

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**February 2, 2016 at 3:00 p.m.**

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1.	<a href="#"><u>09-23117</u></a> -E-13    THIERRY/MICHELLE VAN SDB-6                    LEUVEN W. Scott de Bie	MOTION TO AVOID LIEN OF CAPITAL ONE BANK 12-31-15 [ <a href="#"><u>80</u></a> ]
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**Final Ruling:** No appearance at the February 2, 2016 hearing is required.  
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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 December 31, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Avoid Judicial Lien is granted.</b>
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This Motion requests an order avoiding the judicial lien of Capital One Bank ("Creditor") against property of Thierry and Michelle Van Leuven ("Debtor") commonly known as 2370 Twain Ct., Fairfield, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$1,784.69. An abstract of judgment was recorded with Solano County on May 16, 2007, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$160,000.00 as of the date of the petition. The unavoidable consensual liens total \$255,667.78 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption

**February 2, 2016 at 3:00 p.m.**

pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$100.00 on Schedule C.

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

#### **ISSUANCE OF A COURT DRAFTED ORDER**

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the 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 judgment lien of Capital One Bank, California Superior Court for Solano County Case No. FCM096082, recorded on May 16, 2007, Document No. 200700056396 with the Solano County Recorder, against the real property commonly known as 2370 Twain Ct., Fairfield, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

2.     09-23117-E-13   THIERRY/MICHELLE VAN                   MOTION TO AVOID LIEN OF CAPITAL  
          SDB-7           LEUVEN                   ONE BANK  
                          W. Scott de Bie                 12-31-15 [[86](#)]

**Final Ruling:** No appearance at the February 2, 2016 hearing is required.  
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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 December 31, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Avoid Judicial Lien is granted.</b>
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This Motion requests an order avoiding the judicial lien of Capital One Bank ("Creditor") against property of Thierry and Michelle Van Leuven ("Debtor") commonly known as 2370 Twain Ct., Fairfield, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$2,792.80. An abstract of judgment was recorded with Solano County on June 15, 2007, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$160,000.00 as of the date of the petition. The unavoidable consensual liens total \$255,667.78 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$100.00 on Schedule C.

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

**ISSUANCE OF A COURT DRAFTED ORDER**

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the 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 judgment lien of Capital One Bank, California Superior Court for Solano County Case No. FCM096607, recorded on June 15, 2007, Document No. 200700067647 with the Solano County Recorder, against the real property commonly known as 2370 Twain Ct., Fairfield, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

3.     09-23117-E-13     THIERRY/MICHELLE VAN     MOTION TO AVOID LIEN OF CAPITAL  
SDB-8                   LEUVEN                   ONE BANK  
                          W. Scott de Bie                 12-31-15 [[92](#)]

**Final Ruling:** No appearance at the February 2, 2016 hearing is required.  
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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 December 31, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

<b>The Motion to Avoid Judicial Lien is granted.</b>
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This Motion requests an order avoiding the judicial lien of Capital One Bank ("Creditor") against property of Thierry and Michelle Van Leuven ("Debtor") commonly known as 2370 Twain Ct., Fairfield, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$1,426.41. An abstract of judgment was recorded with Solano County on March 15, 2007, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$160,000.00 as of the date of the petition. The unavoidable consensual liens total \$255,667.78 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$100.00 on Schedule C.

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

**ISSUANCE OF A COURT DRAFTED ORDER**

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the 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 judgment lien of Capital One Bank, California Superior Court for Solano County Case No. FCM095736, recorded on March 15, 2007, Document No. 200700031227 with the Solano County Recorder, against the real property commonly known as 2370 Twain Ct., Fairfield, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

4. [14-21319](#)-E-13 MARK/SARAH ANN HANSEN  
BB-8 Bonnie Baker

MOTION TO CONFIRM PLAN  
1-20-16 [[201](#)]

**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.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 21, 2015. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

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

Mark and Sarah Ann Hansen ("Debtor") filed the instant Motion to Confirm the Amended Plan on January 20, 2016. Dckt. 201.

#### **TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on January 26, 2016. Dckt. 207. The Trustee first asserts that the Debtor may have improperly noticed the instant Motion. The Debtor filed the most recent plan on December 21, 2015. Dckt. 196. However, the Debtor failed to serve the Motion until January 20, 2015, with a hearing date of February 2, 2016.

The Debtor's proof of service indicates that the Chapter 13 Trustee was served via "E-SERVICE" at [legalmail@cusick13.com](mailto:legalmail@cusick13.com). Dckt. 206. However, the

Trustee states that he did not receive the documents listed in the proof of service at that email address. The Trustee states that the documents were received at two other addresses on December 21, 2015. The Trustee states that the electronic service of these documents appears improper but is willing to waive the service issue as to these documents in this case, this time only.

The Trustee states that, outside the service issue, the Trustee does not oppose the plan.

## DISCUSSION

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

The Trustee concern over whether proper notice was provided emphasizes the need for parties to serve and file any pleadings at the same time. In the instant case, the Proof of Service, which was not filed with the court until January 20, 2016, states that the Motion to Confirm, Plan, and other necessary papers were served on December 20, 2015.

Local Bankruptcy Rule 3015-1(d) provides the procedure to confirm amended plans. Specifically, Local Bankr. R. 3015-1(d) states:

(1) Modified Plans Proposed Prior to Confirmation. If the debtor modifies the chapter 13 plan before confirmation pursuant to 11 U.S.C. § 1323, the debtor shall **file and serve** the modified chapter 13 plan together with a motion to confirm it. The plan shall be filed as a separate document. Notice of the motion shall comply with Fed. R. Bankr. P. 2002(b), which requires twenty-eight (28) days' of notice of the time fixed for filing objections, as well as LBR 9014-1(f)(1). LBR 9014-1(f)(1) requires twenty-eight (28) days' notice of the hearing and notice that opposition must be filed fourteen (14) days prior to the hearing. In order to comply with both Fed. R. Bankr. P. 2002(b) and LBR 9014-1(f)(1), parties-in-interest shall be **served** at least forty-two (42) days prior to the hearing.

The language of the Local Rule indicates that, while the Debtor is supposed to file and serve the plan and Motion, the rule's main concern is ensuring that parties in interest receive at least 42 days notice. According to the Proof of Service, which is signed under the penalty of perjury, the Debtor served all parties-in-interest on December 21, 2015. While the Trustee asserts that he did not receive service at the email listed on the Proof of Service, it is possible that this was a technical glitch. Either way, the Trustee offers to waive the service defect for this single instance.

Outside the service issue, the Trustee does not object to the plan. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee (outside the notice defect) or creditors. Upon review of the plan and the Motion, the amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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



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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on December 21, 2015 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. [14-23652-E-13](#) PHILIP/YVETTE HOLDEN  
SDB-5 W. Scott de Bie

CONTINUED AMENDED MOTION TO  
APPROVE LOAN MODIFICATION  
1-12-16 [[98](#)]

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 4, 2015. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

<p><b>The Motion to Approve Loan Modification is denied without prejudice</b></p>
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The Motion to Approve Loan Modification filed by Philip and Yvette Holden ("Debtor") seeks court approval for Debtor to incur post-petition credit. ("Creditor"), whose claim the plan provides for in Class 4, has agreed to a loan modification. The modification will result in a total monthly payment of \$1,609.33 per month which includes the escrow shortage. The new principal balance of the Note will be \$344,587.60. The interest rate will be 4.125%.

The Motion requests that the court authorize Debtor to enter into a loan modification with "Wells Fargo Home Mortgage." In reviewing the Loan Modification documents (Exhibit A, Dckt. 90), a person known as "Wells Fargo Home Mortgage" does not appear to be a party to the modification. On the Modification Agreement (Deed of Trust), the "lender" is identified as "Wells Fargo Bank, N.A." Exhibit A, Dckt. 90 at 1. All of the terms of the Agreement

are with "Wells Fargo Bank, N.A." The Agreement is executed for Wells Fargo Bank, N.A. by one of the Bank's Vice Presidents. *Id.* at 9. The Loan Modification document was prepared by Wells Fargo Bank, N.A. *Id.*

In reviewing the on-line data base provided by the California Secretary of State, the court notes that there formally was an entity known as "Wells Fargo Home Mortgage, Inc." <http://kepler.sos.ca.gov/>. This entity is identified as having been "merged out." The California Secretary of State also identifies two other "Wells Fargo Home Mortgage" entities: (1) Wells Fargo Home Mortgage of Hawaii, LLC (its status listed as cancelled) and Wells Fargo Home Mortgage, LLC (status listed as active, but "agent resigned 05/20/2014). *Id.*

The Motion is supported by the Declaration of Debtor. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms. Debtor testifies under penalty of perjury, "I am requesting permission from the Court to allow a loan modification of my first mortgage with **Wells Fargo Home Mortgage** for our residence." Dckt. 89, ¶ 2 [emphasis added].

David Cusick, the Chapter 13 Trustee, filed a non-opposition on December 17, 2015.

Wells Fargo Bank, N.A. filed proof of claim No. 13 in this case on August 12, 2014. The creditor is identified as Wells Fargo Bank, N.A. The Promissory Note attached to Proof of Claim No. 13 identifies the lender and payee under the notes as **Wells Fargo Bank, N.A.** Proof of Claim No. 13. The Deed of Trust securing the Note attached to Proof of Claim No. 13 identifies Wells Fargo Bank, N.A. as the Lender and the beneficiary under the Deed of Trust.

On November 1, 2014, a Notice of Mortgage Payment Change was filed, naming **Wells Fargo Bank, N.A.** as the creditor. The Notice is signed by a vice president of a "company" identified as "Wells Fargo Home Mortgage."

On May 11, 2015, a second Notice of Mortgage Payment Change was filed, naming **Wells Fargo Bank, N.A.** as the creditor. The Notice is signed by a vice president of a "company" identified as "Wells Fargo Home Mortgage."

On May 12, 2015, a third Notice of Mortgage Payment Change was filed, naming **Wells Fargo Bank, N.A.** as the creditor. The Notice is signed by a vice president of a "company" identified as "Wells Fargo Home Mortgage."

#### **JANUARY 12, 2016 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on February 2, 2016. Dckt. 108. Debtor was ordered to file and serve an amended motion and supporting pleadings on or before January 19, 2016.

#### **DISCUSSION**

To date, the Debtor has failed to file any supplemental papers in connection with the instant Motion.

In light of more than five years stressing to the parties and attorneys who appear in this court the need to correctly identify the real parties in

interest so that the court's order have legal force and effect, the court is at a loss to find any bona fide, good faith reason for listing "Wells Fargo Home Mortgage" as the person with whom the court should authorize Debtor to modify a loan. The court presumes that Debtor and Debtor's counsel carefully chose the name of the party with whom the loan modification was to be conducted. There is no evidence to support an order of the court authorizing a modification with Wells Fargo Home Mortgage. FN.1.

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FN.1. It could well be that Debtor is attempting to mislead the court into entering an order which Debtor could later, in bad faith, disavow. Such conduct does not bode well for a debtor who must not only file, but propose and confirm a plan, and prosecute the bankruptcy case in good faith.  
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The Debtor and Debtor's counsel failed to take advantage of the opportunity offered by the court to provide actual evidence of the creditor. Without the Debtor and Debtor's counsel providing the identity of the real party in interest to the loan modification, the Motion is denied without prejudice.

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

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

The Motion to Approve the Loan Modification filed by Phillip and Yvette Holden 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.

6. [14-23652-E-13](#) PHILIP/YVETTE HOLDEN  
SDB-6 W. Scott de Bie

CONTINUED MOTION TO EMPLOY  
JOSEPH M. LOVRETOVICH AS  
SPECIAL COUNSEL  
12-10-15 [[92](#)]

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 10, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Employ 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.

<b>The Motion to Employ is denied without prejudice.</b>
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Philip and Yvette Holden ("Debtor") seeks to employ special Counsel Joseph M. Lovretovich, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Counsel to assist the Debtor in a wrongful termination action against Metropolitan Van and Storage.

The Debtor argues that Counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present wrongful termination claims.

Mr. Lovretovich testifies that he is representing Debtor in a wrongful termination against Metropolitan Van and Storage. Mr. Lovretovich testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

David Cusick, the Chapter 13 Trustee, filed a non-opposition to the instant Motion on December 15, 2015.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

#### **JANUARY 12, 2016 HEARING**

At the hearing, the court continued the hearing to allow Debtor and proposed special counsel to supplement the record and file the employment agreement. Dckt. 109.

#### **DISCUSSION**

To date, the Debtor and Debtor's counsel has failed to file any supplemental papers in connection with the instant Motion.

Unfortunately, the Debtor has not provided the employment agreement. The Motion states that the Debtor wishes to retain Mr. Lovretovich on a contingency basis. However, the terms of the actual representation has not been disclosed. Without a copy of the retainment agreement, the court cannot determine whether the employment of special counsel is in the best interest of the Debtor, the estate, or creditors. The Debtor only provides a copy of Mr. Lovretovich's resume, which does not provide any of the terms of representation.

That Debtor, bankruptcy counsel, and the proposed special counsel have failed to disclose the actual contingent fee terms causes the court concern. In his declaration, proposed special counsel mentions that it is a 40% contingent fee and he is obligated to advance costs. The court does not know whether it is purported to be a 40% contingent fee prior to trial, after trial, or through all appeals, if any.

The Debtor nor Debtor's counsel took the opportunity offered by the court to provide supplemental evidence of the employment agreement. Instead, the Debtor and Debtor's counsel failed to file the employment agreement.

Without this information, the court cannot determine the reasonableness of the terms of employment. Therefore, the Motion is denied without prejudice.

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

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

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

**IT IS ORDERED** that the Motion is denied without prejudice.

7. 15-28475-E-13 CARLA GALBRAITH  
DPC-1 Kristy A. Hernandez

CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY DAVID  
P. CUSICK  
12-16-15 [[15](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on December 16, 2015. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
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<b>The court's decision is to sustain the Objection.</b>
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David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

1. The Debtor is \$440.00 delinquent in plan payments. The Debtor has paid \$0.00 into the plan to date.
2. The Debtor's plan relies on a Motion to Value Collateral of Capital One Auto Finance.

#### **JANUARY 12, 2016 HEARING**

At the hearing, the court continued the hearing to 3:00 p.m. on February 2, 2016, to be heard in conjunction with the Motion to Value Collateral of Capital One Auto Finance.

#### **DISCUSSION**

On February 2, 2016, the court granted the Debtor's Motion to Value Collateral of Capital One Auto Finance. With the Motion being granted, the Trustee's second objection is overruled.

However, the Debtor has still failed to provide evidence that the Debtor is no longer \$440.00 delinquent in plan payments. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

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

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

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

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



8. [15-28475](#)-E-13 CARLA GALBRAITH  
HLG-1 Kristy A. Hernandez

MOTION TO VALUE COLLATERAL OF  
CAPITAL ONE AUTO FINANCE  
12-30-15 [[20](#)]

**Final Ruling: No appearance at the February 2, 2016 hearing is required.**  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 30, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion to Value secured claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 Capital Auto Finance ("Creditor") is granted and the secured claim is determined to have a value of \$15,866.00.**

The Motion filed by Carla Galbraith ("Debtor") to value the secured claim of Capital One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2011 Dodge Durango ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of \$15,866.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in June 6, 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$22,831.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$15,866.00. See 11 U.S.C. § 506(a). FN.1. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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FN.1. A review of Proof of Claim No. 1 filed by the Creditor indicates that the Creditor now "values" its secured claim based on the valuation of the Debtor. According the Proof of Claim No.1, the Creditor lists a secured claim in the amount of \$15,866.00 and an unsecured amount in \$8,383.05.  
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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 Carla Galbraith ("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 Capital One Auto Finance ("Creditor") secured by an asset described as ("Vehicle") is determined to be a secured claim in the amount of \$15,866.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$15,866.00 and is encumbered by liens securing claims which exceed the value of the asset.

9. [15-28582-E-13](#) LYNN SANSOM  
GG-1 Gerald B. Glazer

CONTINUED MOTION TO VALUE  
COLLATERAL OF GM FINANCIAL  
11-24-15 [[14](#)]

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

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

**Below is the court's tentative ruling.**

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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, Creditor, parties requesting special notice, and Office of the United States Trustee on November 23, 2015. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value secured claim of GM Financial ("Creditor") is granted and the secured claim is determined to have a value of \$14,202.00.**

The Motion filed by Lynn Marie Sansom ("Debtor") to value the secured claim of GM Financial ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2009 Mercedes Benz C300 ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of \$14,202.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

**JANUARY 12, 2016 HEARING**

At the hearing, the court continued the hearing to February 2, 2016 at 3:00 p.m. to allow the Debtor to file a supplemental declaration. Dckt. 33.

## **SUPPLEMENTAL DOCUMENT**

The Debtor filed a supplement to the instant Motion on January 21, 2016. Dckt. 40. The Debtor states that the Vehicle was purchased on July 9, 2012 and provides the Retail Installment Contract as evidence.

## **DISCUSSION**

The lien on the Vehicle's title secures a purchase-money loan incurred in July 9, 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$19,529.53. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$14,202.00. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Lynn Marie Sansom ("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 GM Financial ("Creditor") secured by an asset described as 2009 Mercedes Benz C300 ("Vehicle") is determined to be a secured claim in the amount of \$14,202.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$14,202.00 and is encumbered by liens securing claims which exceed the value of the asset.

10. [15-28582-E-13](#) LYNN SANSOM  
DPC-1 Gerald B. Glazer

CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY DAVID  
P. CUSICK  
12-16-15 [[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).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on December 16, 2015. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

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

<b>The court's decision is to sustain the Objection.</b>
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David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the plan relies on the Debtor's Motion to Value Collateral of GM Financial.

On January 12, 2016, the court continued the hearing to 3:00 p.m. on February 2, 2016 to be heard in conjunction with the Motion to Value Collateral of GM Financial. Dckt. 38.

On February 2, 2016, the court granted the Debtor's Motion to Value Collateral of GM Financial. Therefore, the Trustee's objection is overruled.

Without any remaining objections and upon review of the plan, 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 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 November 3, 2015 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.

11. [11-48095-E-13](#) MICHAEL NEUMANN  
LDD-5 Linda D. Deos

CONTINUED OBJECTION TO NOTICE  
OF MORTGAGE PAYMENT CHANGE  
10-16-15 [[107](#)]

**Final Ruling:** No appearance at the February 2, 2016 hearing is required.

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Local Rule 3007-1 Objection to Notice of Mortgage Payment Change.

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 16, 2015. By the court's calculation, 60 days' notice was provided. 30 days' notice for asserting opposition is required. (Fed. R. Bankr. P. 3007(a) 30 day notice.)

The Objection to Notice of Mortgage Payment Change was properly set for hearing on the notice required by Local Bankruptcy Rule 3007(d)(2). Creditor, Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

<p><b>The Objection to Notice of Mortgage Payment Change filed by Federal National Mortgage Association is dismissed without prejudice.</b></p>
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Michael Neumann ("Debtor") filed the instant Objection to Federal National Mortgage Association's Notice of Mortgage Payment Change, Proof of Claim No. 1-2 on October 16, 2015. Dckt. 107. The Debtor seeks for the court to deny Federal National Mortgage Association's ( "FNMA" or "Creditor") Notice of Mortgage Payment Change filed on October 9, 2015 and for the award of attorney fees and expenses in the amount of \$900.00.

**JANUARY 12, 2016 HEARING**

At the hearing on January 12, 2016, the court issued the following order:

**IT IS ORDERED** that the hearing on the Objection to Notice of Mortgage Payment Change filed by Federal National Mortgage Association is continued to 3:00 p.m. on February 2, 2016.

**IT IS FURTHER ORDERED** that Linda Dios, counsel for Debtor, and Nichole L. Glowin, counsel for Federal National Mortgage Association each appear at the continued hearing in person (no telephonic appearances permitted for counsel) if the matter has not been resolved and removed from calendar by the court.

**IT IS FURTHER ORDERED** that if this matter has not been resolved and removed from the calendar by the court, on or before January 29, 2016, Federal National Mortgage Association shall file a Status Report in which it provides the court with the reasons for the continuing investigation, review, and delay in addressing the Objection, what further investigation and review is anticipated, and a good faith projection of when it will be able to respond to the Debtor's objections if the court further continues the hearing.

Dckt. 128.

**STIPULATION FOR CONTINUANCE - Filed January 11, 2016**

On January 11, 2016, one day before this multi-continued hearing, the Parties filed another Stipulation requesting that the court continue the hearing for yet another month. Dckt. 124. In the "Whereas" paragraphs of the Stipulation, the Parties state the following reasons for requesting the continuance, rather than prosecution, of this Contested Matter:

**"WHEREAS**, FNMA is in the process of researching the issues set forth in Debtor's Objection. In particular, FNMA is reviewing the escrow account, reviewing Debtor's forthcoming proof of insurance and proof of payment of escrow funds, substantiating the change in the principal and interest payment with Debtor's counsel, and if necessary, correcting any elements of Debtor's loan account to fully resolve Debtor's Objection to the Payment Change;

**WHEREAS**, the Parties have met and conferred regarding a resolution of Debtor's Objection to FNMA's Payment Change

and have agreed that continuing the hearing on the Objection to February 2, 2016 at 3:00 PM will best facilitate settlement;...."

This Objection to the proposed mortgage payment change was filed on October 16, 2015. In the eighty-eight days which has passed since the objection was filed, FNMA purports to be "researching" the issues set forth in the objection. Additionally, FNMA is continuing to review the escrow account, proof of insurance, proof of payment of funds, and correcting any errors in FNMA's records concerning this obligation.

The grounds in the January 11, 2016 Stipulation are the same as stated to the court thirty days earlier in requesting continuance of the December 11, 2015 hearing:

**"WHEREAS**, FNMA is in the process of researching the issues set forth in Debtor's Objection. In particular, FNMA is reviewing the escrow account, reviewing Debtor's forthcoming proof of insurance and proof of payment of escrow funds, substantiating the change in the principal and interest payment with Debtor's counsel, and if necessary, correcting any elements of Debtor's loan account to fully resolve Debtor's Objection to the Payment Change;

**WHEREAS**, the Parties have met and conferred regarding a resolution of Debtor's Objection to FNMA's Payment Change and have agreed that continuing the hearing on the Objection to January 12, 2016 at 3:00 PM will best facilitate settlement;...."

Dckt. 118.

These December 2015 grounds are merely the parroting of the grounds stated to the court in October 2015 by FNMA and Debtor:

**"WHEREAS**, FNMA is in the process of researching the issues set forth in Debtor's Objection. In particular, FNMA is reviewing the escrow account, reviewing Debtor's forthcoming proof of insurance and proof of payment of escrow funds, substantiating the change in the principal and interest payment with Debtor's counsel, and if necessary, correcting any elements of Debtor's loan account to fully resolve Debtor's Objection to the Payment Change;

**WHEREAS**, the Parties have met and conferred regarding a resolution of Debtor's Objection to FNMA's Payment Change and have agreed that continuing the hearing on the Objection to December 15, 2015 at 3:00 PM will best facilitate settlement;...."

Though months have passed since FNMA confirmed that it is investigating, reviewing, and correcting, it offers no representations to the court that there has been any headway, that it's investigation or research has produced any useful information, or that there is anything which is being



resolved. Rather, boilerplate representations are made to the court from this sophisticated creditor.

As FNMA is well aware, the prior loan servicer and counsel for that loan servicer were the subject of an order to show cause concerning their conduct in this case. Dckt. 92. The court addresses these shortcomings in detail in its Ruling on the Order to Show Cause. Civil Minutes, Dckt. 115.

The court continues this hearing one final time. If this matter has not been fully resolved, at the continued hearing the appearance of lead counsel for each party will be required to appear at the hearing (no telephonic appearances permitted). The court does not order, at this time, the in-person appearance of the Debtor or senior management of FNMA (though their attendance in court or telephonically is permitted).

#### **STIPULATION FOR CONTINUANCE - Filed December 11, 2015**

On December 11, 2015, the parties filed a stipulation requesting that the Objection be continued to 3:00 p.m. on January 12, 2016 to allow the parties the chance to settle. Dckt. 118.

#### **Order**

On December 12, 2015, the court issued an order continuing the Objection to 3:00 p.m. on January 12, 2016. Dckt. 120. The court further ordered that Federal National Mortgage Association's deadline to file a responsive pleading is extended to December 30, 2015.

#### **STIPULATION FOR CONTINUANCE - Filed October 29, 2015**

On October 29, 2015, the parties filed a stipulation requesting that the Objection be continued to 3:00 p.m. on December 15, 2015 to allow the parties the chance to settle.

#### **Order**

On October 29, 2015, the court issued an order continuing the Objection to 3:00 p.m. on December 15, 2015. Dckt. 114. The court further ordered that Federal National Mortgage Association's deadline to file a responsive pleading is extended to December 1, 2015.

#### **REVIEW OF OBJECTION**

The Debtor states that Ocwen Loan Servicing, LLC filed a Notice of Mortgage Payment Change on February 18,, 2013 which lowered Debtor's escrow payment from \$361.78 to \$329.36. Debtor did not dispute this change nor was there any mention of an escrow shortage of \$4,280.95.

The Debtor states that Ocwen Loan Servicing, LLC filed another Notice of Mortgage Payment Change on February 28, 2014 which lowered the Debtor's escrow payment from \$329.36 to \$265.84. Once again, the Debtor states that he did not dispute the change nor was there any mention of any escrow shortage.

**February 2, 2016 at 3:00 p.m.**

Ocwen Loan Servicing, LLC filed another Notice of Mortgage Payment Change on April 24, 2015 which proposes to increase the Debtor's escrow payment from \$265.84 to \$569.31. The Debtor states that Ocwen Loan Servicing, LLC alleges the increase is necessary because of the cost of force placed hazard insurance (\$739.00 and a Proof of Claim Escrow Shortage Adjustment of \$4,280.95.

The Debtor objected to the adjustment based on the following:

1. The Proof of Claim Escrow Shortage Adjustment of \$4,280.95 identified by Ocwen Loan Servicing, LLC in its Notice is already being paid by Debtor through his Chapter 13 plan and the Proof of Claim filed by the predecessor in interest, GMAC. In the Proof of Claim No. 1, GMAC claimed \$4,473.33 in pre-petition fees, expenses, and charges.
2. Debtor already paid Ocwen Loan Servicing, LLC to cover an escrow shortage.
3. Debtor has obtained hazard insurance from USAA for \$364.00 effective July 1, 2015.

On August 13, 2015, the court sustained the Debtor's objection and disallowed the stated changes in the requested escrow payments in the April 24, 2015 Notice of Mortgage Payment Change. Dckt. 84.

On August 31, 2015, Creditor filed a Notice of Transfer of Claim from Ocwen Loan Servicing, LLC to itself. Dckt. 89. The claim was actually transferred on October 6, 2015. Dckt. 106.

On October 9, 2015, the Creditor file a Notice of Mortgage Payment Change which proposed an increase in Debtor's escrow payment from \$265.84 to \$270.40. Creditor argues that the increase is necessary because of the cost of force placed hazard insurance in the amount of \$402.47 and a Post Petition Escrow Shortage Adjustment of \$160.99. The Debtor argues that there is no explanation given for the increase in Debtor's principal and interest payment nor is there any evidence submitted to justify such increase.

The Debtor objects to the adjustment based on the following:

1. The Proof of Claim Escrow Shortage Adjustment of \$4,280.95 identified by Ocwen Loan Servicing, LLC in its Notice is already being paid by Debtor through his Chapter 13 plan and the Proof of Claim filed by the predecessor in interest, GMAC. In the Proof of Claim No. 1, GMAC claimed \$4,473.33 in pre-petition fees, expenses, and charges.
2. Debtor already paid Ocwen Loan Servicing, LLC to cover an escrow shortage.
3. Debtor has obtained hazard insurance from USAA for \$364.00 effective July 1, 2015.

#### **APPLICABLE LAW**

Fed. R. Bankr. P. 3002.1 deals with "Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence." The Rule provides for the following, in relevant part:

(b) Notice of payment changes

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

(c) Notice of fees, expenses, and charges

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred. . . .

(I) Failure to notify

If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

**NOTICE OF MORTGAGE PAYMENT CHANGE**

The court has reviewed the Notice of Mortgage Payment Change filed on October 9, 2015, filed by Creditor. The information in the Notice is summarized as follows:

1. Current Payment:
  - a. Principal and Interest = \$644.94
  - b. Escrow = \$265.84
  - c. Total = \$910.78
2. New Payment Effective 11/1/15
  - a. Principal and Interest = \$749.28

- b. Escrow = \$267.72
- c. Shortage Spread = \$2.68
- d. Total = \$1,019.68

3. The Notice includes a history of this escrow as follows

Month	Projected Payments to Escrow	Projected Payments from Escrow	Description	Projected Ending Balance
Beginning Balance				\$-96.11
Post Petition Beginning Balance				\$1,846.03
November 2015	\$267.72	\$1,405.09	County Tax	\$708.66
December 2015	\$267.72			\$976.38
January 2016	\$267.72			\$1,244.10
February 2016	\$267.72			\$1,511.82
March 2016	\$267.72	\$1,405.09	Count Tax	\$374.45
April 2016	\$267.72			\$642.17
May 2016	\$267.72			\$909.89
June 2016	\$267.72			\$1,177.61
July 2016	\$267.72	\$402.47	Hazard Insurance	\$1,042.86
August 2016	\$267.72			\$1,310.58
September 2016	\$267.72			\$1,578.30
October 2016	\$267.72			\$1,846.02
TOTALS	\$3,212.64	\$3,212.65		

4. The Notice states that the projected beginning balance of the escrow account is \$1,846.03. The Notice further states that the minimum required balance of the escrow account is \$2,007.02. This means a "post-petition shortage and/or deficiency of \$160.99." The Notice states that Creditor has spread out the shortage over the next 60 installments and included the amount in the escrow payment.

#### DISCUSSION

On January 26, 2016, the Debtor filed a Withdrawal of the Objection. Dckt. 129.

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

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 Michael Neumann, 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 Objection to Notice of Mortgage Payment Change filed by Federal National Mortgage Association is dismissed without prejudice