment of $1,512.30 is due November 25,2014. The case was filed on September 18, 2014, and the plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each month beginning the month after the order for relief under Chapter 13. The Debtor has paid $0.00 into the plan to date.

2. Debtor's Schedule I (Dckt. 12, pages 22-23) fails to include an attachment showing detailed gross business income and expenses as required by the form, line 8a.

3. Debtor's plan is not the Debtor's best effort under 11 U.S.C. § 1325(b). Debtor is above median income, although Form B22 (Dckt. 12, pages 1-7) has not been properly filled out. Debtor's plan proposes to pay $1,512.30 for sixty months, paying 100% to unsecured claims. Debtor's Schedule J, line 23c shows net disposable income of $1,789.00 per month which is $276.70 more than the proposed plan payment. Where the plan is effective on confirmation and unsecured creditors are not paid in full on that date, interest appears to be required to pay the present value to unsecured claims.

4. Schedule B (Dckt. 12) discloses at line 35 100% ownership of AMI Precision, Inc. and values the business at $0.00. Debtor testified at the First Meeting of Creditors held on November 13, 2014 that AMI Precision, Inc. is a sheet metal fabrication business and there are business assets not disclosed on the Schedule. Debtor has failed to describe the assets or identify any debt to business creditors, where the Debtor is a co-obligor. Schedule H does not list any co-debtors (Dckt. 12, pg. 21).

5. Class 4 of Debtor's plan (Dckt. 10) lists a mortgage to Bank of the West on commercial real property at 763 Main Street, Chester California. Debtor testified that this property is currently in escrow and the mortgage is four months delinquent. Debtor stated that he was relying on the sale of the property to pay the mortgage arrears. Based on the language of the plan in Section 2.08, the mortgage should be provided for in Class 1 of the plan, and an adequate protection payment provided to the creditor as the sale is pending.

6. Debtor's Statement of Current Monthly Income, Form B22 (dckt. 12) is not properly filled out. Based on the wage income in line 2, and the rental income in line 4a, Debtor is above median income and the form should be filled out. Debtor improperly deducts the rental expenses at line 4b.

DEBTOR'S REPLY

Debtor filed a reply to the Trustee's objection on December 8, 2014. Dckt. 28. The Debtor states the following:

1. The Trustee notes a delinquency in plan payments and indicates that a second payment will be due before this matter is heard. The Debtor will make the two missing payments prior to the hearing on the plan.

2. The Trustee states that the plan is not the Debtor's best efforts yet the plan calls for the payment of 100% of the unsecured claims.

3. As noted by the Trustee, there is some additional information that needs to be included in the petition. The Debtor owns equipment in a sheet metal fabrication corporation and neglected to list all of the equipment in that business that is personally owned.

4. This plan cannot be confirmed until the changes and additional information requested by the Trustee are completed.

5. The Debtor will file an amended plan along with any additional information requested by the Trustee and will set such plan for confirmation hearing.

DISCUSSION

The Trustee's objections are well-taken. The Debtor remains to be delinquent. There is no evidence that the Debtor has cured the delinquency. The Trustee's remaining objections seem to all correlate with what the Debtor admits in the response – there is missing information in the petition and plan as well as there are necessary changes needed to be made. Without the necessary forms, schedules, and plan being filled out honestly and properly, the court cannot determine if the Plan is feasible.

While the Debtor's reply questions the Trustee's objection as to Debtor's best efforts, the failure of the Debtor to properly list all assets, properly provide for claims in the Plan, and being delinquent under the Plan are all indications that the Plan is, in fact, not Debtor's best efforts.

With respect to the Plan being a 100% plan, it does not provide for paying creditors interest. The Debtor proposes to spread $25,000.00 of general unsecured claims over 60 months with the $1,512.30 plan payment. Adding the additional $267.00 a month would shorten the plan to approximately 40 months. Debtor has not shown a reason why creditors with very modest general unsecured claims should be delayed almost two years in getting paid while the Debtor keeps the "extra" money.

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

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

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

24. 14-27266-E-13 MICHAEL MASON — MOTION TO SELL
NBC-1 Eamonn Foster — 11-21-14 [21]

Tentative Ruling: The Motion to Sell Property 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 whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 21, 2014. By the court's calculation, 25 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property 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 Sell Property is denied without prejudice.

The Bankruptcy Code permits the Chapter 13 Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to sell the "Property" described as follows:

A. 23689 Proberta Road, Gerber, California

The proposed purchaser of the Property is M&S Properties. The Movant states in the Motion that the Debtor is seeking to short sell the Property becaues the First Deed of Trust Holder, Nationstar Mortgage LLC, the Second Deed of Trust Holder, Wells Fargo Bank, N.A., and Movant have agreed to sell the property to M&S Properties.

Movant states that the purpose of the Motion is to obtain a “comfort order” so that the court may find that negotiating and entering into a sale agreement does not violate 11 U.S.C. § 362 or any other provision of the Bankruptcy Code or law. Movant states that he is not requesting that the court approve nor disapprove any specific terms of the sale agreement or any incorporated document.

Movant argues that he has already stated in his schedules and in the confirmed plan that his intention is to surrender the property. There will be no net proceeds from the sale available to the Movant, as the proposed sale is a short sale.

Movant does not provide any purchase agreement nor any stipulations between the Movant, Nationstar Mortgage LLC, or Wells Fargo Bank, N.A.

MOVANT SEEKS AN ADVISORY OPINION

The Motion does not seek the court to approve any proposed sale of any property as permitted by 11 U.S.C. § 363, but is stated to seek “a "comfort order" so that the Court may find that negotiating and entering into a sale agreement does not violate the automatic stay provision of 11 U.S.C. § 362 or any other provision of the Bankruptcy Code or law.” The court first notes that it has not been shown that the automatic stay in any way limits the Chapter 13 Debtor from fulfilling its obligations and rights as the fiduciary of the bankruptcy estate with respect to selling property of the estate as permitted pursuant to 11 U.S.C. § 363. The court also notes that the words “comfort order” are generally code for, “there is no basis for this motion and no need for the order, but someone is making the Debtor, or is personally seeking, an order which does nothing.” There is no “case or controversy” as required by Article III, Section 2 of the United States Constitution for the proper exercise of federal judicial power, and this court will not purport to exercise such extra-Constitutional power. FN.1.

FN.1. The Declaration of Janae Grisham has been provided in support of the Motion. Dckt. 23. Grisham testifies that Nationstar Mortgage, LLC and Wells Fargo Bank, N.A. have requested that the Debtor seek this Advisory Opinion for a non-existent sale. The court is bewildered as to why or how, in good faith, either of these sophisticated entities, one commonly a creditor and the other a loan servicer, would require the Debtor and Debtor’s counsel to waste the time and money in filing such a frivolous motion. The court will consider whether issuing an order to appear and explain the basis for requiring this Motion by these two sophisticated entities is proper, warranted, and consistent with their prosecuting their interests in this case.

The Motion is denied without prejudice. The Chapter 13 Debtor may exercise the rights and powers, as the fiduciary of the bankruptcy estate, negotiate the terms of an actual sale, and then present that sale to the court for approval.

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 Sell Property filed by Michael Mason, the Chapter 13 Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

25. 14-30070-E-13 DPC-1 LEAH CHERRY Mikalah Liviakis

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 11-20-14 [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 Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 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.

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

1. Debtor has not complied with 11 U.S.C. § 1325(a)(2). On October 9, 2014, the court issued an Order Approving Payment of Filing Fees in installments. Dckt. 6. According to the Order, installments are due November 10th and December 9th, 2014, and January 7th and February 6th, 2015. Debtor has paid the installments of $77.00 due on November 10, 2014, and December 10, 2014 have been paid.

2. The Debtor cannot make the payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6). The Debtor proposes to value the secured claim of Vanderbilt Mortgage on a second deed of trust on real property at 137 Hap Arnold Loop, Roseville, California. Debtor filed a Motion to Value Collateral on October 20, 2014 (Dckt. 16), then withdrew the Motion on November 3, 2014. Dckt. 23. No new Motion to Value Collateral has not been filed to date.

3. The plan does not pay unsecured creditors what they would receive in the event of a Chapter 7. 11 U.S.C. § 1325(a)(4). Debtor's non-exempt assets total $1,422.00 and Debtor proposes to pay 0% to unsecured creditors. According to Debtor's Schedule B and C (Dckt. 1, pages 10-15), non exempt equity of $1,422.00 exists in a 2007 Toyota Prius.

As to the Trustee's first objection, it appears that the Debtor has paid the installment fees to date. Therefore, the first objection is overruled. However, the remaining Trustee's objections are well-taken. The proposed Plan is based on the success of a motion to value the secured claim of Vanderbilt Mortgage. The Debtor withdrew a Motion to Value on November 3, 2014. Dckt. 23. A review of the docket shows that no new motion to value has been filed. Without the Vanderbilt Mortgage being valued, the Debtor's proposed Plan is not feasible. As to the Trustee's third objection, there does appear to be non-exempt equity remaining in the 2007 Toyota Prius that would be avaliable to unsecured creditors in a Chapter 7. Therefore, it appears that the proposed Plan fails the liquidation analysis under 11 U.S.C. § 1325(a)(4).

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

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

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

26. 12-31671-E-13 CHRISTIAN NEWMAN
PGM-6 Peter Macaluso

CONTINUED EVIDENTIARY HEARING RE: MOTION TO CONFIRM PLAN 2-13-14 [149]

Final Ruling: No appearance at the December, 16 2014 hearing is required.

On December 12, 2014, the court issued an Order on Stipulation Regarding Evidentiary Hearing on Debtor's Motion to confirm Fifth Amended Plan. Dckt. 220. The court, in the order, continued the evidentiary Hearing to 3:00 p.m. on February 3, 2014, to be heard in conjunction with the court's order to appear set for the same date and time.

The court's decision is to continue the hearing to 3:00 p.m. on February 3, 2015.

27. 14-29671-E-13 DANNY RUE
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-20-14 [42]

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*), Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 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.

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

1. Debtor is $1,005.00 delinquent in plan payments to the Trustee to date and the next scheduled payment of $1,005.00 is due November 25, 2014. The case was filed on September 29, 2014, and the plan in § 1.01 calls for payments to be received by the Trustee not later than the 25th day of each month beginning the month after the order for relief under Chapter 13. The Debtor has paid $0.00 into the plan to date.

2. Debtor has not complied with 11 U.S.C. § 1325(a)(2). On September 29, 2014, the court issued an Order Approving Payment of Filing Fees in installments. Dckt. 7. According to the Order, installments are due October 29th, December 1st, and December 29th, 2014 and January 27th, 2015. Debtor has paid the first installment of $77.00 due on October 29, 2014.

3. The Debtor cannot make the payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6). The Debtor proposes to value the secured claim of Anna Bliss Revocable Living Trust on a second deed of trust on Debtor's residence, but has failed to file a Motion to Value Collateral to date.

4. Section 2.15 of the plan (Dckt. 22) lists total unsecured debts as $2,169.00. A review of Debtor's Schedules D, E, and F (Dckt. 23) indicates that total unsecured debts are actually $36,512.00.

5. Class 4 of Debtor's plan lists a mortgage of $971.31 to America's Servicing Co. Debtor testified at the First Meeting of Creditors held on November 13, 2014 that he is in a trial loan modification. Debtor also testified that he has not yet made a trial mortgage payment and has not made any mortgage payment within the last year. Based on the language of the plan in section 2.08, the mortgage should be provided for in Class 1 of the plan and an adequate protection payment provided to the creditor through the plan.

6. Debtor has failed to use the correct form for the Statement of Current Monthly Income, Form B22. Debtor filed a Chapter 7 means test on September 29, 2014. Dckt. 1, pages 19-27.

7. Debtor's Petition (Dckt. 1) fails to list a prior filing, case number 13-24737.

8. The Petition may not be filed in good faith under 11 U.S.C. § 362(c)(4)(B), and the Trustee is not certain that Debtor can prove good faith. At the hearing held on October 28, 2014, the court denied Debtor's Motion to Extend Automatic Stay in this case (Dckt. 33) and state in part that "the Debtor has not shown that the case was entered into in good faith nor gave any justification on why the prior three bankruptcy cases were dismissed within the past year."

To start, a review of the docket shows that the Debtor has paid the installment fee on December 1, 2014. Therefore, the Trustee's second objection is overruled.

However, the Trustee's remaining objections are well-taken. The Debtor is currently delinquent under the Plan. There is no Motion to Value the secured claim of Anna Bliss Revocable Living Trust which is necessary for the Plan to be feasible as currently drafted. A review of Debtor's proposed plan and Debtor's Schedules show that there is a discrepancy on the total unsecured debts owed. Based on the representation s at the First Meeting of Creditors, the Trustee appears to be correct that America's Servicing Co. should be listed as a Class 1 claim, especially since there is no pending Motion to Approve Loan Modification pending. Debtor has not properly submitted the correct form for the Statement of Current Monthly Income. The Debtor failed to list his prior bankruptcy, case number 13-24737. Lastly, based on the myriad of issues and the repeated filings of the Debtor, it appears to the court that this case may not

be filed in good faith, especially in light of the court's previous order in the Motion to Extend Automatic Stay. Dckt. 33.

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.

28. 14-29671-E-13 DANNY RUE
PD-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY DEUTSCHE BANK NATIONAL TRUST COMPANY
11-20-14 [46]

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*), Chapter 13 Trustee, and Office of the United States Trustee on November 20, 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.

Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-NC4, Mortgage Pass-Through Certificates, Series 2006-NC4 ("Creditor") filed the instant Objection to Confirmation of Chapter 13 Plan on November 20, 2014. Dckt. 46.

Improper Joinder of Claims

The Objection seeks two different types of relief:

1) That the confirmation of Debtor's Chapter 13 Plan be denied without prejudice; and

2) That Debtor's case be dismissed with a 180-day bar against refiling under any Chapter pursuant to Title 11 United States Code section 109(g).

Creditor's combination of two types of relief in one pleading is procedurally incorrect. Federal Rule of Bankruptcy Procedure 7018 makes Federal Rule of Civil Procedure 18 applicable in adversary proceedings. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, however, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014 does not incorporate Rule 7018 for contested matters, which includes motions. Debtors have improperly attempted to join two separate requests for relief in one motion.

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

Therefore, because of the improper joinder of claims, the court denies any relief sought for the dismissal of Debtor's case. The court, however, will consider the Creditor's Objection to Confirmation.

OBJECTION TO CONFIRMATION

Creditor opposes confirmation of the Plan on the basis that:

1. Debtor's Chapter 13 plan cannot be confirmed because it was not proposed in good faith. Creditor states that the Debtor has filed six prior chapter 13 petitions, all of which were either converted to Chapter 7 or dismissed for failing to make payment required under the plan.

Debtor also fails to indicate any positive change in financial circumstances in the present bankruptcy case in comparison to the Debtor's prior bankruptcy cases. The aforementioned successive filing have prevented Creditor from lawfully exercising its state law remedies. Creditor believes that the Plan proposed by Debtor in the instant bankruptcy case is in bad faith, constitutes a misuse of the Bankruptcy Code, and was proposed solely for the purpose of preventing Creditor from lawfully obtaining possession of its property, thereby prejudicing Creditor.

2. Debtor's Chapter 13 plan cannot be confirmed because it does not provide for the full value of Creditor's claim. Creditor's claim for pre-petition arrears in the total amount of $75,346.35. However, the Debtor's Chapter 13 plan fails to provide for payment of the pre-petition arrears on Creditor's secured claim under the assumption that the Debtor will be approved for a loan modification.

However, Debtor's plan does not provide for the situation where a loan modification is denied. In fact, the Debtor was previously denied a loan modification on January 18, 2013 for failing to have a sufficient monthly income that would meet the requirements of the program. From a review of Debtor's previously filed schedules, it does not appear that his financial circumstances have significantly changed. Also, to date, Debtor has not yet provided a complete loan modification application to Creditor.

3. Debtor's chapter 13 plan cannot be confirmed because it does not promptly cure creditor's pre-petition arrears as required under 11 U.S.C. § 1322(b)(5). Creditor's secured claim consists of $75,346.25 in pre-petition arrears, however, Debtor's plan does not provide for the cure of any arrears. Debtor will have to increase his monthly payment through the Chapter 13 plan to Creditor to approximately $1,355.77 in order to cure Creditor's pre-petition arrears over a period not to exceed sixty months.

4. Debtor's Chapter 13 plan cannot be confirmed because it is not feasible. Debtor's Schedule J indicates that the Debtor has disposable income of $1,005.00 per month. However, this does not include the ongoing post-petition arrears owed to Creditor in sixty months as required by 11 U.S.C. § 1322(b)(5). As the monthly plan payment sufficient to cure Creditor's pre-petition arrears exceeds the Debtor's monthly disposable income, the Debtor lacks sufficient monthly disposable income with which to fund the plan.

Additionally, the Debtor's history of multiple bankruptcy cases being dismissed for failing to make plan payments is further evidence that the Debtor either cannot or will not make the payments proposed, not to mention the payments needed to cure the arrears owed to Creditor.

DISCUSSION

The Creditor's objections are well-taken.

Creditor alerts the court that the Debtor filed a total of previous 9 previous bankruptcy cases since April 9, 2003. The Debtor's recent bankruptcy case has implications for the duration of the automatic stay, *see* 11 U.S.C. § 362(c)(3), but is not by itself reason to deny confirmation. However, taken the repeat filings in conjunction with the other objections presented by the Creditor, the plan appears to be in bad faith.

The Creditor holds a deed of trust secured by the Debtor's residence. The Creditor asserts $75,346.35 in pre-petition arrearages. 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.

Additionally, a review of the Debtor's Schedule I and J does show that the plan is not feasible given the fact the plan does not account for Creditor's pre-petition arrears and the available disposable income is not sufficient to cure these arrearages.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-NC4, Mortgage Pass-Through Certificates, Series 2006-NC4 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. 13-31975-E-13 JACK/LINDA GANAS
PLC-3 Peter Cianchetta

OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE
11-13-14 [55]

Final Ruling: No appearance at the December 16, 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, Creditor, and Office of the United States Trustee on November 13, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Objection to Notice of Mortgage Payment Change is sustained.

Jack and Linda Ganas ("Debtors") filed the instant Objection to Notice of Mortgage Payment Change and Request for Attorney's Fees [CCP 1717] on November 13, 2014. Dckt. 55.

Debtors state that Wells Fargo Bank, N.A. filed Proof of Claim No. 4 on January 15, 2014 where they claimed an arrearage existed at the time of the bankruptcy filing. The escrow shortage they listed was $529.34 as of the petition date. On October 28, 2014, Wells Fargo Bank, N.A. filed a Notice of Payment Change. The documents submitted with their Notice of Mortgage Payment Change state that there was an escrow shortage on the date of the petition of ($8,977.23). Debtors argue that this pre-petition shortage was not listed on Wells Fargo's Proof of Claim and is unsupported by any explanation on an amended proof of claim or on the Notice of Mortgage Payment Change.

Wells Fargo Bank, N.A.'s Notice of Mortgage Payment Change requests that the current escrow payment change from $167.74 to $348.05.

Debtors allege that the inconsistences are the result of pre-petition arrearage escrow amounts not being properly credited in the analysis which result in the pre-petition arrearage also being paid post-petition, thereby resulting in a duplicate payment. The deed of trust only provides for payment

of collection fees in to protect their security interest as stated in paragraph 18 of the deed of trust note attached to Proof of Claim 4.

Debtor additionally requests that the court grant reasonable attorney's fees pursuant to California Civil Code § 1717.

Objection to Notice of Mortgage Payment Change

Wells Fargo Bank, N.A. filed Proof of Claim 4 on January 1, 2014. In the Proof of Claim, Wells Fargo Bank, N.A. states that the "Escrow shortage or deficiency" as of the petition date is $529.34.

Wells Fargo Bank, N.A. filed a Notice of Mortgage Payment Change on October 28, 2014. The Notice states the following:

1. Date of payment change: 12/1/2014

2. New total payment: $1,138.35

3. Part 1: Escrow Account Payment Adjustment:

   a. Current escrow payment: $167.74

   b. New escrow payment: $348.05

The Notice of Mortgage Payment Change also has attached an escrow statement that, in part, outlines the Debtors' escrow account history. In relevant part, for September 2013, the statement provides:

Payments to escrow			Payments from escrow		Escrow balance	
Date	Projected	Actual	Projected	Actual	Projected	Actual
Sep. 2013	$164.01	$348.54	$0.00	$0.00	$772.50	($8,977.23)

A review of the Objection, Proof of Claim No. 7, and the Notice of Mortgage Payment Change shows that there is no evidentiary basis for the substantial increase in escrow shortage. Wells Fargo Bank, N.A. does not explain how they calculated the escrow shortage to determine that, at the time of the petition, the ($529.34) listed on the Proof of Claim 4 (filed on January 15, 2014) is actually ($8,977.23) as listed on the Notice of Mortgage Payment Change (filed on October 28, 2014).

The Escrow Analysis attached to the Notice of Mortgage Payment Change provides the following information. Page 4 of the Escrow Analysis provides the actual payments made during the period July 2013 through August 2014, and estimates for September - November 2014. Through August 2014, Wells Fargo Bank, N.A. reports receiving actual escrow payments totaling $3,921.70. For these fourteen months, escrow payments of $2,296.98 (14 x $164.07 a month) were required.

For the period December 2014 through November 2015, Wells Fargo Bank, N.A. projects disbursements from escrow for taxes and insurance to total

$2,178.50. Escrow Analysis, pg. 3. During that period, monthly escrow payments of $181.54 would be required. This portion of the Escrow Analysis states, "Scheduled escrow payment $181.54." *Id.*

However, Wells Fargo Bank, N.A. then states on page 1 of the Escrow Analysis that the monthly principal and interest payment is $790.30 and the Escrow payment will be $348.54. The court cannot identify the basis for the additional $167.00 a month in escrow payments for the twelve months through November 2015 – which total $2,004.00 (12 x $167.00).

Without any further evidence or response from Wells Fargo Bank, N.A., the court sustains the objection.

Attorneys' Fees

As to the Debtor's request for attorney's fees under California Civil Code § 1717, the Debtor has not pleaded with particularity under Local Bankr. R. 9013 to justify such relief.

In support for attorney fees, the Objection states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

> A. California Civil Code Section 171 provides for attorney fees for the prevailing party whenever there is an attorney fee provision, there has been notice and a hearing, wherein the reasonable attorney's fees shall be fixed by the Court.

The Objection does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 for attorneys' fees because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states the code section. This is not sufficient.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.,* 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

While the Debtor's counsel does provide for a time sheet, the Debtor failed to provide the specific contract provisions that justify an award for attorneys' fees nor does Debtor provide how the applicable statute applies to the instant case. The court does not have the resources to fill-in the blanks for Debtor and Debtor's counsel. Therefore, the court denies the Debtor's request for attorneys' fees. If Debtor's counsel wishes to be compensated for the instant Objection, Debtor's counsel may make a motion within 14 days of the issuance of this ruling for compensation, specifically and particularly citing the grounds and basis for attorneys' fees. Debtor's counsel is not permitted to include fees for the motion for compensation.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Notice of Mortgage Payment Change filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Notice of Mortgage Payment Change filed on October 28, 2014 by Wells Fargo Bank, N.A. is sustained and that the new monthly payment in amount in excess of $971.84 ($790.30 principal and interest, and $181.54) are disallowed. This disallowance is without prejudice to Wells Fargo Bank, N.A. or its successor from providing notice of such future, prospective changes allowed or required under the Note and Deed of Trust upon which Proof of Claim No. 701 in this case is based, however, such changes shall not be based on any amounts, asserted defaults, or expenses which predate the date of this Order.
>
> **IT IS FURTHER ORDERED** that Debtor's request for attorneys' fees and costs is denied without prejudice as part of this motion. If Debtor wishes to pursue a claim for attorneys' fees, Debtor shall within 14 days of the issuance

of this Order, file a motion for prevailing party attorneys' fees, stating with particularity the grounds in which Debtor is entitled to attorneys' fees, and provide sufficient evidentiary support for such requested fees.

30. 12-28183-E-13 MARK/YLVON WILLIAMS
PJM-1 Pamela Marchese

MOTION TO APPROVE SETTLEMENT AND ISSUANCE OF ORDER REGARDING DEBTORS' MOTION TO VALUE COLLATERAL OF OPERATING ENGINEERS LOCAL NO. 3 FEDERAL CREDIT UNION
11-19-14 [61]

Final Ruling: No appearance at the December 16, 2014 hearing is required.

Local Rule 9014-1(f)(2) Motion – No Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 19, 2014. By the court's calculation, 27 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise 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. While styled as a Motion to Approve a Compromise, it actually is a stipulation resolving the Motion to Value a Secured Claim. No further hearing is required, the Motion to Value having been set for hearing in August 2014, at which time the parties announced they had resolved the Motion.

The Motion is granted and the court values Creditor's secured claim to be $10,000.00.

Mark and Ylvon Williams, the Chapter 13 Debtors, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Operating Engineers Local No. 3 Federal Credit Union("Settlor"). The claims and disputes to be resolved by the proposed settlement are reducing Settlor secured claim from approximately $77,895.95 to $10,000.00 and filed an Amended Proof of Claim.

REVIEW OF MOTION

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit C in support of the Motion, Dckt. 66):

1. The Stipulation resolving Debtors' motion to value collateral entered into between secured creditor holder Operating Engineer's Local No. 3 Federal Credit Union, represented by Barlett, Leader-Picone & Young, LLP and Debtors, represented by Pamela J. Marchese, Attorney at Law is hereby approved.

2. The secured claim (Claim No. 1) of Operating Engineer's Local No. 3 Federal Credit Union shall be paid the total sum of $10,000.00 with 0.00% interest through Debtors' 1st Amended Chapter 13 Plan. The balance of the claim in the amount of $67,895.95 shall be treated as a general unsecured creditor. Secured creditor will file an amended proof of claim to reflect the terms as provided for in this Stipulation and Order.

3. Upon Completion of Debtors' Chapter 13 plan and receipt of a Chapter 13 Discharge, including payment of the Credit Union's secured claim of $10,000, Operating Engineer's Local No. 3 Federal Credit Union shall promptly record a reconveyance of the Second Deed of Trust against the property within which the Property is located and the Second Deed of Trust against the Property shall be null and void and such lien shall not act as an encumbrance on the property.

4. In the event Debtors' Chapter 13 case is either dismissed or converted to a case under Chapter 7, 11, 12 (or any other chapter) or should Debtors fail to receive a discharge in the instant Chapter 13 case, Operating Engineer's Local No. 3 Federal Credit Union shall retain the lien of its Second Deed of Trust against the Property for the full amount of the balance of the subject loan.

5. The terms and provisions contained herein as referenced by the Stipulation resolving Debtors' Motion to Value Collateral of Operating Engineer's Local No. 3 Federal Credit Union filed August 28, 2012 as Docket Entry No. 52 are hereby granted and made an Order of the Court.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The parties have come to an agreement as to the value of the secured claim of Settlor to be $10,000.00, which then allows for the Movant's plan to be feasible and viable as well as allows the Settlor to have a valid secured claim accounted for in the plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Mark and Ylvon Williams, the Chapter 13 Debtors, ("Movant") having been presented to the court, the parties having filed a Stipulation resolving this Contested Matter and requested that relief be granted pursuant thereto, 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 Operating Engineers Local No. 3 Federal Credit Union ("Creditor") secured by a second deed of trust recorded against the real property commonly known as 2327 Harris Lane, Auburn, California, California (the "Property"), is determined to be a secured claim in the amount of $10,000.00, 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 agreed by the Stipulation to be equal to the obligations secured by senior liens and the $10,000.00 for this Creditor's secured claim.
>
> The parties have included in their Stipulation further agreements as to plan terms and other matters beyond the scope of a motion to value secured claim which are not made part of this order, but are express representations and terms upon which the parties have relied in entered into the Stipulation resolving this Contested Matter.

31. 14-29688-E-13 MARVIN/DARYL GARDNER
DPC-1 Julius Engel

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
11-20-14 [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 Debtors, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 20, 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 overrule the Objection.

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

1. Debtor has not complied with 11 U.S.C. § 1325(a)(2). On September 30, 2014, the court issued an Order Approving Payment of Filling Fees in installments. Dckt. 7. According to the Order, installments are due October 30th, December 1st, December 29th, 2014 and January 28th, 2015. Debtor has paid the first installment of $77.00 due on October 30, 2014.

2. While the plan in section 2.06 proposes to pay the attorney $2,000.00 through the plan under LBR 2016-1(c), the Disclosure of Compensation of Attorney for Debtors (Dckt. 11, pg. 27), appears to list in item 6 that the attorney services do not include some services required under LBR 2016-1(c), such as judicial lien avoidances and relief from stay actions. The Trustee believes that the Attorney is effectively opting out of 2016-1(c) and opposes attorney fees being granted under that section, requiring a motion for any attorney fees.

A review of the docket shows that Debtor has made an installment payment on December 8, 2014. Therefore, the Trustee's first objection is overruled.

As to the Trustee's second objection, any discrepancies in the treatment of attorney fees is not, in and of itself, grounds for denying confirmation. Local Bankr. R. 2016-1(c)(3) states "Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most post-confirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed." This appears to be the services the Trustee is referencing in his objection. However, reviewing the Disclosure of Compensation of Attorney for Debtor, none of the listed as not being part of the fee fall within the necessary services of Local Bankr. R. 2016-1(c). It does not appear to the court that the Plan and the Petition are in conflict with Local Bankr. R. 2016-1(c).

The court interprets the Fee Statement as including all no-look fees as required by Local Bankruptcy Rule 2016-1(c). The "exclusion" of the judicial lien avoidances and the "relief from stay" actions is read to be that counsel and Debtor that such issues will not exist, and if the Debtor makes demands on counsel in the future, it will have to be addressed whether they are reasonably included in the fee (such as meeting with the Debtor to discuss the issue) or whether Debtor's change of heart puts the attorney in a possible conflict with his obligations under Federal Rule of Bankruptcy Procedure 9011.

The court overrules the objection. FN.1.

FN.1. Though the court overrules this objection, counsel for the Debtor would be well served to more clearly state the distinction between conferring with the Debtor if these issues arise and not agreeing to undertake Quixotesque tasks.

Therefore, the Trustee's second objection is overruled.

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

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

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

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

IT IS ORDERED that the Objection is overruled, Debtor's Chapter 13 Plan filed on October 13, 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.

32. 10-37491-E-13 LUIS/ROSA NUNEZ — MOTION TO MODIFY PLAN
TJW-3 Timothy Walsh — 11-2-14 [64]

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 November 3, 2014. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

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

Luis and Rosa Nunez ("Debtors") filed the Instant Motion to Confirm Second Modified Chapter 13 Plan on November 2, 2014. Dckt. 64

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 1, 2014. Dckt. 69. Before The Trustee lists his objection, he states that while based on the motion the Debtor appears unemployed and receiving social security and may be justified in reducing the plan payment or possibly even entitled to a hardship discharge, the Debtors have not supplied the proper documents or asked for the proper relief. Under the confirmed plan, Debtors' plan payments are $600.00 for 60 months with 27% to unsecured creditors. Debtors are above median income debtors according to the Form 22C filed with the court on July 1, 2010, and November is month 52 under the plan in which a payment was due. Debtors are $4,800.00 delinquent under the confirmed plan with the last payment of $1,800.00 having posted March 20, 2014, month 44. The Trustee continues and objects on the following grounds:

1. Where the present plan requires no additional payments, and Debtors reflect a negative net income, the Motion appears to be a motion for an early discharge which is governed by 11 U.S.C. § 1328(b). The Debtors have not filed the Motion as a motion for a hardship discharge and should consider carefully should they seek a hardship discharge. The Debtors have a debt for a junior deed of trust to First Solano Credit Union that would presumably need to be dealt with if the Debtors sought a hardship discharge.

2. Debtors' Motion (Dckt. 64, pg. 2, lines 5-6) and Declaration (Dckt. 67, pg. 2, lines 3-4) indicate the reason for Debtors' modified plan is due to Debtor Luis Nunez losing his job and now receiving social security. Debtors file Schedule I and J as Exhibit 1 (Dckt. 66) and indicate on the cover page that the Exhibit is a statement of their current income and expenses. Debtors do not indicate whether the Schedules are an amended filing or a supplement. Schedule I reflects social security income of $2,264.00 per month, while Schedule J reflects a monthly net income of -$1,071.26. Debtors' Schedule J appears to be an exact duplicate of their prior Schedule J filed as Exhibit 2 in their prior motion to modify where Debtors indicated on the cover page of that Exhibit (Dckt. 55, pg. 2, lines 8-19) that Schedule J was not an accurate depiction of their actual expenses, but rather what their normal expenses should be. If the Debtors are seeking relief from the court, the Debtors should provide the court with accurate information or the court may find that the plan is not proposed in good faith under 11 U.S.C. § 1325(a)(3).

3. The Debtors' plan filed October 30, 2014 is not properly signed. The signatures do not comply with Local Bankr. R. 9014-1(c).

DISCUSSION

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. Here, Debtors do not seek to confirm a modified plan in this case which they will perform, but to back door a hardship discharge by confirming a modified plan under which no performance by the Debtors is required. This bankruptcy case was filed on July 1, 2010. December 2014 is the 49th month in this case. The proposed Modified Plan provides for only 44 months of payments. There are no payments to be made under this Plan.

Congress has provided in 11 U.S.C. § 1328 a remedy for a debtor who has confirmed a plan but is unable to continue with that plan or perform under a modified plan.

> "(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if–
>
> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
>
> (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
>
> (3) modification of the plan under section 1329 of this title is not practicable."

11 U.S.C. § 1328(b). The Debtors may seek such relief as may be proper. The Debtors may not confirm a plan which requires no performance in lieu of complying with these requirements established by Congress.

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.

33. 11-40191-E-13 KEENAN ROSS
PGM-2 Peter Macaluso

MOTION TO DISALLOW JACOBY & MEYERS, LLP/MACEY & ALEMAN DBA LEGAL HELPERS, P.C. ATTORNEY FEES
11-17-14 [46]

Final Ruling: No appearance at th December 16, 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, parties requesting special notice, and Office of the United States Trustee on November 17, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Disallow Jacoby & Myers, L.L.P./Macey & Aleman DBA Legal Helpers, O.c., Attorney Fees for failure to Complete the Representation and Approval of No Look Fees Remaining to New Counsel for Completing These Services 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 Disallow Jacoby & Myers, L.L.P./Macey & Aleman DBA Legal Helpers, P.C., Attorney Fees for failure to Complete the Representation and Approval of No Look Fees Remaining to New Counsel for Completing These Services is granted.

Peter Macaluso, Debtor's counsel, filed the instant Motion to Disallow Jacoby & Myers, L.L.P./Macey & Aleman DBA Legal Helpers, P.C., Attorney Fees for failure to Complete the Representation and Approval of No Look Fees Remaining to New Counsel for Completing These Services on November 17, 2014. Dckt. 46.

Mr. Macaluso states that Debtor hired the Law Firm of Jacoby & Meyers, L.L.P. to file his Chapter 13 bankruptcy. On or about January 31, 2014, the Law Firm went out of business. Thereafter, the firm of Macey & Aleman dba Legal Helpers, P.C. took over the case load and reassigned attorneys internally and consequently to each case such as the instant case.

The last remaining attorney of record, Keith Wood, was employed as an associate attorney and was laid off when the Law Firm closed. Mr. Wood's name was listed as the Attorney of Record to facilitate the transfer of cases as he was the remaining local attorney.

Mr. Macaluso argues that the case is in need of competent counsel, that has the staff an resources to complete the cases. All attorney fees remaining should be assigned to Mr. Macaluso as he will not be tasked with completing cases without compensation.

In support, Mr. Macaluso cites to Fed. R. Bankr. P. 2016(b) stating that he is seeking to comply with the provisions that require a disclosure of compensation, to complete the work that has been authorized by the court in the no look fee approval, and to receive the payment that are still due and being paid by the Trustee for the services provided to complete the instant case.

Mr. Macaluso then argues that Fed. R. Bankr. P. 7025(b) is applicable because, in the instant case, the Law Firm, which was employed to represent the Debtor has ceased to exist. However, Fed. R. Bankr. P. 7025 merely states that Fed. R. Civ. P. 25 applies to adversary proceedings. What Mr. Macaluso appears to be relying on is Fed. R. Civ. P. 25(c) which provides:

> (C) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, or orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

Mr. Macaluso recognizes that the Fed. R. Civ. P. 25 is not directly on point, he argues that he wises to insure that the substitution of counsel, includes the substitution and the disallowance of the remaining attorney fees in the case, thereby substituting the two non-existent Law Firms with new counsel, Mr. Macaluso.

Mr. Macaluso argues that disallowance of the previous fees ordered due to impossibility and Substitution under Fed. R. Bankr. P. 7025 appears to be the most efficient and expeditious means for the parties to fully resolve this matter while allowing the Debtor to have representation and to insure that the attorney fees set aside in the plan are issued to the counsel that is completing the services for the Debtor.

Mr. Macaluso alleges that under Local Bankr. R. 2016-1(c)(5) the court has the power to approve this transfer of attorneys fees. Local Bankr. R. 2015-1(c)(5) states:

> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of development not capable of being anticipated at the time the plan is confirmed or denied confirmation.

Mr. Macaluso alleges that the language of the Local Rule is applicable because neither the court nor the Debtor could have anticipated that neither the original law firm, nor the second law firm, nor the associate attorneys would

be in practice at the time the services contracted for by the Debtor were needed.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the Motion on December 2, 2014. Dckt. 49. In response, the Trustee states:

The instant case was filed August 19, 2011 and Debtor's plan proposed to pay $61.00 per month for thirty-six months and 0% to unsecured creditors. The case is now in month 39.

Total attorney fees allowed are $3,500.00, with $1,550.00 paid by Debtor prior to filing, and $1,950 to be paid through the plan. Fees were disbursed to attorney Deborah Rivas in the amount of $1,578.47. The remaining fees were returned/not negotiated starting with the checks issued in December 3013. The Trustee has a balance on hand of $549.00. The unpaid attorney fees are $371.53

The Trustee does not oppose this Motion and if the Motion is not granted, the Trustee intends to turn over the remaining fees to the Clerk of the Court and proceed with the Closing of the case.

DISCUSSION

This is Mr. Macaluso's second attempt at having the remaining attorneys fees be assigned to him since his substitution in as attorney for Debtor. The first motion was denied because not all necessary parties were served and the court's uncertainty on who the motion was seeking to have the assignment against or how that party is entitled to the remaining fees. Particularly, the court was uncertain whether Fed. R. Bankr. P. 2016 was a valid basis for the relief requested.

However, in Mr. Macaluso's instant Motion, Local Bankr. R. 2016-1(c)(5) seems to offer a sound legal basis for the court to grant the relief sought. As stated supra, Local Bankr. R. 2016-1(c)(5) does permit the court to allow compensation different than what has been provided for in a confirmed plan if "such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan" was confirmed.

Here, the fact that both law firms employed by Debtor prior to Mr. Macaluso being substituted in as attorney closed during the Debtor's case is clearly an unanticipated event. This type of unforeseen change in circumstances seems to fall squarely within the purview of Local Bankr. R. 2016-1(c)(5).

Therefore, because the unanticipated development of Debtor's previous attorneys going out of business after Debtor's plan being confirmed, the court grants the Motion.

The challenge for the court is that none of the effected attorneys have responded to the Motion. It may well be that the modest dollar amount at issue does not warrant a response – the time spent being well in excess of any disgorgement and the future fees.

This bankruptcy case was filed in August 19, 2011. The Plan was confirmed December 12, 2011. Order, Dckt. 28. The term of the Plan is 36

months, which would have the last payment being August 2014 (presuming the first payment was made September 2011). Prior counsel prosecuted an uncontested motion to value as part of the representation. Order, Dckt. 25.

On April 14, 2014, current Counsel filed the Substitution of Attorney. It appears that what remains to be done in this case is assist the Debtor in completing the post-plan completion reporting to obtain a discharge. The Trustee has a balance on hand of $549.00. The unpaid attorney fees are $371.53.

The court disallows the payment of the remaining $371.53 in attorneys' fees to prior counsel in this case and allows the $371.53 in the remaining No-Look Fees allowed in this case to be paid to Peter C. Macaluso, Debtor's current counsel. The court also allows an additional $150.00 in attorneys' fees to Peter G. Macaluso for the unanticipated and substantial legal services in obtaining this order from the court. The Chapter 13 Trustee is authorized to pay the additional $150.00 in fees from any remaining monies of the estate after payment of claims and other expenses as required by the plan, if Mr. Macaluso so requests the additional fees.

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 Disallow Jacoby & Myers, L.L.P./Macey & Aleman DBA Legal Helpers, P.C., Attorney Fees for failure to Complete the Representation and Approval of No Look Fees Remaining to New Counsel for Completing These Services filed by Debtor's counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, $371.53 of the Fixed Fee previously allowed for prior counsel for the Debtor in this case pursuant to Local Bankruptcy Rule 2016-1(c) is disallowed.
>
> **IT IS FURTHER ORDERED** that $371.53 of the Fixed Fee shall be disbursed by the Chapter 13 Trustee to Peter G. Macaluso through the Chapter 13 Plan as the successor counsel for Debtor. The Chapter 13 Trustee is authorized to make the $371.53 of monies for the balance due on the Fixed Fee approved in this case to Peter G. Macaluso.
>
> **IT IS FURTHER ORDERED** that Peter Macaluso is awarded an additional $150.00 in attorneys' fees for substantial and unanticipated legal services in prosecuting the present motion. L.B.R. 2016-1(c)(3). The Chapter 13 Trustee is authorized to pay the additional $150.00 in fees from any remaining monies of the estate after payment of claims and other expenses as required by the plan, if Mr. Macaluso so requests the additional fees.

34. 13-24993-E-13 DENNIS/SANDRA CUVA
DPC-1 Peter Macaluso

CONTINUED MOTION TO DISMISS CASE
10-15-14 [69]

Final Ruling: No appearance at the November 12, 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 Debtors, Debtors' Attorney, and Office of the United States Trustee on October 15, 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 continue the hearing on the Motion to Dismiss to 3:00 p.m. on February 5, 2015.

David Cusick, the Chapter 13 Trustee, filed the Motion to Dismiss on October 15, 2014. Dckt. 69. The Trustee asserts that Dennis and Sandra Cuva ("Debtors") are in material default pursuant to section 5.03 of their plan. This section provides that the plan must complete in a period not to exceed 60 months. The Trustee's calculations show that the plan will complete in 278 months as opposed to the 60 months proposed.

Debtors' Plan confirmed on September 17, 2013 proposes to pay unsecured creditors 100% of their claims. Debtors' plan estimated that unsecured claims totaled $11,285.62. This amount did not include the under-collateralized portion of secured claims in Class 2C. Unsecured filed claims total $197,747.87. Debtors' monthly plan payment is $2,700.00. After trustee's fees and Debtors' monthly contract installment are allocated, $800.60 remains available to pay unsecured creditors on a monthly basis. The remaining approximate amounts to be paid total $208,629.00, including secured principal and interest and unsecured claims. That total, divided by $800.60 yields 261 months remaining to complete the plan. Debtors have completed 17 months of their plan to date, bringing the plan's overall duration to 278 months.

DEBTOR'S RESPONSE

Debtors state that they received a prior discharge of the unsecured portions of secured claims in Case No. 11-38896. While the claim has been filed, the payment of the unsecured portion should be limited to the mathematical calculation allowed by payments disbursed by the Trustee. Debtors request that the court allow the Debtors 30 days to file, set, and serve a new plan that decreases the percentage paid to unsecured creditors.

Debtors assert that a 100% plan is not otherwise required. Debtors do not have any non-exempt assets, nor were Debtors subject to a 100% plan based on the B22C form. The creditors holding unsecured claim numbers 4 and 5 have

been contacted regarding the fact that their claims had been discharged in the prior bankruptcy and both creditors have agreed to withdraw claims.

NOVEMBER 12, 2014 HEARING

At the November 12, 2014 hearing, the court continued the hearing to 3:00 p.m. on December 16, 2014, to be hear in conjunction with the Motion to Confirm the proposed First Modified Chapter 13 Plan.

DISCUSSION

On November 7, 2014, Debtor filed a First Modified Plan. Dckt. 80. The basic terms of the proposed Plan are:

A. Debtor shall make $2,700.00 monthly plan payments for sixty months.

B. The Claim secured by Debtor's residence is the subject to loan modification negotiations and provided in the Additional Provisions.

C. The Class 2 Secured Claims provide for an aggregate $525.00 monthly dividend.

D. For Class 7 General Unsecured Claims, Debtor provides for a 3% dividend on a total of $186,544.16 in such claims.

The Motion to Confirm the proposed First Modified Chapter 13 Plan may not comply with the requirement that it state with particularity (Fed. R. Bankr. P. 9013) the grounds for confirming a modified plan as required by 11 U.S.C. §§ 1329, 1325(a), and 1322. Such grounds stated in the Motion are:

A. Debtor filed bankruptcy.

B. Debtor confirmed a plan on September 17, 2013.

C. Debtor cannot complete the confirmed plan due to unsecured claims being greater than projected.

D. Debtor has paid $48,600.00 into the confirmed plan to date.

E. Debtor will "resume" making $2,700.00 monthly plan payments in November 2014 for twenty-four months.

F. The Plan term is sixty months.

G. Debtor has paid the required fees, charges, or other required amounts.

H. The First Modified Plan has been filed in good faith.

I. The Modification modifies the rights of the holder of the Class 1 Claim, providing for adequate protection payments while Debtor pursues a loan modification.

J. The modification reduces the unsecured dividend from 100% to 3%.

Dckt. 76.

On its face, the Motion indicates that there has been a default in the plan payments, with them to "resume" in November 2014. It is not stated that the proposed First Modified Plan meets the Chapter 7 liquidation standard.

The evidence in support of the Motion may also be insufficient. Debtor provides testimony that modification is necessary because of several "changes/problems" they have encountered.. These factors "include," but would not appear to be limited to, the filed general unsecured claims being greater than Debtor projected at the commencement of the case. Declaration, Dckt. 78. Debtor offers no testimony as to how they so grossly understated the unsecured claims to be only $11,285.62 (Chapter 13 Plan, Dckt. 51) and the actual $186,544.16 (1,653% increase).

This case was filed on April 12, 2013, and Debtor now seeks to confirm a First Modified Plan nineteen months later. No current financial information is provided by Debtor. On July 12, 2013, Debtor filed Supplemental Schedules I and J. Dckt. 45. At that time Debtor stated monthly net income of $4,448.54 (which included projected commissions from future work installing solar panels).

No provision is made on Amended Schedule J for any taxes arising from Debtor income generated from solar installation contracts – just income of $1,840.00 a month. No provision is made for payment of self employment taxes from this business.

In reviewing Amended Schedule J the court notes that Debtor provides only $5.00 a month for home maintenance, only $5.55 for medical and dental expenses, and $0.00 for business expenses. It appears that the expenses on Amended Schedule J have been "made as instructed" so as to achieve a preconceived $2,700.00 monthly net income so as to "support" confirmation of the Chapter 13 Plan in 2013. (This is commonly called a "Liar Declaration" by the court.)

It may well be problematic whether Debtor can confirm the Modified Plan. However, the court affords Debtor, the Chapter 13 Trustee, and creditors to address such issues at confirmation.

In light of the Motion to Confirm being continued to allow Debtor to file supplemental evidence, the hearing on the Motion to Dismiss is continued to 3:00 p.m. on February 5, 2015, to be hear in conjunction with the Motion to Confirm the proposed First Modified Chapter 13 Plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> 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 hearing on the Motion to Dismiss is continued to 3:00 p.m. on February 5, 2015.

35. 13-24993-E-13 DENNIS/SANDRA CUVA — MOTION TO MODIFY PLAN
PGM-5 Peter Macaluso — 11-7-14 [76]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 7, 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 continue the Motion to Confirm the Modified Plan to 3:00 p.m. on February 5, 2015. Debtor shall file supplemental pleadings and evidence on or before January 16, 2015. Any responses or objections shall be filed on or before January 20, 2015.

Dennis and Sandra Cuva ("Debtors") filed the Instant Motion to Modify Chapter 13 Plan on November 7, 2014. Dckt. 76.

TRUSTEE'S OBJECTION

David Cusick, the Chapter 13 Trustee, filed an objection to the instant Motion on December 2, 2014. Dckt. 85. The Trustee objects on the following grounds:

1. The Debtors are delinquent $2,700.00 under the proposed plan. The plan states: monthly plan payments of "2,700.00," for the duration of 60 months. Dckt. 80. The case was filed on April 12, 2013, and 19 payments have come due under the plan; payments totaling $51,300.00 have become due under the proposed modified plan. The debtor has paid the Trustee $48,600.00 with the last payment of $2,700.00 posted October 27, 2014.

2. The Trustee is uncertain if Debtors can afford monthly plan payment. There is no current statement of income and statement of expenses on file. The Debtors last amended Schedules I & J were filed on July 12, 2013. Dckt. 45, pgs 4-6). The Debtors' income appears to be based on future work projects and self employment taxes are not reflected on the expense statement. Additionally, the Debtors' Schedule J reflects a minimal amount of $5,.00 for home maintenance and $5.55 for medical and dental expenses. The Trustee questions if plan payment is affordable if higher expenses occurred during the life of the Chapter 13 plan.

3. The Motion to Confirm Modified Plan may not comply with the requirements of Fed. R. Bankr. P. 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The Trustee believes the Debtor should have included information such as: a detailed explanation as to why the Debtors thought their confirmed plan could pay unsecured creditors 100% and if the reason is based on the advice from Debtors' counsel, an explanation from Debtors' counsel as to what steps he has taken to make certain that this error will not continue to occur.

DEBTORS' REPLY

The Debtors filed a reply to the Trustee's objection on December 9, 2014. Dckt. 88. The Debtors reply as follows:

1. The Debtors are current.

2. The Debtors' counsel requests that further time be allowed for the Debtors to bring evidence of the ability to make said payments absent the proof "being in the pudding" as the Debtor has had physical limitations related to the time of healing.

3. They had received a Chapter 7 discharge in case no. 11-38896, which included the same creditors and thus had no new unsecured creditors. The Debtors did not include claim #4 and 5, which were pre-chapter 7 claims, as were all the Debtors' claims because no new debt was accumulated between this case and the Chapter 7 discharge. As such the Debtors' intent was to propose a plan that was not merely a perfunctory Chapter 13 plan as the Debtors intended to pay the unsecured creditors to the best of their ability.

The curing of the arrearage and saving the family residence, and payment of several pre-petition claims represent a real, substantial plan and financial reorganization for these Debtors. At the present time, the ability to strip a lien in a Chapter 7 is pending and could resolve and clarify the

steps needed for counsel to successfully assist debtors in "stripping" undersecured claims without the need to resort to a Chapter "20."

DISCUSSION

In light of Debtor's counsel request for further time to file supplemental evidence as to Debtor's ability to make plan payments, the court will continue the hearing to 3:00 p.m on February 5, 2015. The Debtor shall file supplemental evidence on or before January 16, 2015. Any response or objections shall be filed on or before January 30, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 hearing on the Motion be continued to 3:00 p.m. on February 5, 2015. Debtor shall file supplemental pleadings and evidence on or before January 16, 2015. Any responses or objections shall be filed on or before January 20, 2015.

36. 14-31014-E-13 ROBERT SLAMA
SJS-1 Scott Johnson

MOTION TO VALUE COLLATERAL OF HERITAGE COMMUNITY CREDIT UNION
12-2-14 [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 – Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor Chapter 13 Trustee, Creditor, and Office of the United States Trustee on December 2, 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. Creditor filed a written opposition.

The Motion to Value secured claim of Heritage Community Credit Union ("Creditor") is denied without prejudice.

The Motion to Value filed by Robert Slama ("Debtor") to value the secured claim of Heritage Community Credit Union ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 10705 Segovia Way, Rancho Cordova, California, APN: 058-0215-012-0000 ("Property"). Debtor seeks to value the Property at a fair market value of $182,502.00 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.

PROOF OF CLAIM

The court has reviewed the Claims Registry for this bankruptcy case. Creditor, on December 1, 2014, filed Proof of Claim No. 2. The Creditor states that the basis of the claim is "Secured 2nd Mortgage" in the amount of $16,054.33. Creditor added a hand written note under Item 4 of the Proof of Claim, stated:

> Deed of Trust for Karen F. Hinson married woman as her sole & separate property.

Attached to the Proof of Claim is a Deed of Trust, recorded on September 18, 2006 in Sacramento County (Book 20060918, Page 0981). The Deed of Trust lists "Karen L. Hinson as a married woman as her sole and separate property" as the borrower and "Heritage Community Credit Union" as the beneficiary.

Also attached to the Proof of Claim is an Interspousal Transfer Grant Deed, recorded on May 19, 2004 in Sacramento County (Book 20040519, Page 0832). The Interspousal Transfer Grant Deed states that it is "From One Spouse to the Other Spouse." The Deed states that:

> FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, GRANTOR Robert Anthony Slama, spouse of grantee
>
> hereby GRANTS to Karen L. Hinson as a married woman as her sole and separate property

the following described property in the City of Rancho Cordova, County of Sacramento, State of California; Lot 632, as shown on the "Plat of Glenfaire Unit No. 6", Recorded in the office of the Recorder of Sacramento County on April 20, 2964, in Book 74 of Map No. 7.

On December 10, 2014, the Creditor filed a letter requesting that Proof of Claim 2 be withdrawn on the basis that the Creditor is not the creditor for the Debtor.

OPPOSITION

Creditor has filed an opposition on December 10, 2014. Dckt. 20. Creditor asserts that Creditor does not hold an allowed claim against the Debtor, Creditor asserts that Debtor's wife, Karen F. Hinson is the sole owner of the Property and is the sole borrower of the equity loan held by Creditor. Creditor states that Karen Hinson is not a joint debtor in the instant case.

Creditor asserts that it does not hold a claim against the Debtor nor holds a right to payment. Creditor states that its only claim is against Debtor's wife.

DISCUSSION

The term "Creditor" is defined by the Bankruptcy Code in 11 U.S.C. § 101(10), which states,

> "(10) The term "creditor" means–
>
> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> (B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(I) of this title; or
>
> (C) entity that has a community claim."

The term is defined in 11 U.S.C. § 101(5) to be,

> "(5) The term "claim" means–
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

It is well established that a debt secured by property of the debtor, for which the debtor has no personal liability (non-recourse, discharged in prior bankruptcy case, property transferred subject to existing lien) is claim. *See Johnson v. Home State Bank*, 501 U.S. 78 (1991)(personal liability discharged in prior case); *Rederford v. US Airways, Inc.*, 589 F.3d 30, 36 (1st Cir. 2009) (right to equitable remedy is a "claim" in bankruptcy if monetary payment is an alternative to the equitable remedy); and *In re Udell*, 18 F.3d 403, 408 (7th Cir. 1994) (right to an equitable remedy for breach is a "claim" in bankruptcy, even though there is no right to payment from the debtor).

While Creditor would be happy to not have a claim, if it would mean that it would not be subject to the Bankruptcy Code, the existence, or non-existence, of a claim is not subject to the discretion of the creditor. If the Debtor owns the property, then Creditor has a claim against the Debtor to exercise its equitable rights to conduct a foreclosure sale and obtain payment on the debt secured by the Property.

Here, Creditor asserts that the Property is not owned by the Debtor, but is owned by his non-debtor spouse. Attached to the Proof of Claim is an Interspousal Transfer Grant Deed transferring any interest the Debtor had in the Property to his wife, Karen L. Hinson. Proof of Claim No. 2, Pg. 9. The Recorder's Office stamp on the Transfer Deed has a date of May 19, 2004.

The Deed of Trust which Creditor has attached to Proof of Claim No. 2 had the date September 8, 2006, and a Recorder's Office stamped date of September 18, 2006. The owner of the property granting the Deed of Trust is just Karen Hinson, identified as a married woman and the property being her sole and separate property. Proof of Claim No. 2, pg. 3.

The Debtor has not provided information, outside of listing the Property on Schedule A, what interest the Debtor actually has in the Property. This is inconsistent with the information included with Proof of Claim No. 2.

Under 11 U.S.C. § 506(a), the valuation determination can only be permitted for "an allowed claim of a creditor secured by a lien on property in which the estate has an interest. . . ." It appears to the court that the Debtor, and therefore the estate, does not have an interest in the Property which secures the Creditor's lien. The court will not issue orders on incorrect or partial parties that are ineffective.

This also raises a further, more complex issue for the Debtor, non-debtor Spouse, and Creditor (1) if the Property is owned by the Debtor and (2) if the court proceeds with valuing a secured claim. Does such valuation constitute a de facto determination that the Creditor may immediately proceed against the non-debtor spouse to enforce the "unsecured claim? Is the non-debtor spouse a necessary party to any determination of value of secured claim since it effectively results in Creditor having an unsecured debt for which the non-debtor spouse appears to have personal liability?

The court cannot make a determination in the context of this Motion, based on the information presented, as to whether the Debtor has any interest in, and the Property is property of the bankruptcy estate. Therefore, the court denies the Motion 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 Robert Slama ("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.
>
> The court makes no adjudication of any issues, the existence or non-existence of a claim, or the respective substantive rights of any parties to this Contested Matter.

37. 10-39863-E-13 SDB-3 — ALEXANDER TAYLOR AND CAROLINE GUERRERO-TAYLOR — Scott de Bie — CONTINUED MOTION TO VALUE COLLATERAL OF NATIONSTAR MORTGAGE, LLC — 9-19-14 [73]

Final Ruling: No appearance at the December 16, 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, 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 granted.

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).

At the time of the Initial Hearing on the Motion, the court was 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. Sufficient notice was provided for the continued hearing.

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.

NOVEMBER 18, 2014 HEARING

At the November 18, 2014 hearing, the court continued the hearing to allow supplemental pleadings to be filed. Dckt. 85

SUPPLEMENTAL DECLARATION

W. Scott de Bie, Debtors' counsel, filed a supplemental declaration in support of the Motion on November 20, 2014. Dckt. 82. Mr. de Bie states that he obtained from the Office of the Solano County Recorder, a copy of an Assignment of Deed recorded on October 29, 2013 and identified by the recorder as Document No. 201300104469.

Mr. de Bie asserts that the Assignment of Deed of Trust indicates that a deed of trust securing a note in an original sum of $40,000.00 and dated August 22, 2006 was assigned to Nation Star Mortgage, LLC on July 18, 2013. The assignment further states that such assignment includes a grant, transfer, and conveyance of "...all beneficial interest under the Deed of Trust...together with the note(s) and obligations described and the money due and to become due thereon...."

However, reviewing the attached Assignment of Deed of Trust, the recorded date is December 7, 2012 and the Document No. is 201200124422. It appears that Mr. de Bie has attached the incorrect Assignment of Deed of Trust. Dckt. 83, Exhibit C.

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."

On December 15, 2014, the Debtor filed a Corrected Exhibit C, which is the July 18, 2014 Assignment of the Deed of Trust which is the subject of Mr. de Bie's declaration. That assignment form is one which has been presented to this court in other proceedings involving Bank of America, N.A. The Assignment of the Deed of Trust also includes express language that the assignment includes "the note(s) and obligations therein [the assigned deed of trust] described and the money due and to become due thereon...." While titled an "Assignment of Deed of Trust," it also is an assignment of the Note. The Assignment states that it is signed by Bank of America, N.A.

The evidence presented is sufficient for this court to have a good faith belief that it has before it the real parties in interests whose claims or controversies are being adjudicated in this federal court. U.S. Const. Art. III, Sec. 2.

GRANTING OF MOTION

The senior in priority first deed of trust secures a claim with a balance of approximately $380,962.39. Creditor's second deed of trust secures a claim with a balance of approximately $38,580.00. 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/payments in the secured amount of the claim 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 Alexander Taylor, Jr. and Caroline Guerrero-Taylor ("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 Nationstar Mortgage, LLC secured by a second in priority deed of trust recorded against the real property commonly known as 220 Bella Vista Way, Rio Vista, 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 $225,000.00 and is encumbered by senior liens securing claims in the amount of $380,962.39, which exceed the value of the Property which is subject to Creditor's lien.

38. 14-29067-E-13 EARLINE MILES
Mary Ellen Terranella

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY NATIONSTAR MORTGAGE, LLC
10-23-14 [22]

Final Ruling: No appearance at the December 16, 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, 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.

The court's decision is continue the hearing to 3:00 p.m. on February 10, 2015.

CONTINUED HEARING - DEADLINE FOR FILING OBJECTION TO CLAIM

As discussed below, the Debtor Opposes the Objection to Confirmation stating that she disputes the Proof of Claim filed by Nationstar Mortgage, LLC, as the loan servicer. The Objection does not relate to Nationstar Mortgage, LLC fulfilling its duties as a loan servicer and filing the claim. Rather, Debtor states that the asserted pre-petition arrearage stated in the Proof of Claim is incorrect.

In substance, the Debtor "Objects" to the arrearage stated in the Proof of Claim. Congress has established the objection to claim process under 11 U.S.C. § 502 and the United States Supreme Court has established the procedure for an objection to claim in Federal Rule of Bankruptcy Procedure 3007. The response to an objection to confirmation is not the correct procedure to "Object to a Proof of Claim."

While the court could sustain the Objection and create a chain of further proceedings for a motion to confirm the plan, for the sake of judicial economy and to reduce the cost and expense to the parties, the court further continues the hearing on this Objection to Confirmation.

The hearing on the Objection to Confirmation is continued to 3:00 p.m. on February 10, 2015.

The Debtor shall file and serve an Objection to Proofs of Claim Nos. 1 and 5 (which appear to be duplicates) on or before January 5, 2015, and set the hearing on the Objection for 3:00 p.m. on February 10, 2015.

OBJECTION TO CONFIRMATION

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.

NOVEMBER 18, 2014 HEARING

At the hearing, the court continued the hearing to 3:00 p.m. on December 16, 2014. Dckt. 31. The court ordered that supplemental pleadings shall be filed on or before December 5, 2014.

DEBTOR'S OPPOSITION

Debtor filed an opposition to the instant Objection on December 5, 2014. Dckt. 35.

Debtor states that she negotiated an agreement to catch up her mortgage before she filed her Chapter 13 case. The Debtor made a payment to Creditor on September 3, 2014 in the amount of $4,640.00. Debtor states that she was then instructed to make three payments of $3,864.37 each on October 3, November 3, and December 3, 2014 at which time her mortgage would be current. Debtor alleges that the Debtor made the first two payments by electronic bill pay.

When November payment was still in her account on November 10, 2014, the Debtor states that she called Creditor. Debtor states that she spoke to a representative who indicated the fact that the first two payments were each $21.20 short and so the November payment was not accessed. The Debtor further states that the representative informed Ms. Miles that the three payments were supposed to be $3,885.57 each, not $3,864.37. However, as there were certain funds in suspense, Debtor was informed that the last of the three payments, due December 3, 2014, should be in the amount of $3,841.57. Debtor states that she made this payment on December 3, 2014 by electronic bill pay. The Debtor believes she has complied with the terms of the catch up agreement and that her mortgage is now current with no arrears.

Debtor supplies her declaration in support providing the narrative stated in the Opposition. Debtor does not provide any exhibits showing these payments nor any copy of the alleged agreement.

DISCUSSION

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.

Debtor's Opposition does not provide any documentary evidence as to the cure of these alleged arrearages. Instead, Debtor merely states a narrative of events relating to an asserted oral modification of the debt. Debtor does not provide a copy of any agreement with Creditor as to the curing of any

arrearages. The Debtor does not provide a copy of any electronic bill statements as to the October, November, or December payments.

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).

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 the hearing on the Objection to Confirmation is continued to 3:00 p.m. on February 10, 2015.
>
> **IT IS FURTHER ORDERED** that the Debtor shall file and serve an Objection to Proofs of Claim Nos. 1 and 5 (which appear to be duplicates) on or before January 5, 2015, and set the hearing on the Objection for 3:00 p.m. on February 10, 2015.