UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

February 4, 2014 at 3:00 p.m.

1.	**13-34907-E-13**	**VICTORIA VALENTE**	**OBJECTION TO CONFIRMATION OF**
	NLE-1	**Stephen J. Johnson**	**PLAN BY DAVID P. CUSICK**
			1-7-14 [16]

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

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 17, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, 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 has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Objection is overruled as moot and confirmation is denied. No appearance required.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on January 28, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot 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 Confirmation of 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,
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> **IT IS ORDERED** that Objection is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

2. 13-35107-E-13 FERNANDO RODRIGUEZ — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
NLE-1 Peter Lago — 1-7-14 [31]

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 January 7, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Debtor has improperly classified Green Tree in Class 1 of the plan. Trustee states that Debtor indicated at the 341 meeting that his is current with his mortgage payments and that he had made his post-petition ongoing mortgage payment directly to the lender. Therefore, it appears the claim should be provided for in Class 4 of the plan and paid directly by the Debtor. FN.1.

FN.1. Though no identified by the Trustee, the Plan may suffer from another fatal defect – misidentification of a creditor. The creditor identified as holding the Class 1 Claim in the Plan is "Green Tree." A review of the California Secretary of State website identifies 97 corporations and 44 limited partnerships and limited liability companies with the words "Green Tree" in their name. http://kepler.sos.ca.gov/. The court has no idea which of these 141 entities is this "Green Tree."

If the Debtor means to name "Green Tree Servicing, LLC" as the creditor, it appears that this is defective. Green Tree Servicing, LLC has appeared in this court on several occasions and confirmed that it is merely the loan servicer for the actual creditor. Based on the information in those cases, Green Tree Servicing, LLC does not meet the definition of a

creditor as set forth in 11 U.S.C. § 101(10). No proof of claim has been filed for this secured claim as of the court's review of this objection.

The Mailing Matrix provided by the Debtor and used in providing notice of this Plan lists "Green Tree Servicing L," with a post office address in Racid City, South Dakota. Matrix, Dckt. 4. The California Secretary of State website lists Green Tree Servicing, LLC being registered to do business in California, listing this entities address to be 1400 Landmark Towers, 345 St. Peter Street, St Paul, Minnesota, 55102. http://kepler.sos.ca.gov/. To the extent that Green Tree Servicing, LLC is the entity named in the Plan, and that such entity is actually the creditor whose rights are being effected, rather than merely a loan servicer, it does not appear that such entity has been served with the plan or notice of this bankruptcy case.

The Trustee also objects on the basis that the Debtor cannot afford to make the payments or comply with the plan. Trustee states that the Debtor's projected disposable monthly income listed on Schedule J is $111.00 but the Debtor proposes a plan paying $1,157.20. Debtor includes on Schedule J $941 for his monthly mortgage payment, which is currently provided for in Class 1. The two figures combined total $1,052.00, which is still insufficient to pay the proposed plan payment. Furthermore, Trustee argues the Debtor's income is very low and relies partially on state aide, unemployment benefits and recycling. On Schedule J, Debtor list household expenses for a household of 4 family members. These expenses are extremely low listing only $80 for electricity, $100 for water/sewer, $28 for telephone, $0 for internet/cable, $0 for home maintenance, $400 for food, $30 for clothing, $40 for recreation, $0 for medical/dental, $0 for transportation. The presentation under penalty of perjury Schedule J expenses which facially appear to be unreasonable and unrealistic is an indicator that the Debtor's statements in general are not credible or that the Debtor did not read the Schedules before signing them.

Trustee also states that the Debtor may receive tax refunds, as they did with $7,826 from Federal Tax Refund in 2012 and $127 from a State Tax Refund. The Debtor has not projected this income.

Additionally, Trustee argues that Debtor cannot afford to make the payments or comply with the plan as Debtors' plan relies on the Motion to Value Collateral of Bank of America, NA, PLL-1, which is set for hearing on January 14, 2014. If the motion to value is not granted, Debtor's plan does not have sufficient monies to pay the claim in full and therefore should also be denied confirmation. The court denied the motion to value on January 14, 2014. The court notes that the Debtor filed and set another Motion to Value on February 25, 2014.

The Trustee opposes confirmation offering evidence that the Debtor is $1,157.20 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

Lastly, the Trustee states that the Debtor lists in his plan, payment to attorney fees of $2,369 was paid prior to filing. The Statement

of Financial Affairs indicates the same, counsel was paid $2,369. Dckt. 1. On December 2, 2013, Debtor filed Rights and Responsibilities which indicate Debtor paid counsel $4,000 prior to filing. The Trustee is unable to determine which is accurate. Debtors plan does not call for any further payment toward attorney fees.

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

3. 12-22208-E-13 IRVIN/THERESA WHITE
EJS-8 Eric John Schwab

MOTION FOR COMPENSATION BY THE LAW OFFICES OF NELSON & SCHWAB FOR ERIC JOHN SCHWAB, DEBTORS' ATTORNEY, FEES: $1,665.00, EXPENSES: $65.32
1-7-14 [106]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Compensation is granted. No appearance required.

Law Offices of Nelson & Schwab, Counsel for Debtor, seeks additional attorney fees in the amount of $1,665.00 and expenses in the amount of $65.32. Counsel argues that these additional fees are actual, reasonable, necessary and unanticipated as post-confirmation work required.

Description of Services for Which Fees Are Requested

1. Motion for Loan Modification and Incur Debt: Counsel addressing missed payments with Debtors, a loan modification and the necessity to incur a new debt.

The hourly rates for the fees billed in this case are $325.00/hour for counsel Eric Schwab and $225.00/hour for counsel Thomas Amberg, Jr. for 3.7 hours of unanticipated and substantial work. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of $1,665.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

Counsel also seeks the allowance and recovery of costs and expenses in the amount of $65.32 for postage. The total costs in the amount of $65.32

are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Compensation filed by Counsel for Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Motion is granted, and Law Offices of Nelson & Schwab, Counsel for Debtor, is allowed the following fees and expenses as a professional of the Estate:
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> Law Offices of Nelson & Schwab, Counsel for Debtor
> Applicant's Fees Allowed in the amount of $1,665.00
> Applicants Expenses Allowed in the amount of $65.32.

4. 13-35314-E-13 BORIS/ZINAIDA MURZAK — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
NLE-1 Mark Shmorgon — 1-7-14 [19]

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

Proper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 7, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, 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 has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Objection is overruled as moot and confirmation is denied. No appearance required.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on January 15, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot 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 Confirmation of 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 is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

5. 13-35315-E-13 STUART/TAMMIE CLARK — MOTION TO VALUE COLLATERAL OF WELLS FARGO DEALER SERVICES, INC.
WSS-1 W. Steven Shumway — 1-2-14 [19]

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' Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on January 2, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Value Collateral of Wells Fargo Dealer Service, Inc. is denied without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following finding of fact and conclusion of law:

Debtors move for an order for order valuing collateral of Wells Fargo Dealer Services, Inc. This motion is accompanied by the Debtors' declaration. The Debtors are the owner of a 2003 Dodge Ram 1500 truck. The Debtors seek to value the property at a replacement value of $3,200 as of the petition filing date. As the owners, the 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).

However, Debtors have not established that underlying debt is not a purchase-money loan acquired within the 910-day period prior to the filing of the petition. If so, Debtors are statutorily unable to prevail on this motion to value collateral pursuant to 11 U.S.C. §1325(a)(*). Given that this is a standard requirement for this type of motion, presumably counsel's vehicle secured claim valuation for has that as a standard paragraph – which has been deleted from this motion rather than an affirmative allegation that the debt was not incurred within the 910-day period.

The Debtors have not stated the prima facie case for the requested relief. *See* Fed. R. Bankr. P. 9013. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is denied without prejudice.

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

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

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

IT IS ORDERED that the Motion to Value Collateral is denied without prejudice.

6.	**13-35315-E-13** **NLE-1**	**STUART/TAMMIE CLARK** **W. Steven Shumway**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **1-7-14 [23]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan relies on a pending motion to value the secured claim of Wells Fargo Dealer Services, which is set for the same date as this Objection. The court having denied the motion without prejudice, this portion of the objection is sustained.

The Trustee also argues that the plan is not the Debtor's best effort. Debtors are above median income and propose a 60 month plan paying $3,149.00 per month with a guaranteed dividend of 5% to unsecured claims. Debtors also report on Schedule I to having $267.93 per month deducted from Mr. Clark's payroll for repayment of a 457 loan. Dckt. 1. However, the Trustee states that according to the Debtor's testimony at the 341 meeting, he estimates that the loan will end in approximately 33 months. Debtors fail to propose an increase in plan payments by $267.93 after the loan payments end.

DEBTOR'S RESPONSE

Debtors respond stating that they have filed a Motion to Value the secured claim of Wells Fargo Dealer Services, with the hearing set for February 4, 2014. The Debtors state they also agreed to amend the plan by placing language in the order confirming the plan that it will increase their payment into the plan in the 34th month by $267.93. Debtors believe this will resolve the Trustee's objection.

However, court has denied the motion to value. The Debtors offer failed to make the basic allegations, and support them with competent evidence, for the motion to value. Or, how they failed to truthfully and honestly provide in their plan for the termination of the $267.93 payment for the 457 loan. Debtors are required to file and prosecute bankruptcy cases in good faith. Debtors are required to file and prosecute bankruptcy plans in good faith. The conduct of Debtors in omitting this key information, which coincidently conferred an improper financial benefit of $7,234.11 to the Debtor is an indication of bad faith in the filing and prosecution of the plan and this case. Truth and honesty from debtors is not required only once they are "caught" by the Trustee, U.S. Trustee, creditors or court in a material misstatement or omission.

Based on the denial of the Motion to Value and, as a separate and independent grounds, the lack of good faith in the filing and prosecution of the Plan, this Chapter 13 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,
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> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

7. 13-35530-E-13 KENNETH GAUDREAU — MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
SDB-1 W. Scott de Bie — 12-30-13 [19]

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's Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on December 30, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 4135 Cabinet Circle, North Highlands, California. The Debtor seeks to value the property at a fair market value of $105,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately $105,772.00. Creditor Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately $49,936.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 4135 Cabinet Circle, North Highlands, 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 $105,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

8. 13-35337-E-13 JESSICA DYKES
RFW-1 Scott J. Sagaria

OBJECTION TO CONFIRMATION OF PLAN BY CARRINGTON MORTGAGE SERVICES LLC
1-9-14 [23]

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

Proper 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 January 9, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

Final Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Objection is overruled as moot and confirmation is denied. No appearance required.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on January 27, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot 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 Confirmation of 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 is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

9. 09-29342-E-13 MANUEL/SHANNON SOUZA — MOTION TO MODIFY PLAN
SDB-5 Scott de Bie — 12-30-13 [64]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 30, 2013. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

Final Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The court's decision is to grant the Motion to Confirm the Modified Plan. No appearance at the February 4, 2014 hearing is required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects to the motion on the basis that the modified plan does not provide for the Priority claim of the State Board of Equalization. The Debtor's confirmed plan provides for the amount of $4,546.11 and the Trustee states that he has disbursed $4,029.06 to the creditor. The modified plan identifies the creditor Franchise Tax Board with a claim for $4,546.11.

Debtors respond, stating that there was an error in the plan and the Franchise Tax Board should read State Board of Equalization. Debtor seeks to correct this clerical error in the Order Confirming the Second Modified Plan. The original confirmed plan in this case listed State Board of Equalization as holding the Class 5 Claim. Plan, Dckt. 43.

With the clerical error being addressed, the modified 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 conditioned on "Franchise Tax Board" being replaced with "State Board of Equalization" in the modified plan, Debtor's Chapter 13 Plan filed on December 30, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

10. 13-35342-E-13 JOSEPH/PEGGY ORLANDO — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
NLE-1 Mark A. Wolff — 1-7-14 [21]

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 January 7, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

The court's decision is to continue the hearing on the Objection to Confirmation the Plan to 3:00 p.m. on February 11, 2014. No appearance at the February 4, 2014 hearing is required.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the proposed plan is not the debtors' best efforts. Debtors are above median income and propose a 60 month plan paying $841 per month with no less than 10% to unsecured claims. Debtors list on Schedule I, that Peggy Orlando has a deduction of $186 per month for repayment of a retirement loan. Debtors fail to propose a plan increase upon payoff of the loan. Debtors supplied the Trustee with documentation which reveals the loan balance as of October 30, 2013 was $4,425.58. It appears the loan will payoff in approximately 24 months, or approximately October, 2015. Trustee argues that the plan should be increased by $186 to $1,027.00 in November, 2015.

Additionally, the Trustee states the Debtor cannot afford to make the payments or comply with the plan, 11 U.S.C. §1325(a)(6). Debtors' plan relies on the Motion to Value Collateral of Addison Avenue Federal Credit Union, but Debtor has not filed the motion to value collateral. Debtors plan does not have sufficient monies to pay the claim in full and therefore should also be denied confirmation.

The court notes that the Debtors filed a Motion to Value set for hearing February 11, 2014. The Motion to Value appears to state with particularity the grounds upon which the requested relief is based. Motion, Dckt. 31. The Debtor provides his testimony under penalty of perjury as to the relevant facts and owner opinion as to the value of the property which secures the claim. Declaration, Dckt. 33.

In light of the pending Motion to Value, the court continues the hearing on the Objection to Confirmation to 3:00 p.m. on February 11, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The 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,
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> **IT IS ORDERED** that the hearing on the Objection to Confirmation the Plan is continued to 3:00 p.m. on February 11, 2014.

11. 13-35843-E-13 CAH-1 — ALFRED/CATHERINE ALVARADO — C. Anthony Hughes — MOTION TO VALUE COLLATERAL OF JPMORGAN CHASE BANK, N.A. — 1-2-14 [15]

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' Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on January 2, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtors' declaration. The Debtors are the owner of the subject real property commonly known as 109 Diamond Grove Court, Roseville, California. The Debtors seek to value the property at a fair market value of $415,000.00 as of the petition filing date. As the owners, the 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 first deed of trust secures a loan with a balance of approximately $530,995.00. Creditor JPMorgan Chase Bank, N.A.'s second deed of trust secures a loan with a balance of approximately $125,115.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of JPMorgan Chase Bank, N.A. secured by a junior deed of trust recorded against the real property commonly known as 109 Diamond Grove Court, Roseville, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $415,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

12. 12-36944-E-13 EDA URRIZA — OBJECTION TO NOTICE OF MORTGAGE PAYMENT CHANGE
PLC-8 Peter L. Cianchetta — 12-17-13 [122]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on December 17, 2013. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

Tentative Ruling: 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).

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

Objection to Mortgage Payment Change

Debtor objects to the Notice of Mortgage Payment Change filed by U.S. Bank, N.A, as Trustee. Debtor argues that the Proof of Claim No. 9 filed by the Bank listed a shortage of $144.67 as of the petition date but the escrow analysis supporting the claim stated that the amount of the escrow balance was positive in the amount of $1,716.51. The Debtor states these documents submitted are inconsistent and unsupported.

This Objection is a Contested Matter objecting to the claim being asserted in this bankruptcy case by U.S. Bank, N.A, as Trustee. Federal Rule of Bankruptcy Procedure 3002.1(e) sets the procedure to object to any post-petition fee, expense, or charge asserted to be part of the cure of any default for a claim in the bankruptcy case. Jurisdiction for this Objection exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and the referral of bankruptcy cases and all related matters to the bankruptcy judges in this District. ED Cal. Gen Order 182, 223. This Contested Matter is a core matter arising under Title 11, including 11 U.S.C. § 502. 28 U.S.C. § 157(b)(2)(A), (B), and (O).

The Objection states with particularity the following grounds upon which the Objection is based:

A. The bankruptcy case was filed on September 20, 2012 and the Chapter 13 Plan was confirmed on June 26, 2013.

B. Proof of Claim No. 9 filed by U.S. Bank, N.A., as Trustee, states a pre-petition escrow shortage of ($144.67). Exhibit 1, pg. 8.

C. The attachment to Proof of Claim No. 9 includes an escrow analysis which states that the escrow balance was a positive $1,716.51. Exhibit 1, pg. 43.

D. On June 5, 2013 U.S. Bank, N.A., as Trustee, filed a Notice of [Post-Petition] Mortgage Payment Change for its claim. It states that the post-petition escrow payments to be made by Debtor, in addition to principal and interest, will be increased from $258.22 to $688.02. Exhibit 2, pg 45.

E. The escrow analysis provided as part of the Notice of [Post-Petition] Mortgage Payment Change states that the starting escrow balance for this claim on October 2012 (the first month of this Chapter 13 case) was a negative ($1,123.91). Exhibit 2, pg. 52.

F. The Notice of [Post-Petition] Mortgage Payment Change stating a negative ($1,123.91) escrow balance as of the commencement of this case is inconsistent with the negative ($144.67) balance in Proof of Claim No. 9 (Ex. 1, pg. 9) and the positive escrow balance of $1,716.51 in the attachment to Proof of Claim No. 9 (Ex. 1, pg. 43).

G. Debtor asserts that the inconsistencies are the result of pre-petition escrow amounts not being properly credited int eh analysis, when then results in a pre-petition "arrearage" which would constitute a second payment.

H. In successfully challenging the asserted change in monthly payment under the Note upon which the claim is based, Debtor asserts that California Civil Code § 1717 allows Debtor to recover attorneys' fees. (Debtor fails to state what contractual provision might exist for attorneys' fees to which Cal. Civ. § 1717 could apply to make it reciprocal. Presumably, Debtor relies on the count "knowing" that institutional lender notes and deeds of trust have attorneys' fees provisions relating to the obligations under the note and deed of trust. Neither the Debtor nor counsel should rely on the court "knowing" the specifics of the transaction or spending time combing the loan documents to assist a party in presenting its case.)

Objection, Dckt. 122.

To support the Objection, the Debtor provides a declaration. Dckt. 124. The Debtor states under penalty of perjury, based on Debtor's personal knowledge (Fed. R. Evid. 602), to the following:

A. Debtor has Reviewed the Notice of [Post-Petition] Mortgage Payment Change.

B. Debtor "believe[s]" that the amounts stated in the escrow account in the Notice of [Post-Petition] Mortgage Payment Change is substantially inaccurate. He states that the documents supplied are insufficient for him to ascertain the correct amount.

C. Debtor has "not seen" any documentation to support the escrow payment changed stated in the Notice of [Post-Petition] Mortgage Payment Change.

D. Debtor testifies that he has been informed in (what would otherwise appear to have been privileged attorney-client) communications with Debtor's attorney that California Civil Code § 1717 allows him to recover attorneys' fees from against U.S. Bank, N.A. Trustee. FN.1.

FN.1. The court is unaware a basis for an attorney's communication to his client being a hearsay exception under Federal Rule of Evidence 801, 802, 803; or why an attorney's legal opinion is the proper subject to a lay witness "personal knowledge" testimony.

Debtor's counsel has provided his declaration, which includes a billing statement for attorneys' fees sought to be recovered from U.S. Bank, N.A., Trustee. Attorney Declaration, Dckt. 125. In this Attorney Declaration, counsel provides the following testimony under penalty of perjury.

A. Counsel is admitted to practice before all courts in the State of California and this court.

B. Counsel has extensive experience in bankruptcy and debtor/creditor law. He has been employed in Chapter 7, Chapter 11, Chapter 12, and Chapter 13 cases, and to represent Chapter 7 trustees.

C. Counsel's hourly billing rate is $325.00 and Counsel's law clerk has a billing rate of $250.00 an hour.

D. Counsel testifies to having spent 7.5 hours (of which 2.5 are for the $250.00 an hour law clerk), for which $2,081.25 in fees are requested and $18.84 in postage expenses (to comply with the service requirements of Fed. R. Bankr. P. 7004(h)).

REVIEW OF PROOF OF CLAIM AND NOTICE OF [POST-PETITION] MORTGAGE PAYMENT CHANGE

The court has reviewed The Notice of [Post-Petition] Mortgage Payment Change filed on June 5, 2013, filed by U.S. Bank, N.A., as Trustee. The information in the Notice is summarized as follows.

A. The payment of principal and interest are not changed.

B. The Current escrow payment amount is stated to be $258.22 and the asserted New Escrow Payment amount is stated to be $688.02.

C. The asserted new monthly payment amount is stated to be $2,535.57.

D. The attached copy of the escrow account statement provides the following information:

1. Information stated in box at top of Escrow Account Disclosure Statement:

a. New Payment Amount.....$ 2,533.57
b. Shortage Amount.....$ 2,796.87
c. Principal Balance.....$349,643.00
d. Interest Rate.....4.000%
e. Statement Date.....April 9, 2013
f. Account Review Period.....Oct 2012 - Jun 2013

2. The review is conducted "to make sure the escrow portion of your scheduled mortgage payment covers your property taxes and/or insurance premiums."

3. "Increases or decreases in your annual taxes and/or insurance premiums may cause your mortgage payment amount to change. Here are the details of your most recent escrow account review."

4. Information stated in the body of the Escrow Account Disclosure Statement:

a. Current Payment

(1) Principal and Interest.....$1,845.55
(2) Escrow Payment.....$ 258.22
(3) Escrow Shortage Payment.....$ -0-
(4) Total Payment.....$2,103.77

b. Option 1 (Pay asserted $2,796.87 escrow shortage immediately.)

(1) Principal and Interest.....$1,845.55
(2) Escrow Payment.....$ 454.95
(3) Escrow Shortage Payment.....$ -0-
(4) Total Payment.....$2,300.50

c. Option 2 (Amortize and pay the asserted $2,796.87 escrow shortage over 12 months.)

(1) Principal and Interest.....$1,845.55
(2) Escrow Payment.....$ 454.95
(3) Escrow Shortage Payment.....$ 233.07
(4) Total Payment.....$2,533.57

5. "Note: This notice is for informational purposes only and is being provided as a courtesy should you voluntarily decide to make any escrow shortage payment, if applicable. This notice should not be construed as an attempt to collect a debt or a demand for payment contrary to any protection you may have received pursuant to your bankruptcy case."

6. The projected disbursements from escrow are $568.48 for hazard insurance and $4,891.00 for County property tax, which total $5,459.48. The projected escrow payment for these items is computed to be $454.95 (which is $4,459.48 divided into 12 equal monthly payments).

7. In projecting the escrow payments to be made, the analysis begins with a "projected" escrow balance of ($666.71) and a "required" escrow balance of $2,274.83.

8. The Notice also includes a history of this escrow asserting the following.

Date	Contractual Escrow Payment	Actual Escrow Payment by Debtors	Actual Disbursements from Escrow (Including Advances by Creditor)	Actual Escrow Balance
September 20, 2012 Debtor Commenced Instant Chapter 13 Bankruptcy Case Post-Petition Escrow Payments and Disbursements				
Oct 2012	$303.71	$0.00		($1,123.91)
Nov 2012	$303.71	$0.00	Property Taxes ($2,445.50)	($3,569.41)
Dec 2012	$303.71	$305.55		($3,263.86)
Jan 2013	$303.71	$303.71		($2,960.15)

Feb 2013	$303.71	$303.71		($2,656.44)
Mar 2013	$303.71	$303.71	Property Taxes ($2,445.50)	($4,798.23)
April 2013 Estimate	$303.71	$3,615.08		($1,183.15)
May 2013 Estimate	$303.71	$258.22		($924.93)
June 2013 Estimate	$303.71	$258.22		($666.71)
Total	$2,733.39	$5,348.20	Property Taxes Paid ($4,819.00)	

Notice of Mortgage Change, Docket Entry dated June 5, 2013 (no docket control number) and Proof of Claim 9-1, Official Registry of Claims in this case.

U.S. Bank, N.A. filed Proof of Claim No. 9-1 on January 15, 2013. The claim asserts a pre-petition arrearage of ($25,304.94) on this debt. The arrearage consists of primarily 11 defaulted payments totaling $23,141.47 (which includes principal, interest, taxes, and insurance). An "escrow shortage" of $144.67 is included in this arrearage.

DISCUSSION

The Notice of [Post-Petition] Mortgage Payment Change is not a paragon of clarity. There is no explanation as to how, in the first month of the bankruptcy case, the Debtor could have a post-petition escrow arrearage of ($1,123.91). It appears obvious that U.S. Bank, N.A., as Trustee, would have to be dragging a pre-petition escrow arrearage (to the extent that one existed) to the post-petition performance of the Debtor. With the pre-petition arrearage being part of the pre-petition claim and then seeking to have it paid as a post-petition arrearage, U.S. Bank, N.A., as Trustee, would be attempting to be double paid on the arrearage.

Starting with the Notice of [Post-Petition] Mortgage Payment Change, U.S. Bank, N.A., as Trustee, states that for the months of October 2012 through June 2013, the Debtor was to pay $303.71 a month into the escrow – which payments would total $2,733.39. The Notice further states that the Debtor paid $5,348.20.

It appears that the $303.71 escrow amount is premised on an incorrect property tax amount. U.S. Bank, N.A., as Trustee, states in the Notice of [Post-Petition] Mortgage Payment Change that the property taxes paid in November 2012 and March 2013 total($4,819.00). Even with this larger amount, the Debtor having funded the post-petition escrow with $5,348.20, there is a surplus of $529.20. FN.2.

FN.2. Presumably the Chapter 13 Trustee has investigated how the Debtor had $3,615.08 in "excess monies" to make that payment into escrow in April 2013. The confirmed plan is funded with the Debtor's projected disposable income and provides for payment of only a 50% dividend to creditors holding general unsecured claims. In Debtor's declaration under penalty of perjury the Debtor testified having projected disposable income of only $2,805.55 a month. Declaration, Dckt. 104. Such testimony, if true, precludes the Debtor from having this "extra money" lying around to make the $3,615.08 in any one month.

The court has reviewed the Escrow Analysis which is attached to the Proof of Claim filed in this case. The Analysis is dated September 25, 2012 and is a review of the prior 12 months. The Debtor is correct that the Analysis states that as of October 2012 there is a "Projected" starting escrow balance of $1,716.51. Ex. pg. 40. On the next page the Analysis states that the "Actual" escrow balance is "est." to be $1,716.51, which is premised on the Debtor having made a $2,840.42 escrow payment in September 2012.

It may well be that the Debtor never made the $2,840.42 payment in September 2012 and the "est." by U.S. Bank, N.A., as Trustee, was an inaccurate projection. First, in the Statement of Financial Affairs the Debtor states under penalty of perjury that no payments were made to U.S. Bank, N.A., as Trustee, (or any other party for this claim) during the 90 days preceding the filing of this bankruptcy case. Statement of Financial Affairs Question 3, Dckt. 1 at 26. Second, the Debtor fails to provide any testimony as to the pre-petition or post-petition payments into escrow he has made for this loan. Rather, he merely states that he cannot determine, from the information provided, how the payments were applied. It appears that if the Debtor made a $2,840.42 in September 2012 he (1) would not state under penalty of perjury no payment was made and (2) he would affirmatively testify that he made such payment.

The Original Chapter 13 Plan filed in this case states that the pre-petition arrearage on the U.S. Bank, N.A., as Trustee, claim was $23,220.00. Plan, Dckt. 5. The Third Amended Chapter 13 Plan states that the arrearage on the U.S. Bank, N.A. claim is $35,304.94. Third Amended Plan, Dckt. 90. The Debtor attests under penalty of perjury that this information is true and correct. Declaration, Dckt. 89. The Third Amended Plan was confirmed by the court. Order, Dckt. 111.

In Proof of Claim No. 9-1 (referenced as Proof of Claim No. 9 by Debtor), U.S. Bank, N.A., as Trustee, asserted that the pre-petition arrearage on its claim was $25,304.94. This included the Debtor defaulting in the monthly principal, interest, and escrow payments for November 2011 through September 2012. It appears that if the Debtor did not make the payment for those 11 months, it would be difficult for the Debtor to have a positive escrow balance.

RULING

Based on the evidence presented, the Debtor's protestations about there not being a pre-petition arrearage are unsupported. The court is not determining that issue in this Objection which relates only to the post-petition mortgage payment change.

Accepting the U.S. Bank, N.A., as Trustee, Notice of [Post-Petition] Mortgage Payment Change filed on June 5, 2013, statements of payments, there is not a negative post-petition balance in the escrow for property taxes and insurance. U.S. Bank, N.A. provides no evidence or explanation as to how it computes the actual post-petition escrow payments. It appears that there may be an increase in post-petition property taxes of $1,814.99, based on the attachment to Proof of Claim No. 9-1 listing county taxes of $3,076.01 for the 2011-2012 property tax year and the Notice of [Post-Petition] Mortgage Payment Change showing a payment of $4,891.00 for the 2012-213 property tax year.

The Notice of [Post-Petition] Mortgage Payment Change projects disbursements from escrow of $568.48 for hazard insurance and $4,891.00 for County property tax, which total $5,459.48. The projected escrow payment for these items is computed to be $454.95 (which is $4,459.48 divided into 12 equal monthly payments). Thus, this would be an increase of only $196.73 from the current escrow payment of $258.22. FN.3.

FN.3. It appears that the attempt to compute an escrow payment amount is complicated by the post-petition payment period beginning in September of 2012. While dividing the escrow payments over 12 months, the first property tax payment comes due in December of 2012 and the second payment in March 2013. The property taxes representing 82% of the escrow disbursements, the escrow cannot be sufficiently funded to make the payments as they come due (the December payment after only two escrow payments having been made and the March payment after only three more payments have been made – only 41% of the annual escrow payments). Possibly nobody thought this through in setting of the escrow payments or determining if the plan could be structured in such a way as to sufficiently fund the escrow payments and then make other more "discretionary" disbursements.

The court sustains the objection to the Notice of [Post-Petition] Mortgage Payment Change and U.S. Bank, N.A., as Trustee, asserting the right to receive a post-petition escrow payment of $688.02. The objection is sustained without prejudice to U.S. Bank, N.A., as Trustee, to provide a timely, accurate, and correct prospective Notice of [Post-Petition] Monthly Mortgage Payment Change.

The Debtor having failed to provide the court with any evidence of payments made or not made, or any methodology for setting a correct amount of the escrow payment, the court cannot make a determination of what portion, if any, of that sought in the Notice of [Post-Petition] Mortgage Payment Change. Though the Debtor knows what he has paid post-petition, knows what the insurance costs (or has the right to inquire), and knows how much the property taxes are, that information has been withheld from the court. It may well be that the Debtor continuing to make the lower monthly escrow payment has the effect of creating a significant escrow shortfall, which the Debtor (who is paying 100% of the projected disposable income into

the plan) will be unable to cure and he will lose the property through foreclosure.

ATTORNEYS' FEES

While the Debtor's approach to attorneys' fees leaves much to be desired, the conduct of U.S. Bank, N.A., as Trustee, in failing to respond to this Objection is such that to the extent that an attorneys' fees provision exists, the Debtor is the prevailing party on this Objection. Rather than denying the request for attorneys' fees or instructing the Debtor to file supplemental pleadings providing the information and grounds which should be in the present motion (and creating even more work for the court), the court will consider these shortcomings in determining a reasonable hourly rate for counsel who fail to provide that basic information.

Attached to the Proof of Claim and provided as Exhibits by the Debtor are copies of the Promissory Note and Deed of Trust upon which the U.S. Bank, N.A. claim is based. Paragraph 22 of the Deed of Trust provides, "If the default [breach of any covenant or agreement in the Deed of Trust] is not cured. . . Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to reasonable attorneys' fees and costs of title evidence." The Note in Paragraph 7.(E) provides that in the event of a default in payments, the borrower is obligated to pay the Note holder costs and expenses, including reasonable attorneys' fees.

California Code of Civil Procedure § 1717(a) provides that for any action on a contract in which the contract provides for attorneys' fees and costs to be awarded to one of the parties if they prevail, then the other party shall also be entitled to enforce that provision (even though not named) if such other party is the prevailing party. In this case, through the Notice of [Post-Petition] Mortgage Payment Change U.S. Bank, N.A., as Trustee, asserted defaults in the Note and Deed of Trust, asserting that required monetary amounts were not paid. Further, U.S. Bank, N.A., as Trustee, asserted that the monetary obligations of the Debtor were greater than determined proper by the court. The Debtor is the prevailing party in this Contested Matter (the "action") and is entitled to recover reasonable attorneys' fees and expenses.

Unless authorized by statute or agreement, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A

compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

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

The Debtor, through Counsel's declaration, seeks an award of $2,081.25 and postage costs of $18.84. The postage costs, while not specifically identified, are not unreasonable as U.S. Bank, N.A., as Trustee, has the right to be served by certified mail. Fed. R. Bankr. P. 7004(h). The court allows the $18.84 in costs.

For the $2,081.25 in attorneys' fees, the court begins with Counsel seeking to charge $250.00 an hour for a law clerk. No information is provided as to the qualifications of this law clerk and no support is given for a law clerk being reasonably billed a client at $250.00 an hour. That hourly rate is one changed by many consumer attorneys in the Sacramento Region.

Further, Counsel asserts that his hourly rate is $325.00 which he regularly bills and that it is reasonable for the work done in connection with the present Motion. The court could not readily determine from its files for other cases involving counsel what he "regularly charged" and what was "actually paid" by his clients for his hourly rate.

The court can make a determination of reasonable hourly rate and time expended from a review of the actual work done and considering it in light of the many fee applications which the court reviews in the regular course of business. First, 4.75 hours at $250.00 an hour is sought for the work of paralegal David Pereira. The services and fees sought are:

Date	**Description of Law Clerk Services**	**Hours**	**Total**
10/14/2013	Review Notice of Payment Change with issue concerns from Peter, compare against Proof of Claim, attempt to analyze in spreadsheet, identified discrepancies in amounts on POC and Notice of Payment Change.	2.50	$625.00
10/15/2013	Draft Objection to Notice of Payment Change	1.75	$427.50
12/17/2013	Finalize documents and upload and file with court. Serve		

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	Total Law Clerk Billings at $250.00 an hour	4.25	$1,052.50

Counsel then seeks fees for his services, charged at $325.00 an hour. These services and fees sought are

Date	**Description of Attorney Services**	**Hours**	**Total**
10/14/2013	Review Notice of Payment Change and analyze impound analysis for accuracy.	1.25	$406.00
10/15/2013	Meeting with Pereira to discuss conclusions of analysis. No Charge for Pereira attendance at meeting.	0.75	$243.75
10/16/2013	Meeting with client to review documents being filed and secure signature on declaration.	0.75	$243.75
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	Total Attorney Billings at $325.00 an hour	2.75	$893.50

Taken at face value, the law clerk did the legal research, drafted the Objection and supporting documents, made the determination that they complied with the requirements of Federal Rule of Bankruptcy Procedure 9011, and then filed the pleadings with the court. The services provided by the attorney were limited to making an initial review of the Notice, meet with the law clerk to discuss the law clerk's analysis, and then met with the client to review the documents to be signed. It would not appear that counsel had any hand in the drafting of the pleadings.

The court has expressed above the concerns with the Declaration of the Debtor and the failure of the Debtor to provide the court with information about what he has paid into escrow since this case was filed. Further, that it appears that the Debtor knew he did not make the estimated September 2012 escrow payment and stated in the Statement of Financial Affairs that Debtor did not make any such payment, but feigned ignorance in contending that Proof of Claim No. 9-1 stated that there was a positive escrow balance as of the commencement of this case. As also noted, the Debtor (for unknown reasons) voluntarily disclosed what would otherwise be a privileged attorney-client communications. While such mistakes would not be expected of an experienced licensed attorney who bills and is paid for his or her services at $325.00 an hour, these are mistakes that one could expect from a law student law clerk who is not experienced in the practice of law. That such glaring omissions and disclosures were made indicate that not any significant effort was put into the pleadings by counsel.

For the 4.25 hours of law clerk time billed, the court will allow recoverable fees of $150.00 an hour, which totals to $637.50. For counsel's 2.75 hours, the court will allow fees of $275.00 an hour, which totals $756.25. Such an hourly rate is fair and consistent with the hourly rates charged in the Sacramento Region for counsel producing this type of work product and providing this level of supervision to non-lawyer law clerks.

Though not requested, the court recognizes that Counsel will have to prepare for the hearing on February 4 and attend the hearing. The court allows counsel an additional 1 hour for preparation for the hearing and 2 hours for attending the hearing. These 3.00 additional hours billed at $275.00 an hour total an additional $825.00.

The court awards the Debtor as the prevailing party in this Contested Matter $2,218.75 in fees and $18.84 of costs, to be paid by U.S. Bank, N.A., as Trustee. The court shall further order that the award of fees and costs cannot be offset by U.S. Bank, N.A., as Trustee, against any obligation arising under or relating to its claim in this case.

states that there has been an escrow account payment adjustment and the current escrow payment of $258.22 is being increased to $688.02.

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 Eda Gahob Urriza, 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 the Notice of Mortgage Payment Change filed on June 5, 2013, by U.S. Bank, N.A., as Trustee successor in interest to Bank, ("U.S. Bank Trustee") is sustained and that the stated changes in the required escrow payments are disallowed in their entirety. This disallowance is without prejudice to U.S. Bank Trustee, 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. 9-1 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 Eda Gahob Urriza, the Debtor, is awarded $2,237.59 in prevailing party attorneys' fees and costs in this Contested Matter, which shall be paid by U.S. Bank Trustee.
>
> This Order, including the award of attorneys' fees and costs, constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014).

IT IS FURTHER ORDERED that this award of attorneys' fees and costs, and the obligation of U.S. Bank Trustee may not be offset by U.S. Bank Trustee against any obligation of the Debtor arising from, part of, or related to the Note and Deed of Trust upon which Proof of Claim 9-1 filed in this bankruptcy case is based.

13. 13-20350-E-13 SDB-2 | **JOSEPH FALLA AND MINDY PINCKNEY-FALLA** | **W. Scott de Bie** | **MOTION TO APPROVE LOAN MODIFICATION** | **12-30-13 [62]**

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's Attorney, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on December 30, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve Loan Modification is granted. No appearance required.

Bank of America, N.A., whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment from the current $1,664.31 to $1,486.60. The modification will capitalize the pre-petition arrears and provides for stepped increases in the interest rate from 2.250% to 4.375% over the next 21 years.

There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

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

The Motion to Approve the Loan Modification filed by 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 Joseph Ernest Falla and Mindy Maria Pickney-Falla are authorized to amend the terms of their loan with Bank of America, N.A., which is secured by the real property commonly known as 9292 Edisto Way, Elk Grove, California, and such other terms as stated in the Modification Agreement filed as Exhibit "A," Docket Entry No. 65, in support of the Motion.

14. 09-36851-E-13 TBH-2 DAVID/STEPHANIE ALEXANDER Thomas B. Hjerpe

MOTION FOR COMPENSATION BY THE LAW OFFICE OF LAW OFFICE OF THOMAS HJERPE FOR THOMAS B. HJERPE, DEBTORS' ATTORNEY(S), FEES: $3,785.00, EXPENSES: $40.52
1-3-14 [125]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 3, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The court's decision is to grant the Application for Fees. No appearance at the February 4, 2014 hearing is required.

FEES REQUESTED

Thomas B. Hjerpe, Counsel for the Debtors, makes a Request for the Allowance of Fees and Expenses in this case.

However, the Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based.

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.

However, as Counsel has not appeared frequently before this court (Department E), the failure to comply with Federal Rule of Bankruptcy Procedure 9013 will be waived for this matter and the court will consider the merits of the motion. Counsel should not rely on the court waiving compliance with the Bankruptcy Rules on future motions.

MOTION

Description of Services for Which Fees Are Requested

Plan Modification: Counsel spent 20.70 hours in this category. In this case, the work necessary for confirmation of the original plan was preformed prior to substitution of Counsel. Original counsel entered into a fee sharing agreement with Thomas B. Hjerpe to receive 40% of the fees that remained unpaid at the time of substitution and original counsel would receive the remaining 60%.

On January 18, 2012, the court approved of the agreement and issued an Order on Stipulation for Transfer of Chapter 13 Attorney Fees. On December 18, 2011 the court approved the First and Final Motion for Compensation for Fredrick E. Clement in the amount of $7,306.74 in fees and $708.86 in costs. The remaining balance to be paid throughout the Chapter 13 Plan, subsequent to the substitution of counsel, was $1,308.79. To date $1,308.79 was distributed through the Chapter 13 Plan to Thomas B. Hjerpe. Thomas B. Hjerpe distributed 60% of these fees to Fredrick E. Clement, and the remaining 40%, or $523.52, was paid to Thomas B. Hjerpe. The services that are the basis for this application relate to post-confirmation matters and include discussing Debtors' change in circumstances, reviewing claims and case file. Counsel prepared the application to modify plan and modified plan, reviewed and responded to objection to modification filed by the trustee, attended the hearing on motion to confirm the modified plan, and discussed claims and plan requirements with debtors.

HISTORY OF FEES

Pursuant to prior Interim Fee Applications the court has approved pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330.

Application	Interim Approved Fees	Interim Fees Paid
First Interim	$5,500.00 (Dckt. 49)	$5,500.00
Second Interim	$1,806.74 (Dckt. 82)	$1,806.74
Total Interim Fees Approved Pursuant to 11 U.S.C. § 331	$7,306.74	

CHAPTER 13 TRUSTEE

The Chapter 13 Trustee filed a non-opposition to the Motion for Compensation.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

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

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

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

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful modified plan, and worked with debtor and trustee to get the modified plan confirmed. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are $250.00/hour for supervising counsel and $175.00/hour for associate counsel.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate counsel and rates for the services provided. Final Fees in the amount of $3,785 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and prior Interim Fees in the amount of $7,306.74 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee under the confirmed plan from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

COSTS ALLOWED

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $40.52 for postage.

The Costs in the amount of $40.52 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and prior Interim Costs in the amount of $708.86 (193.26 + 515.60) are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	$3,785.00
Costs and Expenses	$ 40.52

For a total final allowance of $3,825.52 in Attorneys' Fees and Costs in this case and prior interim fees of $7306.74 and interim costs of $708.86 as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by 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 Thomas B. Hjerpe is allowed the following fees and expenses as a professional of the Estate:
>
> Thomas B. Hjerpe, Counsel for the Debtor
> Applicant's Fees Allowed in the amount of $ 3,785.00
> Applicants Expenses Allowed in the amount of $ 40.52.
>
> **IT IS FURTHER ORDERED** that the Fees and Costs pursuant to this Applicant, and Fees in the amount of $7,306.74 and costs of $708.86 approved pursuant to prior Interim Application are approved as final fees and costs pursuant to 11 U.S.C. § 330
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

15. 12-28856-E-13 KEVIN/BRANDEE MCCANN — MOTION TO MODIFY PLAN
DEF-3 David Foyil — 12-23-13 [47]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2013. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee is uncertain Debtor's have the ability to make the plan payments proposed. Plan payments under the confirmed plan are $406.00 for 60 months and the Debtor is currently $688.00 delinquent. Under the modified plan, Debtor's are proposing a plan payment of $365.00 for 19 months (December 2013 where Debtors petition was filed May 7, 2012), $406.00 for 11 months, then $757.00 thereafter. Debtor's Declaration indicates Debtors became delinquent in their plan payments due to Kevin McCann changing jobs resulting in a decrease in income, and due to the last quarter of 2013 bringing less business income for Brandee McCann while business expenses increased.

Debtor's filed as Exhibit C, proof of income in the form of two months of pay advises for Kevin McCann and two months of profit and loss statements for Brandee McCann, which the Trustee believes does not support the net income Debtors claim. Debtor's state Kevin McCann's net monthly income is $3,163.33, while Debtor's pay advises indicate Debtor is making $11.50 per hour. The monthly gross pay for a job paying $11.50 per hour at 40 hours per week is $1,993.34 per month. Debtor's state Brandee McCann's net monthly income is $3,286.00, while Debtor's two months of profit and loss statements reflect Debtor's net income to be $906.00 one month and $1,030.00 in the other. Debtor's gross income during that time period was $3,005.00 and $2,961.00, or $2,983.00 averaged. Debtor's claim Brandee McCann's business expenses have increased when Debtor's amended Schedule J filed as Exhibit D reflects current business expenses to be $1 ,396.00,

which is identical to Debtor's business expenses listed on their prior schedule J filed May 21, 2012. Dckt. 9. The Trustee also argues that the Debtor's business expenses are understated with the two months of profit and loss statements submitted by the Debtor indicating Debtor had business expenses of $1,7 4 7. 00 in one month and $1,530.00 in the other.

Additionally, the Trustee states section 2.06 of Debtor's modified plan states $1,500.00 in attorney's fees were paid prior to the filing of the case with $200.00 to be paid through the plan. Under the confirmed plan, $1,500.00 was paid prior to filing and $2,000.00 were to be paid through the plan. The Trustee has disbursed $2,000.00 in attorney's fees under the confirmed plan.

Trustee also states that Debtor proposes to reclassify the second deed of trust, which has been valued, from a Class 7 unsecured claim to Class 3 surrender. The Trustee argues that the Order valuing has not been vacated so the creditor is entitled to an unsecured claim under 11 U.S.C. §506(a)(l).

Lastly, the Trustee argues that the Debtor's amended Schedules I and J filed December 23, 2013 as Exhibit D were not filed using Official Form B61 and B6J effective December 2013.

Based on the foregoing, the modified Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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

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

16. 09-24071-E-13 WW-4 | **MOHAMMAD KHAN AND CINDY EMERICK-KHAN** | **MOTION TO MODIFY PLAN** | **12-19-13 [90]**

Mark Wolff

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 19, 2013. By the court's calculation, 47 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee opposes confirmation offering evidence that the Debtor is $4,779.88.00 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

Additionally, the Trustee argues that the plan is not Debtor's best effort, under 11 U.S.C. § 1325(b). The Debtor is proposing the following plan payments: 56 payments of $732.23, followed by 4 payments of $100.00 with a 0% dividend to unsecured creditors. Debtor's residence at 5701 Gold Poppy Way is a Class 3 secured claim under the confirmed plan and remains Class 3 under the proposed modified plan. Debtor's Motion filed December 19, 2013 states that the Debtors are continuing to work with the holder of the note and deed of trust on their residence and are attempting to obtain a loan modification. Debtors also states that until such time as Debtors receive a modification or trial period payment (or the property is foreclosed), Debtors are paying no ongoing mortgage or rent expense. Dckt. 90.

However, Debtor's Supplemental Schedule J filed December 19, 2013 budgets $0.00 per month for mortgage or rent. Dckt. 93. Debtor's last modified plan was filed February 12, 2010 and confirmed April 8, 2010. Dckts. 46, 53. Under the last modified plan, Debtor reclassified his residence from a Class 1 secured claim to Class 3 surrender. Section 7.01 of that plan states that the Chapter 13 Trustee shall make no further payments

to Chase and should the modification be approved, Debtors will seek court approval of such modification and make payments to Chase pursuant to such modification. Should chase not agree to modify debtors' loan, then Debtors will surrender the residence. Dckt. 64.

Debtor's Schedule J filed February 12, 2010 budgeted $1,300.00 monthly for rent or home mortgage. Dckt. 45. A review of the court docket reveals no motion to approve a loan modification has ever been filed by the Debtors. Debtors do not indicate what happened to the loan modification they attempted nearly four years ago and provide no evidence of their continuing efforts in obtaining a loan modification over that span of time. Additionally, Debtors now state they are not making a mortgage or rent payment until a modification or trial period payment is obtained. The Trustee questions whether that is a new development, or if the Debtor has not been making rent or mortgage payments all this time. Debtor budgeted $1,300.00 for this expense on his prior Schedule J filed February 12, 2010. Dckt. 45. If during these four years the Debtors have not been spending the $1,300.00 a month for rent or mortgage, there is $62,400.00 unaccounted for in this case.

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

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

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

17. 13-28480-E-13 CHARLES/TAMYRA HEARD **MOTION TO APPROVE LOAN MODIFICATION**
PGM-3 **1-7-14 [57]**

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, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 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).

The Motion to Approve the Loan Modification is denied without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

REVIEW OF MOTION

The Motion to Approve Loan Modification does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. 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. Debtors are seeking permission from the court to enter into a trial modification agreement.
>
> B. Debtors identify the Lender in this agreement as US Bank/America's Servicing Company.
>
> C. The Lender has allegedly offered Debtors a trial modification, the terms of which are detailed in the document attached as Exhibit "A" to this Motion.

The pleadings do not clearly state the grounds upon which relief is sought. Debtor does not even attempt to identify the creditor in interest. Debtor's flagrant failure to identify the lender is reason for the court to

reject this Motion at the outset. Debtors state that they have entered into a loan modification agreement, but do not describe the lender that is party to this agreement. Instead, Debtors describe the lender using the imprecise, ambiguous term of "US Bank/America's Servicing Company" in their motion. In effect, Debtors are asking the court to issue an order against unidentifiable entities. Debtors do not elaborate on the relationship between the two entities in the motion, and the evidence offered further muddles the court's understanding of the identity of the real creditor in interest.

Exhibit A, Dckt. No. 60, which appears to be a letter from America's Servicing Company, inviting the Debtors to enter into a monthly trial period with three payments, makes no reference to U.S. Bank, N.A. The end of the document states that "America's Servicing Company is a division of Wells Fargo Bank N.A. © 2012 Wells Fargo Bank, N.A. All rights reserved." The letter also instructs Debtors to make sure and to not make their payments to anyone other than Wells Fargo Home Mortgage. The Declaration of Debtors in Support of the Motion, Dckt. No. 59, refers to the lender as America's Servicing Company/US Bank. Debtors' filed evidence sheds no light on who the real lender is in this case.

The court also notes that U.S. Bank, N.A., *as Trustee*, filed Proof of Claim 26-1, which clearly identifies U.S. Bank, N.A. *as Trustee* and the creditor. The court is baffled as to why Debtor's counsel does not take notice of this identification, and instead refers to the lender using the equivocal term of US Bank/America's Servicing Company. According to the lender's identification as U.S. Bank, N.A., as Trustee for the Structured Asset, the creditor would not be identified as U.S. Bank, N.A., but in its fiduciary capacity as "U.S. Bank, N.A., as Trustee." Serving as a trustee is a different capacity than U.S. Bank, N.A. merely performing its banking responsibilities.

A Motion to Approve a Loan Modification that 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 cannot grant relief against a respondent who is unidentified, or against a respondent whose identity is ambiguous. Fed. R. Bankr. P. 9013. 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. A motion that does not identify clearly the responding party does not comply with Rule 9014(a) because 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).

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."

DISCUSSION

Debtors Motion does not meet the particularity requirements of Federal Rule of Bankruptcy Procedure 9013, and Debtors' Motion is rejected for not clearly and stating with particularity the grounds upon which the relief is based.

The Motion suffers from another major defect, however; it does not appear that the relief is requested by Debtors with any recognizable legal entity – "US Bank/America's Servicing Company." The court cannot identify any such entity after searching the FDIC website for federal insured financial institutions, the Comptroller of the Currency website for national banks, or the California Secretary of State website for corporations, limited liability companies, and limited partnerships. The court will not issue an order purporting to have an binding effect on a person or entity that the court does not have a good faith belief exists.

The Motion also misstates that upon completion of the trial period payments are made, the "mortgage will be permanently modified. Refer to Exhibit A filed herewith." Motion ¶ 5, Dckt. 57. From the court's reading of Exhibit A, it does not so provide that solely based on making the trial loan modification payments the Debtors have an absolute right to a loan modification.

Debtors state in their declaration that they have worked out a modification which will reduce the Debtor's monthly mortgage payment from the current $2,135.00 to $1,542.25 beginning on January 1, 2014. Federal Rule of Bankruptcy Procedure 4001(c) requires that a motion for authority to obtain credit shall summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

Debtors do not, however, attach a copy of their post-petition credit agreement, to the motion. Rather, Debtors offer Exhibit A, labeled on their Exhibit Cover Sheet as "US Bank/ASC Trial Loan Modification Offer. The "Offer" is a letter from America's Servicing Company to Debtors, dated November 12, 2013. No terms are stated, other than a detailing of the three trial payments and their remitment deadlines (3 payments of $1,542.25, due on January 1, 2014, February 1, 2014, and March 1, 2014). Exhibit A, Dckt. No. 60 at 2. The letter requests that Debtors to contact America's Servicing Company to discuss workout options, and invites to apply for a loan modification.

The letter addresses Debtors and can be summarized as stating the following:

> A. Please read this letter so that you understand all the steps you need to take to modify your mortgage payments.
>
> B. Your decision to discuss workout options with America's Servicing Company is strictly voluntary. You are not obligated to pursue any workout options discussed with us.
>
> C. To accept this offer please call the company at the phone number listed below, or send in your first monthly trial period payment instead of your normal monthly mortgage payment.
>
> D. Please note that your trial period may extend beyond the dates provided. For that reason, continue making your trial period payments in the same amount by the same day of each month you currently make your trial period payments until your home preservation specialist advises that you may move forward with a final modification or that you are no longer eligible for HAMP.
>
> E. After all trial period payments are timely made and you have submitted all the required documents, your mortgage may be permanently modified. However, if you are in active bankruptcy any conversion to a permanent modification is conditioned on obtaining the bankruptcy court's approval to modify the mortgage or release of the mortgage from inclusion in the bankruptcy.

Exhibit A, Dckt. No. 60 (Emphasis added).

This letter is merely an offer, contingent on Debtors' ability to make the three trial period payments and meet some other, unstated conditions. This modification is not guaranteed, and the lender may or may not modify the Debtors' loan.

In this situation, other debtors have requested and obtained court authorization to make the trial modification payments directly to the creditor rather than through the trustee while their loan modification application is being processed. This is requested and authorized because often times the payment must be received by the creditor by the first day of the calendar month, which deliver cannot be assured by the Chapter 13 Trustee (since the monthly distributions are subject to holidays and weekends at the end of the month). Further, having the debtor make the trial payments directly enhances the debtor's *bona fides* as a consumer who can make the payments.

The Debtors misstate the modification and essentially request that the court write a blank loan modification check for the Debtors to enter into whatever modification they want, hidden from the court, Chapter 13 Trustee, creditors, U.S. Trustee, and other parties in interest.

The Motion is denied without prejudice. There is no loan modification, no terms of a loan modification, and no loan modification agreement which has been presented to the court for approval. FN.1.

FN.1. This situation is a good example of one of the practical reasons underlying Federal Rule of Bankruptcy Procedure 9013 which requires that the grounds for the motion must be stated with particularity in the motion and Rule 4001(b) which requires that <u>all</u> material provisions of the financing be summarized in the loan. If counsel had done so, he would have realized that there is no loan modification to be presented at this time. He would have then realized that the Debtors should be requesting the authorization to make trial payments directly to the creditor while the loan modification was being negotiated.

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 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 to Approve the Loan Modification is denied without prejudice.

18. 12-24882-E-13 JOSE AVALOS **MOTION TO MODIFY PLAN**
TJW-3 **12-12-13 [53]**

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 Chapter 13 Trustee, all creditors, and Office of the United States Trustee on December 12, 2013. By the court's calculation, 54 days' notice was provided. 35 days' notice is required. That requirement was met.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, the Chapter 13 Trustee has filed opposition to confirmation of Debtor's Plan. The Trustee objects on the basis that the Debtor is delinquent $1,088.00 under the proposed plan. The plan payments called for under Debtor's proposed modified plan are $544.00 per month for 36 months. This case was filed on March 13, 2012, and 21 payments totaling $11,424.00 have come due under this plan.

Debtor has paid $10,336.00 into the plan, with the last payment of $544.00 posted December 30, 2013.

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

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

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

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

19. 13-34982-E-13 HUGO HERREROS
NLE-1

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
1-7-14 [27]

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 January 7, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

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

1. Debtor cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6) because his Plan relies on pending motions. The subject motions are the Motion to Value Collateral of Wells Fargo Mortgage, TOG-1, and the Motion to Value Collateral of Wells Fargo Mortgage, TOG-3, both of which were set for hearing on January 14, 2014.

   On January 14, 2014, both Motions to Value were granted (Dkct. Nos. 35 and 36), thereby rendering this part of Trustee's objection moot.

2. Trustee argues that Debtor may not be able to make the payments under the plan, or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor admitted at his 341 Meeting, held on January

2, 2014, that he has changed places of employment and is now working in the Bay Area, causing his expenses to change as well. Debtor has not yet provided accurate current financial information for his expenses.

3. Debtor reported at his 341 Meeting that he owns a 1998 Ford Expedition that is not listed on Schedule B. Unless Debtor amends his Schedule B, and files a declaration to show that he has disclosed assets, the plan may not fulfill the requirements of 11 U.S.C. § 1325(a)(4).

It appears that Debtor filed Amended Schedules on January 27, 2014 (Dckt. No. 37). Debtor amended his Schedule B to reflect that he owns a 1998 Ford Expedition, which appears to be in his personal possession and is located at his residence.

Debtor's changes to the income and expense information on his Schedules I and J are still unclear. Debtor informed trustee that he is now working in the Bay Area, but in his Amended Schedule I, Debtor reports that he is now employed with Evolution Hospitality, LLC, located in San Clemente. He reports having been employed there for one month, and indicates that he is now receiving $2,899.00 in monthly income, resulting in a $167.00 increase in Debtor's income when compared to the $2,732 income Debtor listed on his original Schedule I, filed on November 24, 2013. Debtor's expenses have also increased from $2,617 on his original Schedule I, to $2,784 as listed in his Amended Schedule I.

Further, it appears that the information provided in Amended Schedules I and J under penalty of perjury are false. The income and expenses are those as of the commencement of the case, which for this Debtor was November 24, 2013. However, on Schedule I the Debtor states under penalty of perjury on Amended Schedule I that he has been employed for only one month. Amended Schedules I and J were signed on January 27, 2014 (though the Debtor chose not to date his signature, the court infers that he was adopting the date the schedules were signed by his counsel).

The change in expenses stems from Debtor now paying more for "personal care products and services," at a rate of $49, real estate taxes at $8, transportation expenses (which rose from $200.00 to $350.00), and an increase in clothing, laundry, and dry cleaning expenses from $20 to $49. Although Debtor has complied with Trustee's requests to report his changes in income, and listed the 1998 Ford Expedition originally omitted from his Schedule B, Debtor has not filed a declaration stating that he has disclosed all assets. It is also unclear whether any creditors hold a security interest in the vehicle.

Trustee's demand for a declaration is a important, necessary act of the Debtor. The amended schedules appear to be statements made under penalty of perjury which are false on their face. If post-petition changes have occurred in the Debtor's income and expenses, he must provide testimony under penalty of perjury of the current information. He cannot falsely amend schedules and misstate financial information. Further, Debtor omitted a substantial asset that Debtor did not list in his schedules, and failed to include the vehicle in his bankruptcy documents until Trustee brought the

instant objection. His credibility is already compromised. Absent a declaration and explanation from Debtor that he has disclosed all assets, the court cannot determine whether 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.

20. 13-34884-E-13 JANELLE HANEY **OBJECTION TO CONFIRMATION OF**
NLE-1 **PLAN BY DAVID P. CUSICK**
1-7-14 [14]

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 January 7, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Plan actually exceeds the 48 months proposed. According to Trustee's calculations, the Plan will complete in 109 months, as opposed to the 48 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d), because the claim amount of the priority claim filed by the Internal Revenue Service for $8,631.70, is listed as unknown in Debtor's 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 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.

21. 13-31986-E-13 ASHLEY BAKER
PLC-3

CONTINUED MOTION TO VALUE COLLATERAL OF CHASE
10-16-13 [28]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on October 16, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 816 Persifer St, Folsom, California. The Debtor seeks to value the property at a fair market value of $202,764.00 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).

Debtor contends that the first deed of trust secures a loan with a balance of approximately $215,098.00 and Creditor JPMorgan Chase Bank's second deed of trust secures a loan with a balance of approximately $143,529.00.

CREDITOR'S OPPOSITION FOR NOVEMBER 19, 2013 HEARING

Creditor filed an opposition disputing the subject property's value. Creditor submits its own Broker's Price Opinion, evidencing the value of the subject property at $310,000.00. Creditor requests that this matter be

continued for 45 days so Creditor can obtain a verified appraisal of the subject property. Further, Creditor requests the cooperation of the Debtors in permitting it to obtain a verified appraisal of the subject property as it requires access to the Subject Property to conduct an interior inspection.

CONTINUANCE

This Motion was continued from its original hearing on November 19, 2013, to permit Creditor to file and serve its opposition and supporting evidence, and a reply, if any, on or before January 24, 2014. The court's review of the docket reflects that nothing further, however, has been filed by Creditor in this matter. In Creditor's initial opposition, Creditor attached a Broker's Price Opinion as Exhibit "C," Dckt. No. 40 at 17. The opinion, which appears to extrapolate the value of Debtor's residence by considering the value of comparable properties in the neighborhood, is improper hearsay and not supported by a declaration by a declarant who has personal knowledge of who prepared the report. Such a declaration is required pursuant to Federal Rule of Evidence 901, requiring that an item of evidence be supported by sufficient evidence to permit a finding that the items is what the proponent claims it is. There is no testimony from the person who prepared report, attesting to how the values were obtained, explanations for the values input into the opinion form, their credentials in making such determinations, etc.

The name of the Blodgett Realty Firm, and Linda Blodgett, who purports to be a real estate broker, is listed on the opinion. The opinion is signed "PROTECK VALUATION SERVICES," and in an Addendum contains comments on the subject property, as well as sales advertisements and listing postings collected by the preparer of the report. Exhibit C, Dckt. No. 40 at 19. But Creditor has not provided any competent evidence authenticating the origins of the report, and the manner in which the opinion was prepared.

Thus, the court will proceed to consider the merits of the motion, using Debtor's valuation of the property as its value, supported by Debtor's sworn declaration (Dckt. No. 30) as of the petition filing date. The first deed of trust on the property secures a loan with a balance of approximately $215,098.00. Creditor JPMorgan Chase Bank's second deed of trust secures a loan with a balance of approximately $143,529.00.

Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

STIPULATION FILED JANUARY 31, 2014

On January 31, 2014, a Stipulation was filed by the Debtor and JPMorgan Chase Bank, N.A. Dckt. 65. The Stipulation provides that the claim of JPMorgan Chase Bank, N.A. will be treated as an unsecured claim in

this bankruptcy case. This appears to state that the secured claim of JPMorgan Chase Bank, N.A. is valued at $0.00 pursuant to this motion filed under 11 U.S.C. § 506(a). The court's ruling above is consistent with that motion.

The Stipulation appears to make other agreements concerning the JPMorgan Chase Bank, N.A. lien, it's validity, obligations of the Debtor under the loan documents and Chapter 13 Plan, and possible modifications of JPMorgan Chase Bank, N.A.'s contractual and statutory obligations to reconvey the Deed of Trust securing its claim. These provisions go well beyond the present motion and the relief which may be granted by this motion to value the secured claim. The court recognizes that some of the statements in the "Stipulation" represent statements and reasonable assurances which may have been made by the Debtor to obtain JPMorgan Chase Bank, N.A.'s acquiescence to the Chapter 13 Plan. The courts takes such representations seriously and would consider them in determining good faith in the prosecution of this case and Chapter 13 Plan in the event of a subsequent disputes relating to those representations.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of JPMorgan Chase Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 816 Persifer Street, Folsom, 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 $202,764.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

22. 13-31986-E-13 ASHLEY BAKER **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK**
TSB-1 **10-24-13 [35]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on October 24, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

This Objection was continued from its original hearing date of November 19, 2013 to today. The Chapter 13 Trustee initially opposed confirmation of the Plan on the basis that Debtor's Plan relied on pending motions. On this basis, Trustee did not believe that Debtor could make the Plan payments required under 11 U.S.C. § 1325(a)(6).

Trustee asserted that Debtor could afford to make the payments or comply with the Plan pursuant to 11 U.S.C. § 1325(a)(6) because Debtor's Plan relied on the Motion to Value Collateral of Chase, as well as Motions to Avoid the Liens of Calvary Portfolio and Riverwalk Holdings, which were set for hearing on the same day of the original hearing on the Objection.

The Motion to Avoid the Judicial Lien of Riverwalk Holdings, PLC-1, was granted, with an order signed on November 22, 2013. Dckt. No. 47. The Motion to Avoid the Judicial Lien of Calvary Portfolio Services, LLC, PLC-2, was granted. Dckt. No. 60. The Motion to Value the Secured Claim of JPMorgan Chase Bank, N.A., PLC-3, however, was continued for discovery. Dckt. No. 58. Creditor was instructed to file and serve its opposition and supporting evidence of its disparate property valuation to the court on or

before January 24, 2014. On January 31, 2014, the parties filed a Stipulation to value the secured claim at $0.00 in this bankruptcy case. The court has granted the Motion to Value the Secured Claim of JPMorgan Chase Bank, N.A. and valued the claim at $0.00.

Since all pending motions have resolved, Trustee's concerns regarding the status of the motions and their impact on Debtor's ability to make Plan payments under 11 U.S.C. § 1325(a)(6) is now moot.

Lack of Explanation for Spousal Support

Trustee also objected, however, that it does not appear that Debtor can make the payments required by 11 U.S.C. § 1325(a)(6) because of issues surrounding Debtor's listed income. On Schedule I, Debtor's income of $3,200.00 as stated on Line #10 is income from spousal support. Line #17 describes a spousal support change, which will take effect when ex-husband retires in January of 2014. It is unclear whether Debtor will or will not continue to receive the $3,200.00 in support income.

Debtor has still not provided an explanation of whether Debtor will continue to receive the $3,200.00 stream in support income from her ex-husband after his retirement in January of this year. This affects the court's determination of whether Debtor can actually afford her monthly plan payments. The lack of Debtor's response on this subject makes it impossible for the court to determine whether the Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

23. 10-23787-E-13 RICHARD RUYBALID
SAC-8 Scott A. CoBen

OBJECTION TO CLAIM OF FLORENTINE & RODNEY ABBOTT, CLAIM NUMBER 15-1
12-18-13 [120]

Local Rule 3007-1(c)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, respondent creditor, and Office of the United States Trustee on December 18, 2013. By the court's calculation, 48 days' notice was provided. 44 days' notice is required. That requirement was met.

Tentative Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(1) and (d)(4). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to overrule Objection to Proof of Claim number 15 of Florentine and Rodney Abbot without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Proof of Service, Dckt. No. 125, reflects that Claimants Florentine and Rodney Abbott were not served. Rather, the Objection was emailed and sent by certified mail to the care of attorneys Phillips J. Rhodes, Esq. and Stephanie J. Finelli, Esq. It appears that the Claimants themselves were not served because their personal addresses are not listed on the service list. Dckt. No. 125.

Debtor incorrectly assumes that by filing this claim, the Claimants have consented pursuant to Federal Rule of Bankruptcy Procedure 7004(h)(1) to service on the counsel signing the proof of claim or is listed for receiving notices (Fed. R. Bankr. P. 2002). The counsel whose name and address are listed on the face of Proof of Claim No. 15-1, the Law Office of Stephanie J. Finelli, has not appeared in this Contested Matter for Creditors. It is unclear whether Stephanie J. Finelli or Phillips J. Rhodes have been designated as agents for service of process on behalf of the Claimants, and are authorized to receive process for the Claimants. An address for "notice" in the Proof of Claim is not the designation of an agent for service of process. Fed. R. Civ. P. 7004, 9014.

Furthermore, an attorney merely signing and filing some other pleading in the case or signing a proof of claim does not make that attorney the agent for service of process for all contested matters and adversary proceedings to be filed against that creditor. Each contested matter, which pursuant to Federal Rule of Bankruptcy Procedure 9014 includes motions,

stands on its own. Debtor cannot assume that because a certain attorney has represented the Claimants in a past adversary proceeding, contested matter, or state court action, that the same attorney will be representing Claimant in this prosecuting this particular Proof of Claim.

Alternative Ruling

If Debtors can provide the court with evidence of proper service of process for this contested matter, can show that the legal authority that the method for service of process utilized in this contested matter is sufficient, or either Phillip Rhodes or Stephanie Finelli can confirm for the court that they are authorized to accept service of process for Creditors in this Contested Matter, the court will address the following alternative ruling at the hearing.

The Proof of Claim at issue, listed as claim number 15 on the court's official claims registry, asserts an unsecured $259,620.00 claim. The Debtor objects to the Proof of Claim on the basis that Debtor never incurred debt with the creditor.

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

Not all Proof of Claims are deserving of this presumption of prima facie validity, however; only a properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. FRBP 3001(f). A proof of claim that lacks the documentation required by Rule 3001(c) does not qualify for the evidentiary benefit of Rule 3001(f), but a lack of prima facie validity is not, by itself, a basis to disallow a claim. The court must look to 11 U.S.C. § 502(b) for the exclusive grounds to disallow a claim. *In re Heath*, 331 B.R. 424, 426 (9th Cir. BAP 2005).

Here, the face of the Proof of Claim form, filed on March 30, 2010 indicates that Debtor owes creditors Florentine and Rodney Abbott the amount of $259,620.00. The basis for claim is listed as "see attached," referring to a one-page addendum to form, which states as follows:

> Creditors Florentine and Rodney Abbot are plaintiffs against debtor Richard Ruybalid individually and doing business as CA Construction in Abbott v. Britschgi, et. al., Sacramento County case no. 07AS04450. The Abbotts seek over $500,000 as against debtor Ruybalid in the action, which damages are covered by insurance. Those $500,000 in damages that are covered by insurance are *not* set forth herein this proof of claim.
>
> The principal on the claim herein is $53,206, the sum creditors Florentine and Rodney Abbott are seeking from debtor Ruybalid as a refund of the sum said creditors paid debtor Ruybalid under a construction contract. Creditors seek this principal sum as against Ruybalid individually for his violations of California Business & Professions Code section 7109, 7026, 7028, 7031, and 7160.

> Additionally, creditors seek treble damages on said sum (a total of $159,618) under California Code of Civil Procedure section 1029.8, as well as interest on said $53,206 at 10$ per annum from January 2006 to the present (approximately $21,500) plus approximately $78,500 in attorney fees, for a total of $259,620.
>
> This claim does not include the sums creditors are owed from debtor on those claims that are covered by debtor's liability insurance, which sum is approximately $500,000.

Attachment to Paragraph 2, Claims Registry, Proof of Claim No. 15.

Creditors seem to assert that Debtor owes them $259,620.00, based on a contingent, unrealized request for damages in a state court case, relating to services provided by Debtor under a construction contract. This contract was the subject of a state court action entitled *Abbott v. Britschgi, et. al,* that was then pending in Sacramento County Superior Court (Case No. 07-04450).

Debtor states that on February 3, 2011, the Sacramento County Superior Court entered judgment in favor of Debtor and others, and against the Creditors. Debtor attaches a "Judgment on Verdict," Exhibit B, Dckt. No. 123, issued by the Honorable Brian R. Van Camp, Judge of the Sacramento County Superior Court.

The Judgment is the state court's approval of a special verdict rendered by the jury in the state court case, finding that among other things, Creditors were not excused from having to perform their construction contract; that the construction work performed by Debtor and others was not negligent, and that their negligence was not a substantial factor in causing harm to Creditors' home; and that Debtor did not perform work as a concrete contractor without a valid California license, and did not knowingly make false or fraudulent representations to Creditors about his ability to properly perform the services he was required to perform under his contract with Creditors. The state court ordered that Creditors, plaintiffs in the action, take nothing against Debtor and Debtor's construction company. Dckt. No. 123 at 12.

The Creditors then appealed the judgment with the Third District Court of Appeals. On December 1, 2011, the appeal filed by the Creditors was dismissed. Exhibit C, Remittitur and Order Dismissing Appeal, Dckt. No. 123 at 14, Thus, the ruling of the Sacramento County Superior Court, refusing to award Creditors the damages requested, stands and Debtor does not owe Claimants the amount claimed.

The Debtor has met the burden of providing substantial factual basis to overcome the prima facie validity of a proof of claim, with evidence exerting probative force equal and superior to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991). Based on the evidence before the court, the creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Florentine and Rodney Abbott filed in this case 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 Proof of Claim number 15 of Florentine Abbott and Rodney Abbott is sustained and the claim is disallowed in its entirety.

24. 13-34889-E-13 NLE-1 | **PAUL/NATALIE KAISER** | **Daryl J. Lander** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** | **1-7-14 [18]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on January 7, 2014. By the court's calculation, 28 days' notice was provided. 14 days' notice is required. That requirement was met.

Tentative Ruling: The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors' Plan may fail the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtors' non-exempt equity totals $150.00, and Debtor is proposing a 10% dividend to unsecured creditors. Debtor, however, lists on Schedule B #20, the Living Trust of Pete and Mary Thompson, with an unknown value. Schedule B, Dckt. No. 1 at 8.

At the 341 Meeting of Creditors held on January 2, 2014, Debtor Paul Kaiser admitted that the trust may now by liquidated. The real property included in the trust, 1432 Meadowlark Lane, Petaluma, CA, was sold on October 30, 2013, for $403,000, according to several internet real estate

websites including: zillow.com, trulia.com, and redfin.com. Debtor is entitled to 50% of the proceeds of the sale.

Debtor has not adequately disclosed the assets included in the Trust. Trustee is unable to determine how much the Debtors' interest in the Trust is until a full disclosure of the assets and values are provided.

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

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

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

25. 10-34099-E-13 JULIAN/VERONICA CERVANTES — CONTINUED MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE TO CHAPTER 7
IRS-1 John M. O'Donnell — 11-19-13 [93]

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, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on November 19, 2013. By the court's calculation, 56 days' notice was provided. 28 days' notice is required. That requirement was met.

No Tentative: The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtors having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

The Internal Revenue Service moves, pursuant to 11 U.S.C. § 1307, for a dismissal for cause of Debtors' Chapter 13 Case, or in the alternative, conversion to a Chapter 7. The Internal Revenue Service ("Service") filed a claim in this case on July 14, 2010, and has subsequently amended the claim on a few occasions, with the last amendment made on June 24, 2011. The claim totals $32,393.97. The basis for the claim is unpaid taxes. The United States seeks to dismiss this case for cause pursuant to 11 U.S.C. § 1307(c).

11 U.S.C. § 1307(c) provides that the court may, on request of a party in interest or the United States trustee and after notice and a hearing, convert a Chapter 7 or Chapter 13 Case or convert the case, whichever is in the best interests of creditors and the estate, for cause. 11 U.S.C. § 1307(c) enumerates the following as factors that constitute cause for the conversion or dismissal of a Chapter 7 or 13 case:

> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees and charges required under chapter 123 of title 28...;
> (4) failure to commence making timely payments under section 1326 of this title...;
> (6) material default by the debtor with respect to a term of a confirmed plan;

Additionally, as the United States explains, Local Rule 3015-1(b)(4) and Debtors' plan requires them to comply with their duties under applicable non-bankruptcy to timely file tax returns and pay taxes due. The United States claims that Debtors have not done so. Specifically, Debtors incurred an income tax liability for the 2011 year. Debtors have also incurred an employment tax liability for the third quarter of 2012. Debtors have not filed an income tax return for the 2012 year and several employment tax returns. Declaration of Insolvency Specialist Rhonda Roberts (Dckt. No. 95).

Debtors owe $43,761.63 for 2011 income tax and $9,571.28 for the employment tax liability. Debtors not made any estimated tax payments on their income tax liabilities and have not made any tax deposits with respect to their employment tax liabilities. Debtors have not paid their federal income tax liabilities, rendering them in violation of their plan and Local Bankruptcy Rule 3015-1(b)(4).

Federal law additionally requires that debtors and trustees to operate businesses within the bounds of other applicable laws and to pay taxes to the same extent as a taxpayer not operating under the control or authority of a United States Court. 28 U.S.C. §§ 959(b) and 960. The United States asserts that on this basis, Debtors are in violation of sections 959(b) and 960, and that the case should be converted for their non-payment on the Service's claim, and their default with respect to the terms of the confirmed plan. The United States argues that Debtors should not be allowed to benefit from one portion of federal law, the Bankruptcy Code, while at the same time ignore their duties under other federal law, i.e., the Internal Revenue Code.

Debtor's Opposition

Debtors file an opposition to the Motion to Dismiss, stating that they had an issue with their prior Certified Public Accountant preparing and filing all appropriate personal and business tax returns. Debtors now submit that all necessary and appropriate returns have now been prepared and filed.

Stipulation, filed on January 7, 2014

The Internal Revenue Service and Debtors entered a stipulation, dated January 7, 2014, to continue the hearing on the Motion to Dismiss to February 4, 2014, so that Debtors can become current in filing and payment of the post-petition liabilities.

FEBRUARY 4, 2014 HEARING

As of the February 2, 2014 review of this file, no further pleadings had been filed. The Internal Revenue Services has provided the court with evidence to establish cause to dismiss this case pursuant to 11 U.S.C. § 1307(c).

At the hearing xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

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 Convert having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Convert or Dismiss the case is xxxxxxx and xxxxxxxxx.