UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

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

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1. 13-31900-E-13 BENJAMIN/MARGARITA DUENAS — MOTION TO CONFIRM PLAN
TOG-5 Thomas O. Gillis — 1-21-14 [45]

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, parties requesting special notice, and Office of the United States Trustee on January 21, 2014. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

Final Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The 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). 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 Amended Plan. No appearance at the March 4, 2014 hearing is required.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee opposes the confirmation of the amended plan on the basis that the plan relies on a pending Motion to Value. However, the court granted the Motion to Value on February 25, 2014. Therefore, the objection is overruled.

The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

IT IS ORDERED that the Motion is granted, Debtor's Chapter 13 Plan filed on January 21, 2014, is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

2.	**14-20909-E-13 MOH-1**	**BERENYZE MENDOZA AND SERGIO VALDOVINOS Michael O'Dowd Hays**	**CONTINUED MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A. 2-11-14 [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 Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on February 18, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The court's tentative decision is to grant the Motion to Value Collateral and determine creditor's secured claim to be $0.00. 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 2732 D Street, Oroville, California. The Debtor seeks to value the property at a fair market value of $128,000.00 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 $156,748.54. Bank of America, N.A.'s second deed of trust secures a loan with a balance of approximately $35,415.95. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Bank of America, N.A. secured by a second deed of trust recorded against the real property commonly known as 2732 D Street, Oroville, 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 $128,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

3. 13-30915-E-13 PETER/THERESA SMITH — CONTINUED MOTION TO DISMISS CASE
NLE-2 Timothy J. Walsh — 1-17-14 [32]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 17, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion to Dismiss. 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:

PRIOR HERAING

Prior Plan Denied, No New Plan

The Trustee's Motion argues that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on December 17, 2013. A review of the docket shows that Debtor has not yet filed a new plan or a motion to confirm a plan. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

No Valuation Motion Pending

The Trustee further argues that the Debtors have not filed a new Motion to Value Collateral of PNC Bank since Debtor's Motion to Value Collateral of PNC Bank was denied on October 22, 2013 (Docket #26). A review of the docket shows that no further Motions to Value Collateral have been filed to date. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

OPPOSITION

Debtors filed an opposition to the motion. The opposition requests the court to give Debtors an additional 30 days in which to file an amended plan as the Debtors are in the process of a loan modification that requires amendment of the plan.

However, Debtor does not address the Motion to Value issue. Furthermore, the process for making "pending loan modification negotiations" part of a confirmed Chapter 13 Plan and the plan terms at issue were

developed over more than three years with the input of knowledgeable debtor counsel and sophisticated creditor counsel and creditors. Requiring a substantial adequate protection payment quickly separated the canard debtors with no intention of making any payments from the debtors proceeding in good faith (whether or not they had a realistic financial plan for modification). It also provided the creditor with a substantial adequate protection payment, as well as creating a track record of payments (which in some cases has replaced three months of trial loan modification payments).

The plan terms also provide the protection to the creditor of getting the stay terminated so that it can foreclose on the collateral if the loan modification is not approved or the debtor does not proceed in good faith. The plan terms, which require only that the creditor shows that specific information was requested and not timely applied (the 30-day period used by the court was pulled from the HAMP loan modification procedure), protects the creditor.

The Debtors commenced the present case on August 19, 2013. The court denied confirmation of the prior plan due to the Debtors' failure to file a motion to value the claim of PNC Mortgage and there being a purported trial loan modification in process without any adjustment in what was to be paid the creditor.

Only after the present Motion to dismiss was filed does a motion relating to a loan modification stumble in to the court. Motion, Dckt. 36. The Motion contains requests for "interesting" relief (as characterized by the court):

A. The Debtors and Residential Credit Solutions, Inc. (the "Lender") want to modify the Note secured by the First Deed of Trust to provide,

   1. Principal Balance.....$268,536.01
   2. Term.....01/01/14 - 09/01/36
   3. Interest Rate.....4.950%

B. The Loan Modification Agreement; Exhibit 4, Dckt. 39; provides that the contract is between Residential Credit Solutions, Inc. and the Debtors.

C. If the court does not approve this Agreement, then the court enter an order allowing Residential Credit Solutions, Inc. to enter into any agreement it wants on whatever terms it wants with the Debtor, and that the court's blanket order approve whatever Residential Credit Solutions, Inc. extracts in terms from these consumer Debtors.

Residential Credit Solutions, Inc. Has filed a proof of claim stating that it is a creditor in this case. Proof of Claim No. 4, Official Registry of Claims in this case. The Note attached to Proof of Claim No. 4 is endorsed in blank. There is attached to the Proof of Claim an assignment of the deed of trust from Mortgage Electronic Registration Systems, Inc. To Residential Credit Solutions, Inc., but other than an endorsement in blank, there is nothing presented showing that the Note has been transferred to

Residential Credit Solutions, Inc. or that Residential Credit Solutions is in physical possession of the Note endorsed in blank. FN.1.

FN.1. While not stated as evidence of any specific fact, when the court conducted an internet search, the Residential Credit Solutions website states that it is a loan servicer, not a debt purchaser. If this is true, then the court questions whether a loan modification with a loan servicer would be of any value to the consumer Debtors.

No response has been provided by the Debtor to date.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

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

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

4. 13-30919-E-13 BUN AUYEUNG AND SOO TSE — MOTION TO AVOID LIEN OF BARTON AND PAULA CHRISTENSEN
PGM-4 Peter G. Macaluso — 1-29-14 [104]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on January 29, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Avoid a Judicial Lien. 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:

Debtor moves to avoid the lien of Barton and Paula Christensen (collectively "Christensen"). A judgment was entered against the Debtor in favor of the Christensen for the sum of $300,000.00 to be disbursed as follows: $144,000 to the Christensen's, $30,000.00 to the Hatada's and $126,000.00 to Dance Hall Investors. The abstract of judgment was recorded with Sacramento County on September 12, 2008. That lien attached to the Debtor's residential real property commonly known as 6311 Point Pleasant Road, Elk Grove, California.

On October 1, 2013, Christensen filed a Proof of Claim with the court in the amount of $140,000.00. Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $185,000.00 as of the date of the petition. The unavoidable liens total $3,014.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(3) in the amount of $175,000.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. Debtor argues that the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing should be avoided in excess of $7,000.00 subject to 11 U.S.C. § 349(b)(1)(B).

CREDITOR'S OPPOSITION

Barton and Paula Christensen ("Creditor") oppose the motion on the basis that the claim has been merged into judgment, *res judicata* and

collateral estoppel apply, double recovery applies and the Debtors acted in bad faith.

Creditor first argues that the Debtors cannot re-litigate this issue because their claims have been extinguished and replaced by the Judgment. However, it does not appear that the Debtors seek to re-litigate the claims that were litigated and resulted in the judgment. Rather, they seek to avoid the judgment pursuant to 11 U.S.C. § 522(f).

Second, the Creditor argues that *res judicata* and collateral estoppel apply. Creditor is argues that the Motion to Avoid Lien of Barton and Paula Christensen in Case No. 09-35065, Dckt. 108, should have preclusive effect.

Third, Creditor argues that double recovery is impermissible and Debtor should not be able to avoid this judgment lien because it would further reduce their lien. Creditor states they already received a prior order avoiding the judgment lien, now have adjusted their higher exemption and seek additional avoidance.

Lastly, Creditor argues that judicial estoppel should be applied because Debtors have acted in bad faith. Creditors state that this case was filed simply to re-file this motion to avoid lien, claim a higher homestead exemption, and reduce the creditor's claim for a second time.

LEGAL STANDARDS

Collateral Estoppel and Res Judicata

In describing the five elements for Collateral Estoppel (claim preclusion) under California law, the Ninth Circuit Court of Appeals stated,

> Under California law, collateral estoppel only applies if certain threshold requirements are met:
>
> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001).

Cal-Micro, Inc. v. Cantrell, 329 F.3d 1119, 1123 (9th Cir. 2003). The party asserting collateral estoppel bears the burden of establishing these requirements. *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001)

Additionally, the determination of value for purposes of 11 U.S.C. § 506(a) is made only for specific purposes and the value may be determined at different times depending on the purpose of the valuation. In *Gold Coast Asset Acquisition, L.P. v. 1221 Veteran Street Co. (In re Veteran Street*

Co.), 144 F.3d 1288 (9th Cir. 1998), the Ninth Circuit Court of Appeals concluded that a valuation of property pursuant to 11 U.S.C. § 506(a) was not binding between the parties when it was not being used for the purpose for which the valuation was made in that case (confirmation of plan).

> "In the present case, the bankruptcy court valued the Property in light of Veteran's proposed plan of reorganization. Since the bankruptcy court rejected the plan, the valuation of the Property served no purpose under the Bankruptcy Code. Therefore, the valuation should not affect Gold Coast's rights to postpetition rents under section 552. The rents generated by the Property constituted Gold Coast's collateral and, thus, were an improper source for L&E's award of attorneys' fees. See *In re Cascade Hydraulics and Utility Service, Inc.*, 815 F.2d 546, 548 (9th Cir. 1987) ("Administrative expenses or the general costs of reorganization may not generally be charged against secured collateral.")."

Id. at 1292. In the present case, Movant seeks to use a valuation of property for purposes of a bankruptcy plan in avoiding a lien in another case years ago to be binding in determining the Debtors' avoidance in this case.

The party "asserting collateral estoppel carries the burden of proving a record sufficient to reveal the **controlling facts** and pinpoint the exact issues litigated in the prior action." *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995)(emphasis added); cited by *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007). If the Court has a reasonable doubt as to what was actually decided by the prior judgment, it will refuse to apply preclusive effect. *Id.*

Collateral Estoppel is a variant of the fundamental *Res Judicata* Doctrine. The Ninth Circuit Court of Appeals addressed the modern application of this Doctrine in *Robertson v. Isomedix, Inc. (In re International Nutronics)*, 28 F.3d 965 (9th Cir. 1994). The court considers four factors in determining whether Res Judicata applies,

> "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Id. at 970, citing *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

Applying these factors yields a decision that issue or claim preclusion does not bar Debtors from avoiding the lien in this subsequent bankruptcy case. The key point is the controlling facts are sufficient different from the prior case to this case. Just as the "valuation" for purposes of § 506(a) in the prior case has no bearing on the valuation in

this case, the determination of the value for the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A) in the prior case has no bearing on the determination in this case.

A review of the Order Granting Motion to Avoid Lien that Impairs and Exemption Pursuant to Section 522(f)(1)(A) (Case No. 09-35065-E-13L), Dckt. 108, filed August 30, 2010, demonstrates that the court determined the value of the subject real property as of the date of the filing of the petition in order to apply the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A). The Order determined that the judgment lien of Barton and Paula Christensen against the real property commonly known as 6311 Point Pleasant Road, Elk Grove, California, was avoided pursuant to section 11 U.S.C. § 522(f)(1)(A) for all amounts of the judgment in excess of $140,000.00.

Equitable Doctrines

The key difference between the doctrines of claim and issue preclusion and equitable doctrines, such as equitable and judicial estoppel is that the equitable doctrines focus upon *conduct* and that claim and issue preclusion turn merely on the existence of an adjudication. *Alary Corp. v. Sims (In re Associated Vintage Group, Inc.)*, 283 B.R. 549, 565 (B.A.P. 9th Cir. 2002).

> Equitable estoppel requires the following elements:
>
> (1) The party to be estopped must know the facts;
>
> (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
>
> (3) The latter must be ignorant of the true facts; and
>
> (4) He must rely on the former's conduct to his injury.

United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978). Since estoppel is an equitable doctrine, it should be applied "where justice and fair play require it." *Id.*

Judicial estoppel is an equitable doctrine that encompasses a variety of different situations that revolve around the concern for preserving the integrity of the judicial process. *In re Associated Vintage Group, Inc.*, 283 B.R. at 565. The doctrine extends to incompatible statements and positions in different cases. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996).

> Independent of unfair advantage from inconsistent positions, judicial estoppel may be imposed: out of "general consideration of the orderly administration of justice and regard for the dignity of judicial proceedings;" or to "protect against a litigant playing fast and loose with the courts." Hamilton, 270 F.3d 778 at 782; Russell, 893 F.2d at

1037. Moreover, it may be invoked "to protect the integrity of the bankruptcy process." Hamilton, 270 F.3d 778 at 785.

In re Associated Vintage Group, Inc., 283 B.R. at 556. The Ninth Circuit requires that the inconsistent position have been "accepted" by the first court. *Id.*

DISCUSSION

Here, the court finds that judicial estoppel applies to the instant case. The court recalls the bad faith activity of the parties in the prior bankruptcy and the court finds that the Debtors are not entitled to reap the benefits of an increased exemption and therefore avoiding more of the Creditor's lien based on their prior bad faith.

Prior Rulings and Bankruptcy Case

Debtors' prior bankruptcy case was filed as a Chapter 13 case on July 21, 2009. Bankr. E.D. Cal. No. 09-35065. The case was converted to one under Chapter 7 by order filed on February 25, 2013. 09-35065 Dckt. 216. In deciding to convert the case to one under Chapter 7, the court found that the Debtors were not prosecuting the Chapter 13 case in good faith, including affirmatively making misrepresentations to the court.

> "Rather than proceeding in good faith to timely comply with the confirmed bankruptcy plan, the Debtors have demonstrated that they are merely engaging in a gamble on the current real estate market. The Debtors are gambling with the creditors' money that the market will rise, allowing the Debtors to pocket more money from a sale. If the market goes down, then creditors can bear the risk (suffer the loss).
>
> The Debtors have obtained two and one-half years of bankruptcy court protection, with all to show is that they will, sometime in the future, do what they have promised to do in the past if they determine that the real estate market has risen high enough for them to make more money by improperly delaying creditors.
>
> The Debtors are not appearing, testifying, and making representations to this court in good faith. Rather, they have acted to mislead the court, creditors, the Chapter 13 Trustee, and other parties in interest.
>
> No evidence is filed in opposition to the Motion to Dismiss, but merely short arguments of counsel. Such argument is not evidence of the facts alleged therein. The absence of such evidence causes the court to infer that such information is wholly unsupported. Even when afforded the opportunity to file supplemental pleadings, the Debtors merely had their attorney file a Supplemental Reply arguing why the case should not be dismissed. The Debtors have been

careful not to make any statements under penalty of perjury to the court.

At the January 9, 2013 hearing the Debtors asked the court to continue the hearing to allow Debtors to sell the property. Such would allow them to profit from their misrepresentations to the court. Debtors' supplemental opposition states that Debtors have obtained a real estate agent and that the sale price is listed as $200,000 instead of the $250,000 initially stated by Debtors. Counsel for the Debtors argues that a modified plan will provide for all increases in value to go to creditors, with the Debtors reducing their exemption. However, the court's review of the docket indicates that a modified plan has not been filed.

In confirming the current Chapter 13 Plan, the Debtors testified under penalty of perjury that they would sell their real property to pay all lien holders and Class 2 claims in full. Declaration, ¶¶ 6, 7, Dckt. 168. In fighting to confirm the plan against opposition on the Debtors' continuing delay, the Debtors represented to the court that they had entered into a one-year listing agreement, September 26, 2011 through September 26, 2012, and were listing the property for sale for $290,000.00. Reply, Dckt. 177. Further, "The debtor's [sic.] intend to reduce the asking price accordingly over the 12 month period so that the sale occurs on or before September of 2012..." *Id.*

The court harmonized the requirements for equal monthly payments specified in 11 U.S.C. § 1325(a)(5)(B)(iii)(1) with the rehabilitation aspect of Chapter 13 and the ability of a debtor to provide for the prompt orderly liquidation of assets through a plan to provide for creditors and protect exempt interests in assets. Civil Minutes for October 14, 2011 Confirmation Hearing, Dckt. 180. The court expressed clear concern over the Debtors' continuing failure to address the issues raised in the prior confirmation hearing (confirmation denied) and unreasonable delay in the prosecution of a plan and liquidation thereunder.

Though the court's November 14, 2011 confirmation order expressly requires that the Debtors' shall immediately list the property for sale at $290,000.00 and shall have the property liquidated (sold) by September 2012, the Debtors did not actively attempt to sell the property. Rather, they impeded the sale of the property, seeking to gamble that the real estate market would increase and they could pocket more the sales proceeds.

The Debtors, in responding to this Motion, have been very careful not to provide any explanation under penalty of perjury as to the efforts they made to market and sell the

property. From this lack of testimony the court infers that such testimony would be adverse to the Debtors – showing that they did not attempt to actively market and sell the property as required under the confirmed Fourth Amended Chapter 13 Plan.

...

The Debtors' conduct in this case under the confirmed plan have been in bad faith. Though representing to the court, and being ordered under the confirmed Fourth Amended Chapter 13 Plan, to promptly proceed with the liquidation of the real property commonly known as 6311 Point Pleasant Road, Elk Grove, California, the Debtors did not prosecute the case. The court finds that the Debtors did not prosecute the case because they were hoping realize a greater gain, gambling that the real estate market would appreciate, allowing them to exempt even more of the sales proceeds.

The gambling on a rise in the real estate market was not in good faith, and directly caused creditors to suffer unreasonable delay to their prejudice. While the Debtors have continued in the possession and use of the property without making regular, equal monthly payments to creditors with liens on the property. While a debtor may proceed with an orderly, prompt liquidation of assets as part of a Chapter 13 Plan, they cannot falsely promise to liquidate the property. Here, the Debtors actively misrepresented to the court that they would liquidate the property, while intending not to sell the property but allow it to hopefully appreciate in value. The Debtors secret, unstated "plan" has been to hold the property idle in the Chapter 13 case and then stumble in to "amend" the confirmed plan to have more time to gamble on appreciation of the property.

The Debtors' opposition that by delaying the prompt liquidation the property is alleged to have increased by $25,000.00 does not help their cause. Just because they believe that they can take more sales proceeds by violating the court order is not a basis for saying that violating the court's order and confirmed Fourth Amended Plan are justified. The Debtors' Opposition reflects that what they want, and always wanted, was a 60-month holding period in which they did not make any payments to creditors holding secured claims. Dckt. 201. Chapter 13 does not give such a "free stay," even when the Debtors attempt to manufacture a step transaction consisting of false promises to liquidate the property, and then when they fail to, request "only a little more time."

If the Debtors had any good faith intention to market and sell the property in an orderly liquidation, they would have done so within the time period specified in the confirmed Fourth Amended Chapter 13 Plan.

Given the Debtors' conduct, the court concludes that conversion of the case to one under Chapter 7 is in the best interests of creditors. If the property is increasing in value, then the estate and creditors may well benefit from such increases. Creditors and the Chapter 7 trustee may well conclude that grounds exist for objecting to all or part of any exemption claim in the property or other assets based on the Debtors' conduct.

The court is convinced that only an independent fiduciary can consider how this estate was handled and what assets exists for the estate and to be properly be distributed to creditors. A Trustee can also dispassionately consider the professional fees paid in this case, as well as monies which the Debtors and estate received in the violation of automatic stay adversary proceeding, or collection any unpaid amounts of such judgment.

Additional Arguments at the Hearing

At the hearing the Debtors' counsel passionately argued that the court dismiss the case or allow these Debtors to dismiss the case rather than having it converted to one under Chapter 7. The Debtors represented to the court that the reason they wanted to dismiss the case was so that they could file a new Chapter 7 case on February 21, 2013, the day after this hearing.

When pressed as to why the court should not just convert the case, Debtors' counsel admitted that the reason was that the Debtors wanted to claim an even larger homestead exemption in that the state law exemption had increased since they commenced this Chapter 13 case on July 21, 2009.

It was explained to the court that after payment of the one claim secured by the real property, that of Christensen which the Debtors assert is $25,000 - $30,000, there will be significant sales proceeds in which the Debtors want to claim their homestead exemption. Their current exemption is $150,000, and they want to now take advantage of an increase to $175,000.

On the one hand the Debtors feign an inability to sell the real property as required by the Chapter 13 Plan and their commitment to creditors due to it not having sufficient value, and now they argue that it would be unfair to convert the case because it prevents them from pulling another $25,000 of value out of any sales proceeds. If the court were to accept this argument it would be falling further victim to the Debtors' fraud upon the court and creditors.

These Debtors committed as part of their Chapter 13 Plan to conduct an orderly liquidation sale of the property. See November 14, 2011 Order Confirming Plan, Dckt. 182. The court confirmed a plan which allowed the Debtors until September 2012 to complete a sale of the property. This case having been filed in 2009, the Debtors had effectively used the Chapter 13 case to forestall any payment to Christensen for more than 3 years before they had to complete the promised liquidation of the real property. The Debtors convinced the court that the delay in confirming the plan for two years, and then getting another year to sell the property was reasonable, even though they had not made any plan payments to Christensen.

But the Debtors did not liquidate the property, and based on the facts of this case, the court concludes that they never intended to liquidate the property by September 2012. These Debtors are represented by knowledgeable counsel who clearly understood, or had the ability to understand, that the Debtors committed to and the order confirming the plan required the property to be sold by September 2012.

At the hearing counsel for the Debtor expressed some confusion over the order providing for the sale to be completed by September 2012, at one point disputing that the order so provided. The court recited the provision of the order, as well as noting for Debtors' counsel that he is the one who actually prepared the order confirming the Plan. There is, and there was, no bona fide confusion that the Debtors' promised and were ordered to complete the liquidation of the property by September 2012.

...

The court finds that the Debtors have prosecuted this Chapter 13 case and the confirmed plan in bad faith, abusing the bankruptcy process and creditors in this case. For the court to indulge the Debtors and dismiss the case is to give the Debtors a "bonus" for having mislead creditors and the court with the promise to liquidate the property by September 2012. Fraud committed on the parties and the court is not rewarded.

Though Debtors counsel mounted a spirited and aggressive fight, he is betrayed by the actions, or lack of action by his clients.

The court is also not impressed by the plea that the Debtors are 80 year old people living on retirement pensions. At one point counsel's arguments bordered on contending that his clients were and are incompetent. That cannot be true as they have actively sought and obtained orders from this court, in response to the Trustee's Motion they advanced a modified plan to let them serve as Debtors in a Chapter Plan for 2 more years while the "actively"

> liquidated the Property, and they successfully prosecuted litigation against Christensen for violating the automatic stay. If the Debtors were not competent or capable of performing a plan which provided for liquidation of the Property, counsel would not have proposed, obtained confirmation of, or seek to have the Debtors fulfill duties under a modified plan for another two years.
>
> Finally, conversion of the case is of little moment to the Debtors if their only concern is the exemption. They have a $150,000.00 exemption they have claim in this property. Amended Schedule C, Dckt. 46. If they are correct and the Christensen claim is $30,000, then the property would have to sell for in excess of $200,000 for there to be any money in excess of the Christensen claim and their homestead exemption. (Assumes a $200,000 sales price, 8% seller costs of sale, and prorated real property taxes.) If it is true that the property has a value in excess of $200,000, then it further highlights the Debtors bad faith in not proceeding with the required liquidation by September 2011."

09-35065, Civil Minutes, Dckt. 214.

The Debtors are attempting to pick the best from all worlds. They get their prior Chapter 13 case converted to Chapter 7 due to their misconduct. They file a new Chapter 13 case, providing a *di minimis* payment, premised on having obtained a discharge in the prior case. Then they seek to take away the lien of Christensen, paying them nothing as an unsecured claim. The Debtors failure of good faith has continued to the present case. Chapter 13 Plan, Dckt. 5.

The court finds that the equitable doctrine of Judicial estoppel encompasses this very situation. The court must preserve the integrity of the judicial process, and Debtors clearly are attempting to abuse the process by filing a sham Chapter 13 plan and avoiding the lien of the Christensens. Debtors filed this bankruptcy after the dismissal of the prior bankruptcy, admitting that they would be able to reap the benefit of a higher homestead exemption if they were to refile. Bankr. E.D. No. 09-35065, Civil Minutes, Dckt. 214.

These Debtors willfully and intentionally abused the Bankruptcy Code in the prior case, breached the order confirming the Chapter 13 Plan and failed to comply with the Chapter 13 Plan for the marketing and sale of the property which secures the Christensen claim. Through misrepresentation and intentional delay, while having committed to pay Christensen several years ago, the Debtors have hung on to the property gambling on a rising real estate market. It further appears, and the court so concludes, that the Debtors intentionally misrepresented the plan in the prior case, misrepresented that they would prosecute the plan to sell this Property that secures the Christensen claim, and then sought to dismiss the prior case as part of a strategy to not only gamble on the real estate market, but obtain a higher exemption due to the passage of time.

Rulings on Motion to Avoid Lien in Prior Case

The court has also reviewed its ruling in the prior bankruptcy case when the Debtors sought to avoid this judgment lien. The court determined that it is the petition date for which the values are determined for the § 522(f) lien avoidance. Civil Minutes, 09-35065 Dckt. 271. It appears that after that ruling the Debtors and their attorney chose to "take a dive" and attempt to circumvent the rulings in that case by choosing not to avoid the lien in that case.

As the court recalls in that case, the Debtors pleaded with the court to allow them to dismiss the case so they could (after having improperly delayed and make affirmative misrepresentations to the court) file a new case and manufacture a larger exemption – apparently not satisfied with the substantial California homestead exemption already afforded them. Not being able to directly manufacture the exemption increase, they are now trying to do it indirectly, exhibiting the same disdain for the judicial process and their duties and obligations in federal court, including the provisions of Federal Rule of Bankruptcy Procedure 9011.

In ruling on the Debtors' attempts to manufacture a higher exemption in the prior case, the court expressly determined that they and Christensen were bound by the final order determining lien avoidance in that case. That ruling, of which the Debtors are fully aware, is equally applicable in this case.

> The issue of avoiding the judgment lien between the Debtors and Creditors has been determined by final order of this court in this bankruptcy case. Once a final order or judgment has been entered, relief may be sought by appeal or pursuant to Federal Rule of Civil Procedure 60. Moores Federal Practice Third Edition, § 132.20[2]. Here, the prior order avoiding the judgment lien of creditors was a final and appealable judgment. The Bankruptcy Code expressly provides that such order remains in full force and effect unless the bankruptcy case is dismissed. 11 U.S.C. § 349(b)(1)(B). No other provision exists under the Bankruptcy Code setting aside a final order avoiding a judgment lien, other than by appeal or relief under Rule 60.
>
> The court concludes that the provisions of 11 U.S.C. § 348(f)(1)(B) and (C) do not work to set aside the final order avoiding the Creditors lien in this case. The focus of these provisions are valuations of claims, for which property must be valued, for treatment of the claims in the bankruptcy case. Commonly, a creditors secured claim is valued pursuant to 11 U.S.C. § 506(a) to reduce the amount which has to be paid as a secured claim through a plan. This allows the debtor to obtain a lien strip and have the lien removed from his or her property upon payment of less than the full amount of the secured debt. See *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), affd., 469 B.R. 803 (ED Cal. 2012) (discussion of lien striping in Chapter 13 case), and

Martin v. CitiFinancial Services, Inc. (In re Martin), Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013). The Debtors in this case did not seek to value Creditors secured claim pursuant to 11 U.S.C. § 506(a) or obtain a lien strip through a completed plan. Rather, the Debtors sought and obtained an order avoiding Creditors lien, irrespective of whether the Chapter 13 Plan was ever completed. A reading of 11 U.S.C. § 548(f)(1)(B) shows that it applies to situation where two conjunctive conditions are met, valuations of property and allowed secured claims. The valuation of property which secures a claim is a necessary determination of a secured claim pursuant to 11 U.S.C. § 506(a), which instructs the court the methodology for determining the value of a secured claim (emphasis added),

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

The Ninth Circuit Court of Appeals addressed the issue of the effect of a valuation of property and allowed secured claim pursuant to 11 U.S.C. § 506(a) in *Gold Coast Asset Acquisition, L.P. v. 1441 Veteran Street Co. (In re 1441 Veteran Street Co.)*, 144 F.3d 1288 (9th Cir. 1998). In holding that a § 506(a) valuation was binding only to the extent of the purpose for which it was made, the court stated,

> Section 506(a) operates to bifurcate a secured creditor's allowed claim into secured and unsecured interests based upon the bankruptcy court's valuation of the secured property. See *Dewsnup*, 112 S. Ct. at 777. A valuation under section 506(a), however, appears to be linked to its identified purpose - e.g., a plan of reorganization. Section 506(a) instructs the bankruptcy court to value the property "in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a); see *In re Madera Farms Partnership*, 66 B.R. 100, 104 (BAP 9th Cir. 1986) ("The need to look at the purpose of the valuation appears to have

> achieved virtually universal acceptance."). It follows that when the purpose behind a particular valuation no longer exists, that valuation becomes irrelevant.
> ...
> In the present case, the bankruptcy court valued the Property in light of Veteran's proposed plan of reorganization. Since the bankruptcy court rejected the plan, the valuation of the Property served no purpose under the Bankruptcy Code. Therefore, the valuation should not affect Gold Coast's rights to postpetition rents under section 552.

Id., 1291-1292. This is consistent with 11 U.S.C. § 548(f)(1) applying to the valuation of property and secured claims, as required by 11 U.S.C. § 506(a).

The order on the prior motion to avoid lien does not value the secured claim in the case, but limits the reach of the judgment lien in, during, and after this bankruptcy case. While such a determination may sound similar to a valuation under § 506(a), the relief granted and order avoid lien is a determination of the substantive real property rights of Creditors irrespective of what they are paid on their secured claim in the bankruptcy case.

A judgment FN.2., when rendered on the merits, constitutes an absolute bar to a subsequent attempting to re-litigate the matters determined by the judgment. *Cromwell v. County of Sacramento*, 94 U.S. 351 (1876).

Central to this claims preclusion doctrine or the concepts of merger and bar. The concept of merger holds that when a plaintiff succeeds in litigation and recovers a valid and final personal judgment, the plaintiffs claim is merged into the judgment, and the original claim and all defenses to it, whether asserted or not, are extinguished. The plaintiffs rights and the defendants liabilities are thereafter determined by the judgment. If the plaintiff loses the litigation, the resultant judgment acts as a bar to any further actions by the plaintiff on the same claim, with certain limited exceptions. By definition, merger and bar prohibit claim-splitting. All facts, allegations, and legal theories which support a particular claim, as well as all possible remedies and defenses, must be presented in one action or are lost (see §§ 131.20-131.24).

Moores Federal Practice, Third Edition, § 131.01. The Ninth Circuit Court of Appeals addressed the application of this principal to orders in bankruptcy court (an order approving the sale of property) in Robertson v. Isomedix, Inc. (In re International Nutronics), 28 F.3d 965 (9th Cir. 1993), cert. denied 513 U.S. 2016 (1994).

> FN.2. Federal Rules of Bankruptcy Procedure 9001 and 9002 defines the term Judgment to mean any appealable order and include any order appealable to an appellate court. The order avoiding the judgment lien issued by the court previously in this case could have been appealed to an appellate court.
> ---
> The court having entered a final order avoiding Creditors judgment lien, it cannot now be relitigated by Debtors. There remains no case or controversy for this court to exercise federal court jurisdiction, all such claims having been merged into the prior final order.

Civil Minutes, Dckt. 271.

Chapter 13 Plan in This Case

The Debtors defaulted, intentionally, in the prior Chapter 13 case as part of their strategy to abuse the Bankruptcy Code, creditors, and the federal judicial process. They did not, and now appears could not, in good faith prosecute a Chapter 13 Plan. Dckt. 5. The same questionable issues arise in the present case.

Under the Proposed Chapter 13 Plan the Debtors are proposing to may $100.00 a month payments for a period of 36 months. This $3,600.00 in payments by the Debtors is not sufficient to even fund the $5,000.00 in fees which Debtor's counsel wants for shepherding the Debtors through this second bankruptcy case so they can manufacture a larger exemption and increase the lien avoidance over the existing final order.

In addition, gifts totaling $13,000.00 will be made to the Debtors by unnamed family members to fund the plan. The Debtors will use the money to pay the balance to their attorney, Trustee fees, property taxes and pay $7,000.00 to Christensen for the newly unavoided amount of their secured claim. The Plan then says that they will pay 100% of their $2,547.31 in unsecured claims. This shows several significant signs of bad faith.

First, the Debtors admit that they have no income with which to fund a plan. Rather than a good faith plan being funded by the Debtors, some other family members appear to be pulling the strings, quite possibly for their own financial advantage. The Debtors appear to be the poor sacrificial lambs who are being deprived of their homestead exemption while other family members appear to be lining their pockets with future gain.

Second, no creditor with general unsecured claims have come forward to file proofs of claim. Quite possibly the "unsecured claims" do not exist or have been manufactured by the Debtors and Counsel to create the illusion that there is some purpose for this bankruptcy case other than to try and circumvent the prior orders of this court and further abuse the federal judicial process. The Claim Bar Date expired on December 26, 2013. Notice of Chapter 13 Bankruptcy Case, Dckt. 9.

In reviewing the Schedules filed by the Debtors under penalty of perjury, the court notes the following:

a. Debtors' personal property consists of $70.00 in cash and bank accounts, $450.00 in household goods and effect, $25.00 in clothing, and nothing else.

b. On Schedule I the Debtors list only $916.40 in Social Security Benefits, plus an additional $550.00 a month in assistance from a Daughter.

c. The Debtors' expenses shown on Schedule J are $1,365.00 a month. To achieve this number the Debtors state, under penalty of perjury, that they spend only $250.00 a month on food, $2.00 on home maintenance, $9.00 on clothing, $100.00 on transportation, and $323.00 on auto insurance (though no car is listed on Schedule B and the Debtors state under penalty of perjury that they have no interest in any automobiles).

Schedules, Dckt.1.

Interestingly, when the prior case was converted to one under Chapter 7, the Debtors stated that Bun Auyeung alone had $2,200.00 a month in pension and retirement income. Chapter 7 Statement of Income, Dckt. 222.

The court has coined a phrase over the years concerning Debtors who "creatively" state under penalty of perjury their expenses on Schedule J or in declarations to create the appearance that a plan could be feasible – "Liar Declarations." A practice developed among the consumer bar to accede to their clients desire to retain some asset that they would let the Debtors lie about expenses because, "the client wants to give it a try, no matter how financially irrational or irresponsible." Judges throughout the District, once learning of the consumer attorneys allowing such "Liar Declarations," have acted to require the truthful, honest statements by parties under penalty of penalty of perjury. There is no "bonus for lying" in the Eastern District of California."

From a review of the Schedules, it appears that the Debtors are engaging in such "Liar Declarations" as to both their income and expenses. Possibly they are getting more assistance from their children. Maybe they have undisclosed assets and income. The court does not know, but it is obvious from Schedules I and J that the numbers don't add up.

It may be that whomever is pulling the financial strings, and has set in forth a pattern which has worked to deprive the Debtors of their homestead exemption for almost five years now (from the time they could have sold their home in the prior case) from receiving the financial benefits of that money than living in what, if Schedules I and J are taken as true, being forced to live in abject poverty with barely the shirt on their back and little food to eat.

Third, in April 2012, the court granted judgment for the Debtors in the amount of $15,259.95 (of which $3,900.00 was for legal fees) against Christensen. Judgment, 10-2497 Dckt. 72. Though presumably collected, this $15,259.95 is not otherwise accounted for by these Debtors who present themselves as qualified Chapter 13 Debtors. Possibly these monies were

taken from the Debtors by those who are calling the financial shots and looking to invest $13,000.00 to take even more through the Debtors' homestead exemption.

This is a very sad state of affairs, which may very well warrant inquiry on many fronts concern the possible abuse of these Debtors.

RULING

The court finds that these issues have been fully and finally litigated between the parties. The court has determined that the Christensen lien has been avoided for amounts of the judgment in excess of $140,000.00. Order, 09-35065 Dckt. 108. The Debtors' bona fide, then in good faith, homestead exemption was and is protected.

The court also finds that judicial estoppel is appropriate in this case, where the parties bad faith form the prior case has permeated this case and Debtors attempt to play "fast and loose with the court." *In re Associated Vintage Group, Inc.*, 283 B.R. at 556. Failure to apply judicial estoppel would be a green light to attorneys and parties (be they creditors or debtors) to lie, cheat, and steal because your conduct has no bearing on how much you can improperly take from others. In order to protect the integrity of the bankruptcy process, the court finds that judicial estoppel applies, and the Motion is denied.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Avoid Judicial Lien is denied.

5. 12-35521-E-13 CHRISTOPHER DEAN
PGM-4 Peter G. Macaluso

CONTINUED MOTION TO CONFIRM PLAN
7-24-13 [96]

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> A Motion to Confirm Plan having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, having filed a subsequent amended plan, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm Plan is dismissed without prejudice.

6. 13-30721-E-13 MICHAEL/LYNETTE ALLEN — MOTION TO CONFIRM PLAN
TJW-3 Timothy J. Walsh — 1-9-14 [40]

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, parties requesting special notice, and Office of the United States Trustee on January 9, 2014. By the court's calculation, 54 days' notice was provided. 42 days' notice is required.

Final Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The 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 decision is to grant the Motion to Confirm the Amended Plan. No appearance at the March 4, 2014 hearing is required.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee opposes the plan on the basis that it relies on a pending Motion to Value the secured claim of RBS Citizens N.A. However, the court granted the motion to value on February 25, 2014. Therefore, the objection is overruled and the Motion is granted.

The amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on August 15, 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.

7. 13-31441-E-13 DOREEN GASTELUM
PGM-1 Peter G. Macaluso

OBJECTION TO CLAIM OF FIFTH THIRD BANK, CLAIM NUMBER 1 AND/OR MOTION FOR ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE IMPOSED
1-13-14 [17]

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 Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 50 days' notice was provided. 44 days' notice is required.

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

The Objection to Proof of Claim is overruled as moot. No appearance required.

Debtor objection to Proof of Claim Number 1 on the court's official claims registry.

However, on January 10, 2014, three days before this objection was filed, Fifth Third Mortgage Company filed a withdrawal of Proof of Claim No. 1. No Dckt. No., listed after Dckt. 16.

Therefore, the Objection to the Proof of Claim is overruled as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Fifth Third Mortgage Company 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 1 of Fifth Third Mortgage Company is overruled as moot, this Creditor having withdrawn the Proof of Claim.

Notwithstanding the withdrawal of the Proof of Claim, which then rendered any further proceedings on this Objection moot, any claim by Debtor to be the prevailing party, or of a contractual or statutory right to reasonable attorneys' fees and costs, shall be requested by separate motion, to be filed and served on or before March 30, 2014.

**8. 13-31441-E-13 PGM-2 | DOREEN GASTELUM
Peter G. Macaluso | OBJECTION TO CLAIM OF FIFTH THRID BANK, CLAIM NUMBER 2
1-21-14 [21]**

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 Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 50 days' notice was provided. 44 days' notice is required.

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

The Objection to Proof of Claim is overruled as moot. No appearance required.

Debtor objection to Proof of Claim Number 2 on the court's official claims registry.

However, on January 10, 2014, three days before this objection was filed, Fifth Third Mortgage Company filed a withdrawal of Proof of Claim No. 2. No Dckt. No., listed after Dckt. 16.

Therefore, the Objection to the Proof of Claim is overruled as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Fifth Third Mortgage Company 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 2 of Fifth Third Mortgage Company is overruled as moot.
>
> Notwithstanding the withdrawal of the Proof of Claim, which then rendered any further proceedings on this Objection moot, any claim by Debtor to be the prevailing party, or of a contractual or statutory right to reasonable attorneys' fees and costs, shall be requested by separate motion, to be filed and served on or before March 30, 2014.

9. 13-33741-E-13 ILUMINADA MILLS — MOTION TO CONFIRM PLAN
FF-2 Gary Ray Fraley — 1-14-14 [20]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 49 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted. No appearance at the March 4, 2014 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on January 14, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

10. 09-45346-E-13 TROY/AMBER SHIPMAN MOTION TO RECONSIDER
TSB-1 Piotr G. Reysner 2-3-14 [71]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 2, 2014. By the court's calculation, 30 days' notice was provided. 28 days' notice is required. That requirement was met.

Final Ruling: The Motion to Reconsider was properly 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 the Court determines the reasonable amount of the Fixed Fees to be paid counsel for the Debtor pursuant to Local Bankruptcy Rule 2016-1. No appearance at the March 4, 2014 hearing is required.

David Cusick, Chapter 13 Trustee, requests that the court reconsider its Order approving $3,500.00 of attorney fees to Debtors' attorney, Piotr G. Reysner ("Counsel"). Dckt. No. 71. Counsel is no longer eligible to practice law, and is still showing to be the attorney of record in this bankruptcy case. As shown by a review of the California State Bar website and as addressed by the court in other cases, Counsel has wrestled with issues which impaired his ability to practice law and has stipulated to disbarment, which was effective June 16, 2012. Counsel status with the State Bar was Note Eligible to Practice Law effective from September 18, 2011 through the June 16, 2012 date. http://members.calbar.ca.gov/fal/Member/Detail/210937.

In this case, Debtors paid Counsel $1,726.00 prior to the filing of the bankruptcy. On March 17, 2010, the Honorable Judge Sargis approved an order confirming Debtors' Chapter 13 Plan. Dckt. No. 53. The Plan was confirmed, and further ordered that:

> [T]he attorney's fees for the debtor's attorney in the full amount of $3,500 are approved, $1,726.00 of which was paid prior to the filing of the petition. The balance of $1,774.00, provided that the attorney and debtor have executed and filed a Rights and Responsibilities of Chapter

13 Debtors and Their Attorneys, shall be paid by the trustee from plan payments at the rate specified.

Order Confirming Debtor's Chapter 13 Plan Filed November 19, 2009. Dckt. No. 53. The fees of $3,500.00 were awarded under Local Bankruptcy Rule 2016-1, which provides in pertinent part,

> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).
>
> (4) If an attorney elects to be compensated pursuant to Subpart (c) but the case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.
>
> (5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

At the times relevant to this Motion the Local Bankruptcy Rule provided for a maximum of $3,500.00 in fixed fees in non-business Chapter 13 cases. The amount was increased to $4,000.00 in 2012.

The Fixed Fee compensation covers the activities of counsel through the debtor obtaining the discharge in the case. The Local Rules provide for additional fees for substantial and unanticipated additional services which may be required. Completing Chapter 13 Plan as confirmed, reviewing the Trustee's proposed final accounting and making sure that the debtor's discharge entered are included in the Fixed Fee.

In addition to Local Bankruptcy Rule 2016-1, 11 U.S.C. § 329 provides that the court may review all transactions between a debtor and counsel during the one-year period prior to the commencement of the case and during the case, and cancel any agreement for fees or order the return of fees that exceed the reasonable value of the services provided.

The Trustee has paid Counsel $1,308.12 through the Chapter 13 Plan to date, which is in addition to $1,726.00 retainer he received. Trustee has not disbursed the additional $465.88, which otherwise remains to be paid to Counsel for services through the entry of the discharge in this case according to the order confirming. Thus, Trustee asks the court to reconsider paying Counsel the additional fees owed, as he is no longer practicing law and he cannot provide the legal services to Debtor.

DISCUSSION

Trustee asserts that the court should reconsider paying Counsel the balance of the Fixed Fee, as "he is no longer practicing law and has not proved that he has earned these remaining fees." Trustee's Motion to Reconsider, Dckt. No. 71 at 2. Though Trustee makes the arguments under Federal Rule of Civil Procedure 60(b), this is properly reviewed under 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1.

Standard for Attorney Compensation

Here, Counsel executed a Rights and Responsibilities on November 19, 2009, which stated that the initial fees charged in this case would be $3,500 for all preconfirmation services, and acknowledged that of this amount, $1,726.00 was paid by Debtors before the filing of the petition. Dckt. No. 7. Debtors and Counsel acknowledged that where substantial and unanticipated post-confirmation work would be necessary, the attorney may request the court to approve additional fees. Dckt. No. 7 at 5.

A bankruptcy court can, consistent with provision of Bankruptcy Code governing officer compensation, issue and rely upon presumptive guideline fees for routine services in Chapter 13 cases. 11 U.S.C. § 330. *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The docket reflects that Counsel did not apply for additional compensation.

The Chapter 13 Plan was confirmed in this case on March 17, 2010. Order, Dckt. 53. The term of the Plan is 60 months. Plan, Dckt. 5. The case having been filed on November 19, 2009, the Debtors are closing in on completing the Chapter 13 Plan.

The Fixed Fees includes the amounts for counsel to review the Trustee's Final Report, advise counsel that the monies have been properly accounted for, make sure the post-petition education and any other documents

necessary for the discharge are filed, and to confirm that the Debtors' discharge is entered. Counsel cannot provide those legal services to the Debtors. The court finds that of the remaining balance of $465.88, the sum of $465.88 relates to further services in the case (including having the Debtors file their certificate of post-petition debtor financial educations), and getting the case to closing.

The Motion is granted, the court does not allow the $465.88 in fees to be paid to Counsel, and the Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan (including payment to other counsel who may substitute in to represent Debtors).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Reconsider filed by the Trustee having been presented to the court, the Motion stating grounds for a review of counsel for Debtors' fees pursuant to 11 U.S.C. § 329 and Local Bankruptcy Rule 2016-1(c)(5), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and attorneys' fees in the amount of $465.88, which remain to be paid through the Chapter 13 Plan as confirmed, are disallowed Debtors' former counsel Piotr Reysner. The Chapter 13 Trustee shall disburse such monies as otherwise provided in the Plan, which may include counsel who may substitute in to represent Debtors in this case.

11. 14-20150-E-13 DJC-1 MICHAEL/DEBORAH SOUZA Diana J. Cavanaugh

MOTION TO AVOID LIEN OF FIA CARD SERVICES, N.A.
2-3-14 [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 Chapter 13 Trustee, respondent creditors, and Office of the United States Trustee on February 3, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Avoid a Judicial Lien is granted. No appearance required.

A judgment was entered against the Debtor in favor of FIA Card Services, N.A. for the sum of $4,468.37. The abstract of judgment was recorded with Solano County on March 23, 2012. That lien attached to the Debtor's residential real property commonly known as 851 Hanlon Way, Benicia, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $475,000.00 as of the date of the petition. The unavoidable consensual liens total $643,605.00 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the 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 judgment lien of FIA Card Services, N.A., Solano County Superior Court Case No. FCM126526, recorded on March 23, 2012, Document No. 201200027088, with the Solano County Recorder, against the real property commonly known as 851 Hanlon Way, Benicia, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

12. 11-23451-E-13 PGM-3 — CLARENCE ISADORE AND DEATRA JONES-ISADORE — Peter G. Macaluso — CONTINUED MOTION TO MODIFY PLAN 10-18-13 [40]

CONT. FROM 1-14-13, 12-10-13

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 October 18, 2013. By the court's calculation, 61 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:

PRIOR HEARING

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee objects to the proposed plan on several grounds.

First, the Trustee states that the modified plan may not be proposed in good faith or be Debtors' best effort. The Trustee requested and received six months of bank statements, pay advices and two years of tax returns. The Trustee has found issues after reviewing the documents. Trustee states that the confirmed and modified plan provide for the Timeshare in Class 4 and state the payment is being made by their daughter. However, the Trustee states the bank statements show that the timeshare payments are being made directly from Debtor's checking account. The Trustee also states he is perplexed by numerous deposits above the Debtor's regular employment income as well as large withdrawals. Trustee states on example is $22,000 deposited on May 20, a $15,782.19 withdrawal on June 7. Trustee states these deposits and withdrawals are not explained.

Trustee also notes that the income for Debtor Deatra Jones-Isadore appears to be understated. Schedule I indicates her net monthly take home pay as a teacher is $2,108.03; however, the Trustee states the payroll advice reflects a year to date income of $31,189.00, which would average to $3,118.90 per month when divided by 10 months.

Trustee also states after a review of the Debtor's tax returns, Schedule D, Capital Gains and Losses (C-2 and 3), of Debtor's 2011 tax return reflects Debtor purchased US Treasury Notes on January 27,2009 for $14,984.00 and sold on April 1, 2011 for $15,731.00. This was not reported on Debtor's Schedule B filed at the time Debtor's bankruptcy case was filed. Schedule B, Interest and Ordinary Dividends, of Debtor's 2011 tax return reflects interest income of$1,850.00 in 2011 which Debtor did not report on Schedule I. The Trustee is uncertain what these investments are, how Debtor was able to obtain them, and what happened to the income from them.

Second, the Trustee states he is unable to determine the plan payment proposed. Section 1.01 of Debtor's modified plan proposes a plan payment of $89,734.15 through October, 2013, then $1,200.00 for 28 months beginning November, 2013. Debtor's Motion indicates Debtors are proposing a $1,200.00 plan payment beginning November, 2013. However, Debtor's Declaration indicates Debtor will begin remitting plan payments of $200.00 per month beginning October 25, 2013. Debtor has submitted a November payment to the Trustee in the amount of $200.00 which posted on November 5, 2013. Debtor's Amended Schedules I and J filed as Exhibits support a monthly payment of $1,200.26.

Third, the Trustee is uncertain whether Debtor's modified plan intends for the Trustee to disburse the October mortgage payment to JPMorgan Chase. Section 1.01 of the modified plan proposes plan payments of $89,734.15 through the month of October, which includes Debtor's October plan payment under the confirmed plan of $2,804.35. Debtor's modified plan, however, only authorizes ongoing mortgage payments to JP Morgan Chase through September of $59,020.35. Debtor is currently involved in a trial loan modification which began November 1, 2013.

Fourth, Debtor's modified plan proposes to reclassify JPMorgan Chase regarding the ongoing mortgage and pre-petition arrears from a Class 1 secured creditor to Class 4 secured claim paid directly by the Debtor based on a trial loan modification. Debtor's filed a Motion for Order Approving Trial Loan Modification on October 18, 2013, which was subsequently granted

on November 19, 2013. Dckt. 45. Trustee argues that Debtor's modified plan provides no provision should the modified plan be granted and then the Debtor is unsuccessful in obtaining a permanent loan modification.

Fifth, Debtor's Declaration fails to adequately explain the numerous changes regarding their individual expenses. Trustee states Debtor provides no explanation for multiple increases in expenses, including food, laundry/dry cleaning, medical/dental, recreation, charitable contributions, property taxes/rentals, personal care and contributions as principle to school programs.

DEBTOR'S REPLY

Debtor filed a reply, stating that due to the holiday, Counsel has not been able to meet with the Debtors in time to supplement the record. Debtor request additional time to completely and thoroughly respond to the Trustee's objections.

CONTINUANCE

The court continued the hearing to allow the Debtor to fully respond to the Trustee's objections.

On January 7, 2013, the Debtor's Counsel filed a response, stating that the Debtors listed the Variable Annuity Policy on schedule B, with "Ameriprise One", with "loans against" it in the approximate amount of $19,500. Counsel states the Debtors were not able to repay that amount and stopped making payments, no payment amount was considered in the monthly obligations which caused a capital gains tax of $15,782.19. Counsel states the Debtors' then moved the remaining funds to First Investors, borrowed $22,000.00, and paid the I.R.S. so to prevent post-petition claims the amount of $15,782.19. Counsel states that the money used by Ameriprise Financial to complete various transactions, included the gross proceeds from the sale of Ameriprise investment including the treasury bonds were reinvested and the debtors' did not receive any funds, but were reinvested by Ameriprise with the debtors not receiving any funds in the process directly.

While Debtors have their attorney make the above arguments, no testimony under penalty of perjury has been provided as evidence that any of the above it true. The attorneys' arguments, allegations, and contentions are not evidence of facts. The Debtors being unwilling to so testify under penalty of perjury in a declaration leads the court to believe that such statements are not accurate.

The Debtors acknowledge receiving increases in payroll of approximately $1,000.00 per month and have increased said payment to the Trustee by $1,000.00 per month.

FURTHER CONTINUANCE

The court again continued the hearing to allow Debtor to provide a more thorough response.

DEBTOR'S RESPONSE

Debtor states that they supplied a supplemental declaration on January 14, 2014, Dckt. 365 to explain the Trustee's concerns regarding bank statements, pay advices and tax returns.

This supplemental declaration states that the Debtors listed the Variable Annuity Policy on schedule B, with "Ameriprise One," with loans against it in the approximate amount of $19,500. The Debtors state they were not able to repay that amount and stopped making payments, thus, no payment amount was considered in the monthly obligations which caused a capital gains tax of $15,782,19. The Debtors' then moved the remaining funds to First Investors, borrowed $22,000.00, and paid the IRS so to prevent post-petition claims in the amount of $15,782.19.

Debtors state the money used by Ameriprise Financial to complete various transactions, included the gross proceeds from the sale of Ameriprise investments including the treasury bonds were reinvested and the debtors did not receive any funds. Debtors also acknowledge receiving increases in payroll of approximately $1,000.00 per month and have increased said payment to the Trustee by $1,000.00 per month. Dckt. 65.

TRUSTEE'S RESPONSE

The Trustee responds, stating that the Debtor's Supplemental Declaration fails to address the majority of the Trustee's objections, including why the timeshare payments in Class 4 are being paid directly from Debtors' checking account when Debtor claims they are being paid by their daughter. Trustee states that no evidence has been provided in support of the Debtors' contentions.

The Trustee also raises several new issues the Debtor's supplemental response raises, such as:

1. Debtor states they listed a Variable Annuity Policy on Schedule B, with Ameriprise One, with loans against it in the approximate amount of $19,500.00. Schedule B lists "Ameriprise ONE; loans against the $19,500 of 410k." Debtor states they were not able to repay that amount so they stopped making payments, which resulted in a capital gains tax of $15,782.19.

    a. What is the Variable Annuity Policy? Is this the 410K (sic) that is listed on Schedule B? The first the Trustee heard of this is in the response.

    b. When did Debtor stop making payments? Before or after they filed bankruptcy? Debtor's schedules do not reflect monthly payments on this debt.

    c. Why is the capital gains tax so high?

2. Debtor states they moved the remaining funds to First Investors, borrowed $22,000.00 and paid the IRS to prevent post-petition claims.

a. In order to "move" the funds, would Debtor not have had to receive the funds?

b. What were the remaining funds?

c. Who is First Investors?

d. Borrowed $22,000.00? Where did these funds come from and did Debtor have Court permission to borrow these funds?

e. Could the IRS have filed a claim for post-petition taxes under 11 U.S.C. § 1305?

3. Debtor goes on to state, "The money used by Ameriprise Financial to complete various transactions, included the gross proceeds from the sale of Ameriprise investment including the treasury bonds were reinvested and debtors' did not receive any funds, but were reinvested by Ameriprise with the debtors not receiving and funds in the process directly."

a. Who is Ameriprise Financial, what money are they using, and what are the "various transactions? Debtor stated previously remaining funds were moved to First Investors from Ameriprise One.

b. What were the gross proceeds from the sale of Ameriprise investment? None were listed on the schedules.

c. What treasury bonds? What amount was reinvested?

4. Debtor now acknowledges increases in payroll of approximately $1,000.00 per month and offers to increase the plan payment by $1,000.00.

a. For how long has Debtors income been increased by $1,000.00 and where is that money? If Debtor's don't have it, where did it go?

b. Increase the plan payment by $1,000.00 for a total of what? The amount of proposed plan payment was one of the objections raised by the Trustee which Debtor has not addressed, one place it says $200.00 and another place it says $1,200.00.

Trustee's Supplemental Response, Dckt. 71.

DISCUSSION

Schedules and statements are signed under penalty of perjury. Fed. R. Bankr. P. 1008. Debtors are presumed to have read the schedules and statements before signing the documents, and are responsible for their contents. Debtors bear an independent responsibility for the accuracy of the information contained in their schedules and statements. *AT&T Universal Card Servs. Corp. v. Duplante (In re Duplante)*, 215 B.R. 444, 447 n.8 (9th Cir. BAP 1997) (noting that "schedules and statements of financial affairs are sworn statements, signed by debtors under penalty of perjury" and warning that "adopting a cavalier attitude toward the accuracy of the schedules and expecting the court and creditors to ferret out the truth is not acceptable conduct by debtors or their counsel").

Additionally, intentional concealment can be inferred from the facts and circumstances of a case, including non-disclosure resulting from a debtor's reckless disregard for the truth of information furnished in the schedules and statements. *See Jordan v. Bren (In re Bren)*, 303 B.R. 610, 614 (8th Cir. B.A.P. 2003) (stating that "multiple inaccuracies or falsehoods may rise to the level of reckless indifference to the truth, which is the functional equivalent of intent to deceive").

The court is again not satisfied by the response provided by Counsel for the Debtors and the Debtors supplemental declaration. First, Debtor's counsel again did not address the majority of the arguments raised by the Trustee in their Opposition. Not only are several of the Trustee's objections not discussed, but no evidence has been presented in support of the factual contentions made by counsel and Debtors in their supplemental declaration. The court allowed ample time for Debtor to provide a "thorough response" to the Trustee's objections and Debtor has again come up short both on evidence and legal argument.

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 to Confirm the Plan is denied and the plan is not confirmed.

13. 13-33760-E-13 JOAN JOHNSON **MOTION TO CONFIRM PLAN**
MMA-1 Mark Alonso **1-16-14 [34]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 16, 2014. By the court's calculation, 47 days' notice was provided. 42 days' notice is required.

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

The Motion to Confirm the Amended Plan is granted. No appearance at the March 4, 2014 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on January 16, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

14. 13-31661-E-13 CHARLES/CANDICE WORCH
SDH-3 Scott D. Hughes

OBJECTION TO CLAIM OF AMERICAN EXPRESS CENTURION BANK, CLAIM NUMBER 13
1-7-14 [26]

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, respondent creditor, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 56 days' notice was provided. 44 days' notice is required.

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

The Objection to Proof of Claim number 13 of American Express Centurion Bank, is sustained and the claim is disallowed in its entirety. No appearance at the March 4, 2014 hearing is required.

The Proof of Claim at issue, listed as claim number 13 on the court's official claims registry, asserts $4,784.53 claim. The Debtor objects to the Proof of Claim on the basis that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts that the date of the last payment was June 2009, with the charge of date January 1, 2010.

DISCUSSION

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

California Code of Civil Procedure § 337 requires that an action upon any contract, obligation or liability founded upon an instrument in writing, be brought within four years.

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is a consumer loan, however, and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to be an open book account as defined in California Code of Civil Procedure § 337a.

It appears that the date of the last payment and transaction in the subject claim was June, 2009. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

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 American Express Centurion Bank filed in this case by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim number 13 of American Express Centurion Bank is sustained and the claim is disallowed in its entirety.

15. 13-31661-E-13 CHARLES/CANDICE WORCH — OBJECTION TO CLAIM OF AMERICAN EXPRESS CENTURION BANK, CLAIM NUMBER 12
SDH-4 Scott D. Hughes — 2-3-14 [37]

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, respondent creditor, and Office of the United States Trustee on January 7, 2014. By the court's calculation, 56 days' notice was provided. 44 days' notice is required.

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

The Objection to Proof of Claim number 12 of American Express Centurion Bank, is sustained and the claim is disallowed in its entirety. No appearance at the March 4, 2014 hearing is required.

The Proof of Claim at issue, listed as claim number 12 on the court's official claims registry, asserts $1,204.37 claim. The Debtor objects to the Proof of Claim on the basis that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. Debtor asserts that the date of the last payment was June 2009, with the charge of date February, 2010.

DISCUSSION

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

California Code of Civil Procedure § 337 requires that an action upon any contract, obligation or liability founded upon an instrument in writing, be brought within four years.

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Creditor indicates that the basis for the claim is a consumer loan, however, and does not report much else, making it impossible for the court to determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to be an open book account as defined in California Code of Civil Procedure § 337a.

It appears that the date of the last payment and transaction in the subject claim was June, 2009. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

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 American Express Centurion Bank filed in this case by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim number 12 of American Express Centurion Bank is sustained and the claim is disallowed in its entirety.

16. 13-32861-E-13 JAMES/BETH FRY — CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
NLE-1 Peter G. Macaluso — 11-7-13 [22]

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 November 7, 2013. By the court's calculation, 33 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.

The court's tentative decision is to sustain the Objection to Confirmation of 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:

PRIOR STIPULATION TO CONTINUE

The Chapter 13 Trustee initially opposed confirmation of the Plan on the basis that the plan relies on a pending Motion to Value the Secured Claim. Debtors filed the Motion to Value Collateral of GMAC Mortgage, LLC/ Ditech Mortgage Corp, PGM-1, on November 1, 2013. The court continued the motion to allow the parties to conduct discovery and for the Creditor to file its evidence.

The Trustee also noted that the Debtors may not be able to make the plan payments as the plan calls for payments of $1,250.00 per month for sixty months and Debtors Schedule J lists net income of $308.17 per month. It appears that Debtors cannot make the payments called for by the plan. Trustee expressed concern that Debtors may not be able to make the plan payments required under 11 U.S.C. § 1325(a)(6

It appears that Debtors filed an Amended Schedule J on December 2, 2013, revising Line 20c to state that Debtors' net monthly income is $1,250.48. No explanation, however, is given for this substantial increase.

CONTINUANCE

The Creditor and Debtors filed a stipulation on January 13, 2014, agreeing to continue the hearing on the Motion to Value Collateral of GMAC Mortgage, LLC/ Ditech Mortgage Corp to allow Creditor additional time to obtain

a verified appraisal and for the parties to reach a possible resolution with respect to the Motion. Per that stipulation, the court ordered that the hearing on the Motion to Value Collateral be continued to March 4, 2014 at 3:00 pm. The Court continued the hearing on the Objection to Confirmation to that date and time, so that this Objection could be heard in conjunction with the Motion to Value the Collateral of GMAC Mortgage, LLC/ Ditech Mortgage Corp.

The court is denying Debtor's Motion to Value the Secured Claim, PGM - 1 on this hearing date. The court has considered the evidence presented by Debtor, and the professional appraisal presented by Creditor, on the disputed value of the property located at 5966 Raymond Way, Sacramento, California. The court has determined that Debtor has not provided sufficient evidence to support its valuation of the property, and that there is likely equity in the collateral to secure repayment of Creditor's claim.

Because Debtors' proposed Plan relied on the valuation of the secured claim of GMAC Mortgage, LLC/ Ditech Mortgage Corp. at 0.00, and the Motion to Value the Secured Claim brought forth by Debtors is denied, the instant Objection of Trustee 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 the Objection to Confirmation of Plan is sustained.

17. 13-32861-E-13 JAMES/BETH FRY
PGM-1 Peter G. Macaluso

CONTINUED MOTION TO VALUE COLLATERAL OF GMAC MORTGAGE, LLC/DITECH MORTGAGE CORP.
11-1-13 [17]

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, respondent creditor, and Office of the United States Trustee on November 1, 2013. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion to Value the secured claim, the court having determined that the collateral has a value of $53,000.00. 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 Debtors are the owners of the subject real property commonly known as 5966 Raymond Way, Sacramento, California. The Debtors seek to value the property at a fair market value of $100,000.00 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 $106,496.00. Creditor "GMAC Mortgage, LLC/Ditech Mortgage Corp's" second deed of trust secures a loan with a balance of approximately $70,000.00. Therefore, the Debtor seeks to value the creditor's secured claim is determined to be in the amount of $0.00.

The motion suffers from a major defect, however; Debtors do not describe any recognizable legal entity that holds the second deed of trust. Debtors identify the holder of the second position security interest as "GMAC Mortgage, LLC/Ditech Mortgage Corp." 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.

Debtors Motion does not meet the particularity requirements of Federal Rule of Bankruptcy Procedure 9013. Fortunately for Debtors, however, Wells Fargo Bank, National Association, as Indenture Trustee for GMACM Home Equity Loan Trust 2005-HE2, has identified itself as the real creditor in interest, and files the below opposition to Debtors' Motion to Value its Secured Claim.

CREDITOR'S OPPOSITION

Creditor, Wells Fargo Bank, N.A. ("Creditor"), as Indenture Trustee for GMACM Home Equity Loan Trust 2005-HE2, filed opposition, stating that Debtor failed to submit any evidence in support of the proposed Property value beyond the lay opinion of the Debtor. Based on information and belief, Creditor maintains that the Property's value is substantially more than $100,000.00. Creditor consequently requests an opportunity to obtain a verified appraisal of the property.

The court continued the hearing to this date, in order to allow Creditor time obtain an appraisal and confer with the Debtor on a possible resolution of the motion.

STIPULATION FOR CONTINUANCE

On January 13, 2014, the Creditor and Debtors filed a stipulation to agree to further continue the hearing on the Motion to Value Collateral. The matter was continued to permit Creditor additional time to obtain a verified appraisal, and for the parties to reach a possible resolution with respect to the Motion (Dckt. No. 36). The court subsequently ordered that the hearing on the Motion to Value Collateral be continued to this hearing date (Dckt. No. 38).

CREDITOR'S AMENDED OPPOSITION TO MOTION

Arguments Regarding Debtors' Ability to "Lien Strip"

On February 18, 2014, Creditor filed an "Amended Opposition to the Motion to Determine Value of Collateral," arguing that its lien may not properly be stripped by the Debtors in this case. Creditor asserts that Debtor cannot value the secured claim at less than full amount, because there is at least some value in the collateral to secure the claim.

Differing Valuation

Creditor states that it disagrees with the Debtors' asserted fair market valuation of the Subject Property. Debtors claim that the fair market value of the subject property is $100,000.00. Debtors assert that the first lienholder is owed $106,496 (Creditor points out that pursuant to the proof of claim on file, the first lienholder is actually owed $109,131.90) and therefore there is no equity in the property.

The amended opposition asserts that the fair market value of the subject property is actually $170,000. Creditor offers the appraisal and

Declaration of Justin U. Fatzer, who purports to be a California Licensed Real Estate Appraiser, in support of its conflicting valuation. ¶ 2, Declaration of Justin U. Fatzer in Support of Opposition, Dckt. No. 48. Fatzer attests to being engaged by the Creditor to complete a Uniform Residential Appraisal Report of the real property at 5966 Raymond Way, Sacramento, California, and to determine the retail market value of the subject property. *Id.* at ¶ 3. Fatzer states that his analysis and findings are contained in the Appraisal of the Subject Property, attached to Creditor's opposition and filed as Exhibit "1" on Dckt. No. 49. The report includes a site map, building sketches, a location map, a report with comments on the current condition of the property, an analysis of the listing values of other real property located in the same vicinity as the subject property, and photos of the comparable properties identified.

Based on Fatzer's appraisal, Creditor asserts that that there is approximately $60,868.10 in equity past the $109,131.90 owed to the first lienholder. Creditor maintains that there is still significant equity in the property, and that its lien in the second position may not be properly "stripped" by Debtors.

DISCUSSION

Creditor asserts that the fair market value of the subject property is $170,000, which would leave significant equity in the property after the deduction of the security interest held by the first lienholder. Debtor maintains that the value of the subject property is $100,000.00. Debtors provide their declaration, the Declaration of James C. And Beth M. Fry, Dckt. No. 19, as an owner's opinion in support of their opinion of value. Debtors have not offered the testimony or appraisals of any appraisers or real estate professionals. The court is faced with conflicting testimony from a licensed real estate appraiser, retained by the Creditor, and the admissible lay opinion regarding the value of the subject property by Debtors.

This Motion lives or dies on the determination of value. The collateral being the Debtor's principal residence and the only collateral securing Creditor's claim, Creditor's claim cannot be valued and bifurcated pursuant to 11 U.S.C. § 506(a) unless there is no value in the collateral for its junior in priority lien.

Consideration of the Evidence

The court considers the evidence concerning the value of the subject property. Creditor has provided the Declaration of Justin U. Fatzer ("Fatzer"), the appraiser who states that he is a California Licensed Real Estate Appraiser, provides additional testimony, and authenticates the Appraisal Report. Dckt. No. 48. Fatzer's Uniform Residential Appraisal Report was filed as Exhibit "1" in support of the motion, Dckt. No. 49. The Report includes comments on the condition of the property, as well as notes on the physical deficiencies and adverse conditions of the property, which includes Fatzer's observations that the garage has been converted with no heat, that there is an unfinished room with half a bathroom with no heating, and that there is a hole in the ceiling of the property and no porch/stoop in the backyard, which could present a tripping/ falling hazard. Page 1 of 6 of the Uniform Residential Report, Exhibit 1, Dckt. No. 49.

Fatzer's Report also includes analyses of three comparable properties located in the same area as the subject property, which includes market listings and prices; value adjustments based on the condition, age and construction of the properties; and identification of square footage and other details of the properties in comparing the similar properties to the subject property. The appraiser also noted that the area has seen increased investor activity, and that the Fatzer used the market data approach to contrast the competitive properties to the subject property. Exhibit 1, Dckt. No. 49 at 5. Fatzer also estimates the value of repairs that need to be made on the conversion of the garage, and to patch up the hole in the unfinished room previously noted. Faztzer also includes a building sketch, location map, and a photographic addendum featuring pictures of the shed, exterior of the residence, rooms, and pictures of the comparable properties in the report. *Id.* Fatzer appears to provide for adjustments to the price after considering features of the property which require attention or repair. Fatzer also includes a copy of his license, which includes his appraiser identification number. *Id.* at 23.

As Creditor noted, the only competent evidence supplied by Debtors to support their $100,000.00 valuation is the sworn Declaration of Debtors, filed as Dckt. No. 19.

The Debtors provide their testimony as owners of the Property, stating under penalty of perjury the following:

a. The total amount of unavoidable liens on the Property is approximately $106,496.00.

b. The fair Market Value is $100,000.00.

c. That results in a negative ($6,496.00) of equity in the Property for the Debtors.

d. In addition to the "total amount of unavoidable liens" on the Property, there is a second deed of trust with Ocwen Loan Servicing securing a claim in the approximately amount of $70,000. [Presumably the "total amount of unavoidable liens" relates only to those senior to the Creditor's Second Deed of Trust.]

e. The Debtors' opinion of value is "based on my residing in the home, as it is our primary residence."

Joint Declaration, Dckt. 19.

No additional evidence has been provided in opposition the Appraiser's Declaration.

The comparable properties (for actual sales) identified by Fatzer range in values of $169,000-$175,000, after reductions in values were calculated following Fatzer's recognition of the utilities, additional structures, porches, garages and carports, and energy efficient items found on the premises of the comparable parties. Dckt. No. 49 at 5. These properties of the same square footage, bedroom, bathroom (one comparable has 2 bathrooms as compared

to the Property and the other comparables having 1 bathroom), and are all stated to be of the same condition grade. The lot sizes are substantially the same, with the exception of one comparable which is 789 square feet larger. The three sales have occurred since July 2013 or later. Two of the comparable and the Property are 63 - 68 years old, with one comparable being 103 years old.

Fatzer also provides three comparables based on their being listed for sale. The listing prices are $175,000 - $185,000.00. No adjustment is made for difference from the Property for the listing comparables. They are generally similar in condition, age, size, , with tow of the comparables being on larger lots.

While the Debtors have properly testified as to their belief as to the value of the Property, the court is not persuaded by their opinion. The evidence presented by the Creditor, in the form of a comprehensive appraisal prepared by a licensed real estate appraiser who performed the appraisal of the subject property on January, 24, 2014 (Dckt. No. 48), is more persuasive and credible.

The court determines that for the purposes of this case, the Property has a value of $153,000.00. Thus, there is value in the collateral to secure at least a portion of Creditor's claim, rendering modification of the claim impossible without the consent of the creditor. 11 U.S.C. § 1322(b)(2). The senior liens total only $109,131.90. The court denies the Motion to Value the Secured Claim of Wells Fargo Bank, National Association, as Indenture Trustee for GMACM Home Equity Loan Trust 2005-HE2, is therefore denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of the secured claim of Wells Fargo Bank, National Association, as Indenture Trustee for GMACM Home Equity Loan Trust 2005-HE2 ("Creditor") filed by James and Beth Fry ("Debtors") having been presented to the court; Creditor having opposed the motion, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Value the Secured Claim of Creditor is denied. The court has determined that the value of the real property commonly known as 5966 Raymond Way, Sacramento, California, which secures Creditor's claim, has a value of $153,000.00, and that the liens against said property senior in priority to Creditor's Deed of Trust are $109,131.90.

18. 13-34164-E-13 ANGELINA ROBINSON
MMA-5 Mark Alonso

MOTION TO VALUE COLLATERAL OF JOANNE ROBINSON
2-3-14 [58]

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 February 3, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required. That requirement was met.

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 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:

Debtor moves for an order valuing the secured potion of the claim held by Joanne Robinson ("Creditor"). The motion is accompanied by the Debtor's declaration. Debtor, Angelina Robinson, states that the schedules filed in her case disclose her interest in "a variety of motorcycles, quadrunners, horse trailer, utility trailer, etc." She states that the total value of these perfected DMV liens is $21,610.00. ¶ 3, Declaration in Support of Motion to Value Secured Portion of Claim of Joanne Robinson, Dckt. No. 60. Debtor further states that she believes and asserts that the reasonable, replacement value of these assets is $21,610.00, while the "the promissory note is for a claim of $31,700.00." *Id.* at ¶¶ 3-4. 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 does not, however, describe the personal property to be valued with much specificity in her declaration. Debtor does supply specific descriptions of the collateral secured by the Creditor's interest for the payment of Creditor's debt, and it is unclear as to how many items of property are being valued. Debtor does not filling anything showing that the value of the "perfected DMV liens" on the property is $21,610.00, and this value does not correspond on what is listed in Debtor's Schedule B.

Similarly, Debtor's Motion to Value the Secured Claim contains general, unclear descriptions of the secured collateral sought to be valued. The Motion does not state with particularity, the grounds upon which

Debtor's request for relief is based as required by Federal Rule of Bankruptcy Procedure 9013. The Motion merely describes the property as,

> A variety of motorcycles, quadrunners, horse trailer, utility trailer, etc.

The Motion also directs the court's attention to Debtor's Schedule B, which supposedly shows all of the collateral that Debtor would like to value and to determine the secured portion of the Creditor's claim on the property. Debtor is charging the court with the task of canvassing its exhibits and evidence to ascertain the grounds upon which Debtor bases her motion. It is not the court's responsibility to look outside of the scope of the motion to determine what is being asked in Debtor's pleadings. That unreasonable expectation notwithstanding, the court reviews the attached Exhibits, and notes that section 25 of Debtor's Schedule B is quite lengthy. There are a number of automobiles, trailers, motorcycles, campers, and other vehicles listed on the schedule. Schedules Exhibit, Dckt. No. 61 at 6-7.

It is unclear exactly in which items the Creditor holds a valid security interest that could be the subject of this Motion. It is impossible to determine which items Debtor is requesting to be valued, and which vehicles are covered by Creditor's secured claim. The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is therefore denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by 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 to Value the Secured Claim of Joanne Robinson is denied without prejudice.

19. 14-20464-E-13 MICHAEL/PHYLLIS ENOS **MOTION TO VALUE COLLATERAL OF**
EJS-1 Eric John Schwab **SANTANDER CONSUMER USA, INC.**
1-31-14 [12]

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 January 31, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required. That requirement was met.

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 $7,550.00. No appearance at the March 4, 2014 hearing is required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of a 2008 Ford Taurus X SEL Sport. The Debtor seeks to value the property at a replacement value of $7,550.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the vehicle's title secures a purchase-money loan incurred in July 16, 2008, more than 910 days prior to filing of the petition, with a balance of approximately $17,000. Therefore, the respondent creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $7,550.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon

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

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Santander Consumer USA, Inc., secured by an asset described as Taurus X SEL Sport is determined to be a secured claim in the amount of $7,550.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the asset is $7,550.00 and is encumbered by liens securing claims which exceed the value of the asset.

20. 11-36470-E-13 WW-3 WASIF/IRUM ASGHAR Mark A. Wolff

CONTINUED OBJECTION TO CLAIM OF STATE BOARD OF EQUALIZATION, CLAIM NUMBER 29 AND/OR MOTION TO CONDITIONALLY DETERMINE THE VALUE OF THE CLAIM PENDING RESOLUTION OF THE APPEAL
7-15-13 [73]

Local Rule 3007-1(c)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 15, 2013. By the court's calculation, 57 days' notice was provided. 44 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

No 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). 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 xxxxxxx the Objection to Proof of Claim number 29 of the State Board of Equalization. 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 Claim at issue, listed as claim number 29 on the court's official claims registry, asserts $37,470.60 claim alleging a priority tax debt for the tax period of July 1, 2007 through June 30, 2008 and indicates the debt is contingent upon dual determination from account no. SR KH 100-713773.

The Debtor objects to the Proof of Claim on the basis that he was not the responsible party as he was involved in an accident and was not involved in the operation of the business during that period. Debtor asserts that the former business partner Qamaruddin Shaikh was in fact operating the business during the relevant time period. Debtor states that the State Board of Equalization has not yet completed its review and investigation with respect to the dual determination but that their claim should be disallowed in its entirety as Debtor was not the responsible party and should not be held liable for the claim.

CREDITOR'S OPPOSITION

Creditor California State Board of Equalization ("SBE") states that Debtors scheduled a disputed SBE 2008 tax claim in Schedule "E," in the amount of $1.00 allegedly incurred by QS Ventures, Inc., for which Debtor, Wasif Asghar, disclosed an ownership interest in Paragraph 18 of his Statement of Financial Affairs. SBE timely filed its Proof of Claim No. 29-1 in the amount of $37,470.60 (the "Claim"), which is asserted as a priority, but contingent, tax claim.

Although SBE does not oppose Debtors' request in Paragraph 11 of the Claim Objection for a six-month temporary suspension in Chapter 13 plan distributions on SBE's Claim pending administrative review, **SBE questions and opposes Debtors' concurrent request in Paragraph 11 of the Claim Objection for a bankruptcy court adjudication of SBE's tax-based Claim on its merits under Federal Rule of Bankruptcy Procedure 9014.**

DISCUSSION

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

Debtor seeks the this court to disallow the claim of SBE through a determination that he was not the "responsible party" and his therefore not personally liable for the tax obligation. Both parties agree that the tax appeal is currently pending, which addresses the same issues.

CONTINUANCE

At the September 10, 2013 hearing on the Objection to Claim, the court continued the hearing so that the Objection could be heard after the State Board of Equalization's review of Debtor's appeal. Dckt. No. 85. The court further stated that if the review had not been completed in a timely manner, this court would have to determine the issue as a necessary proceeding for the administration of federal law. A review of the case docket shows that nothing has been filed by either the Debtors or the Board, to show whether the determination on the appeal has been made.

21. 09-38174-E-13 JAMES/CHERYL COLLINS MOTION TO SELL
WW-2 Mark A. Wolff 1-30-14 [59]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on January 30, 2014. By the court's calculation, 33 days' notice was provided. 21 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

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

Here, Debtors proposes to sell the real property commonly known as 15580 N. Mendocino Dr., Lot 330, Corning, California. Joint Debtor James Collins holds a 50% ownership interest in the property. The owner of the other 50% interest in the property is Mario Dimanno.

Debtors claimed an exemption of $4,395.00 for the property on their Schedule C. Debtors state that under the confirmed Chapter 13 Plan Debtors are paying the unsecured creditors the unexempt portion of the equity,

$7,755.00, in the Chapter 13 Plan. To date, Debtors have paid approximately $7,581.00 to unsecured creditors through the Chapter 13 Plan.

Sale Terms

Debtors and the co-owner of the property, Mario Dimanno, have collectively listed the property for sale. Debtors have received an offer for the proposed purchase price of $29,000.00. As a 50% owner of the real property, Debtor will receive 50% of the net proceeds from the sale. Although not stated in the Motion, it appears from the Purchase Agreement that the named buyers of the property are Brandon Nelson and Brent Nelson. The terms of the sale are set forth in the Vacant Land Purchase Agreement and Joint Escrow Instructions, filed as Exhibit A in support of the Motion. Dckt. No. 63.

Debtors believe that the purchase price of $29,000.00 represents a fair value for the subject property, given the current economy. Through the sale of the real property, all liens and security interests encumbering the property will be paid in full (or pursuant to the agreement of the parties) before or simultaneously with the transfer of title or possession to the buyer. Debtors state that all costs of sale will be paid in full from the sale proceeds, and the sales price is all cash. The proposed buyer was located by a real estate agent that was retained for the purpose of marketing the property. The proposed buyer is not a relative or friend.

Trustee's Non-Opposition to Debtors' Motion to Sell

Trustee states that he does not oppose the Motion to Sell. Trustee further informs the court that Debtor has paid $27,825.00 into the plan, and $8,086.64 has been paid to unsecured claims. The non-exempt equity appears to have been paid, except for a remaining $180.00. Trustee expects this to be distributed from Debtors' plan payment in February.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

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

IT IS ORDERED that James Collins, Jr. and Cheryl Collins, the Debtors ("Debtors"), are authorized to sell pursuant to 11 U.S.C. § 363(b) to Brandon Nelson and Brent Nelson, the residential real property commonly known as 15580 N. Mendocino Dr., Lot 330, Corning, California on the following terms:

1. The Real Property shall be sold to Buyer for $29,000.00, on the terms and conditions set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 62.

2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

3. The Debtor be and hereby is authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. The Debtor be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Debtor's broker.

5. The proceeds of the sale for the Debtors' and estate's interest from the sale of the Property shall be disbursed XXXXXXXXXXXXXXXXXXXXXXXXXXX.

22. 12-24882-E-13 JOSE AVALOS — CONTINUED MOTION TO MODIFY PLAN
TJW-3 Timothy J. Walsh — 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.

No 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 xxxxx 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 filed opposition to confirmation of Debtor's Plan. The Trustee objected 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.

At the February 3, 2014 hearing, the court continued the Motion to Confirm the Modified Plan to this hearing date to allow the Debtor to become current on his plan payments. Civil Minutes, Dckt. No. 60. Nothing further has been filed by Debtor or the Trustee that indicates whether Debtor is now current on his payments.

Supplemental Declaration

On February 27, 2014, Charmaine Jones, an employee of the Chapter 13 Trustee filed a Supplemental Declaration in support of the Trustee's Objection to Debtor's Motion to Confirm the First Modified Plan. Dckt. No. 61. Jones testified that she had reviewed the Trustee's records, and that Debtor had paid in a total of $11,968.00 as of February 18, 2014. The incorporated chart shows that Jones analyzed payment records from April 25, 2012, to December 19, 2014. Jones states that the Debtor remains delinquent $544.00 under the proposed modified plan.

MARCH 4, 2014 HEARING

At the hearing, XXXXXXXXXXXX

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 XXXX.

23. 13-34884-E-13 NLE-1 — JANELLE HANEY — Gerald B. Glazer — CONTINUED OBJECTION TO CONFIRMATION OF 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 overrule 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.

Supplemental Documents in Response to Trustee's Objection

Debtor states that the father of her child has agreed to help her with her Chapter 13 Plan payments, in the amount of $125.00, so that her plan will not be under-funded. The Declaration of Mark Allen, filed as Dckt. No. 19, states that Mark Allen is the father of Debtor's child. Allen states that he has agreed to assist Debtor with her Chapter 13 payments. Allen declares that he has the ability and is willing to help Debtor financially, during the entire period of Debtor's Chapter 13 plan. Declaration of Mark Allen, Dckt. No. 19.

Trustee's Reply to Debtor's Supplemental Documents

The Trustee replies to Debtor's supplemental documents in response to Trustee's Objection to Confirmation of the Plan. Debtor proposes to resolve Trustee's objection by proposing to increase plan payments by $125.00 per month, effective the third month of the plan. The Declaration of Mark Allen, Dckt. No. 19, indicates that Allen will contribute $125.00 toward Debtor's plan, for the entire duration of the plan. Debtor's plan will then complete within the time permitted with the propose increase.

Trustee is not opposed to this proposed change.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on November 22, 2013, as amended to increase the monthly plan payment by $125.00, 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.

24. 10-27489-E-13 JOANNE GIARLETTO MOTION TO MODIFY PLAN
DJC-3 Diana J. Cavanaugh 1-25-14 [45]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on January 28, 2014. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. That requirement was met.

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

The Motion to Confirm the Modified Plan is granted. No appearance at the March 4, 2014 hearing is required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on January 25, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

25. 13-33589-E-13 DANIEL/JOIE SHANE — MOTION TO CONFIRM PLAN
JJC-3 Julius J. Cherry — 1-9-14 [60]

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 January 9, 2014. By the court's calculation, 54 days' notice was provided. 42 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)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, Trustee objects to confirmation of Debtors' Second Amended Plan on the following grounds:

1. Debtors' Plan is not Debtors' best efforts under 11 U.S.C. § 1325(b). Debtors are above median income. Line 59 of Form 22C shows Debtors' monthly disposable income as totaling $794.69. Based on the applicable commitment period of 60 months, the unsecured creditors would be entitled to $47,681.40. Debtors propose to pay $485 per month for 16 months, and $840 for 44 months and $1,700 per year for 2 years from tax refunds, with a guaranteed dividend of 56.07% to general unsecured (unsecured creditors would receive approximately $32,042.88).

2. Debtors propose to contribute only $1,700 from tax refunds for two years, but do not disclose what refund is expected. Income from tax returns is household income, and Debtors have listed all household expenses on Schedule J. The disposable household income is to be contributed to the plan, and thus it appears that Debtors should be required to contribute their tax refunds in their entirety for the duration of the plan.

3. Debtors' Plan may fail the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtors' non-exempt equity totals $3,100.00,

and Debtor is proposing a 40% dividend to unsecured creditors. The plan proposes to pay no less than 40%, which does resolve the liquidation analysis; however, Debtors' Motion and Declaration state that the plan proposes to pay no less than 0%. If Debtors' intent was to propose a 0% plan, the plan would pay less than creditors would receive in a Chapter 7. The nonexempt equity derived from Debtors' ownership of a 2004 Toyota Tundra.

Reply to Trustee's Objection to Confirmation

1. Debtors state that they intend to turn over their entire tax refunds to the Chapter 13 Trustee in 2014 and 2015. Debtors' Second Amended Plan states that "debtors will turn-over their tax refund in the approximate amount of $1,700." Debtors argue that they are not required as a matter of law to turn over tax refunds every year of the plan, as the Trustee asserts.

2. Debtors' Second Amended Plan states that they intend to pay no less than 40 percent to the unsecured creditors. Debtors' Motion and Declaration state that the plan proposes to pay no less than 0%. Trustee is correct that the Motion and Declaration should have stated 40% to be consistent with what is stated in the Plan. Debtors do intend to pay no less than 40 percent to the unsecured creditors.

3. Debtors claim that Trustee's argument regarding the Debtors' Plan not being the Debtors' best efforts is factually inaccurate. Debtors state that their Amended Form 22C lists Debtors' monthly disposable income at $600.69, and not $794.69. $600.69 x 60 = $36,041.40. Doing an analysis on Debtors' payment stream in their plan, the unsecured creditors would receive approximately $34,082.00.

   Line 24(b) health care costs of the means test is $180.00. Line 7 of the Amended Schedule (medical and dental expenses) is $300.00 per month. Thus, the $36,041.40 means test figure needs to be reduced by $120.00 x 60 = $7,200.00. The new number using the means test as a starting point that the unsecured creditors should receive is $36,041.40 - $7,200.00 = $28,841.40. Since $28,841.40 is less than the $34,082.00 the unsecured creditors would receive under Debtors' payment stream.

DISCUSSION

The court does not follow Debtors' calculation of the "payment stream," but notes that contrary to Trustee's statement, Debtors list their monthly disposable income as $600.69 on their Amended Form 22C, filed with the court on December 9, 2013, Dckt. No. 21. The creditors holding unsecured claims would be entitled to receive $36,041.40 in the 60-month duration of the plan, minus the deduction of reasonable costs of sale and Chapter 7 Trustee compensation fees.

Section 6.01 of Debtors' Plan states that,

> Debtors payment into the Plan shall consist of $485.00 per month, for the first sixteen months; then $840.00 for forty-four months. In addition, the Debtor proposes $1,700.00 per year from Income Tax refunds for the first two years. Dckt. No. 29.

The Plan states that Debtors will $485 per month for 16 months, and $840 for 44 months and $1,700 per year for 2 years from tax refunds, with a guaranteed dividend of 56.07% to general unsecured creditors. These payments appear to meet the best effort standards under 11 U.S.C. § 1325(b). The creditors holding general unsecured claims would receive approximately $32,042.88 under Debtors' Chapter 13 Plan. In acknowledging that their Motion and Declaration should state 40%, Debtors address and resolve Trustee's concern about the Plan meeting the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325 (a)(4).

Additionally, Debtors point out that the Trustee cannot require Debtors to commit to the plan all tax refunds actually received during term of plan; however, Trustee may demand the turnover of tax refunds if Trustee can make the minimal showing that debtors could receive tax refunds during plan's term. *In re Heath*, 182 B.R. 557 (B.A.P. 9th Cir. 1995). 11 U.S.C. § 1325(b)(1) also provides that all of Debtors' projected disposable income received in the applicable commitment period beginning on the date that the first payment is due under the Plan, will be applied to make payments to unsecured creditors under the Plan. Under the disposable income requirement for Chapter 13 plan confirmation, even if the Trustee is unable to offer some minimal evidence at time of confirmation that debtor may receive future tax refunds, the Trustee is free to request modification of plan if debtor's tax returns later reveal that refund is due or has been issued. *In re Heath*, 182 B.R. 557, 561 (B.A.P. 9th Cir. 1995).

A tax refund is disposable income under 11 U.S.C. § 1325(a)(4). Here, Trustee has stated that the disposable household income is being contributed into the plan, and Debtors have not modified their plan to excuse a particular refund, or included any language stating that the tax refunds will not be committed to the plan for a particular reason. Thus, the Trustee is entitled to demand that all present and future tax refunds be contributed into Debtor's Plan. Debtors have not proposed to pay all of their tax refunds as disposable income into the Chapter 13 Plan.

The court must be provided with an accurate projected disposable income calculation, and this includes debtors having proper tax withholdings. If taxes are properly withheld, a debtor should not be receiving significant tax refunds year after year. If so, it could appear that the debtor is playing a "catch me if you can" by intentionally having taxes over withheld to try and sneak money past creditors.

The court can deal with the tax refund issue in a short simple manner. The order, if any, confirming the Chapter 13 Plan shall include the following:

A. At the same time the Debtors file state and federal tax returns with the respective agencies, copies of said returns shall be served on the Chapter 13 Trustee. The Debtors shall

file a certificate of service attesting to such timely service on the Chapter 13 Trustee.

B. All federal and state tax refund checks during the term of the Plan shall immediately upon receipt be endorsed over to the Chapter 13 Trustee for deposit in the Trustee's Chapter 13 account. The Debtors shall not receive electronic payment of any tax refunds during the term of the Plan. The Trustee shall hold such funds for a period of 60 days from receipt for Debtor to file motion for disbursement of the tax refund monies to Debtors instead of to creditors through the Chapter 13 Plan. If such motion is timely filed, the Trustee shall than hold such tax refund monies until otherwise ordered by the court.

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

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

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

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

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

26. 13-34889-E-13 PAUL/NATALIE KAISER
NLE-1 Daryl J. Lander

CONTINUED 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 overrule the Objection, based on the amendments to the Plan stated at the hearing. 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 initially opposed 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 creditors holding general unsecured claims. Debtors list 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 be 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. Trustee argued that Debtors have not adequately disclosed the assets included in the Trust, and that the extent of the Debtors' interest in the Trust could not be determined until a full disclosure of the assets and values are provided.

At the February 4, 2014 hearing, the court continued the Objection to so that the Debtors could resolve Trustee's concerns regarding the plan.

Debtor's Response to Trustee's Objection to Confirmation

Debtors assert that Trustee's objection erroneously states that Debtors' non-exempt equity totals $150.00. Debtors state that they are proposing only a 10% dividend to unsecured creditors. Debtors' plan actually proposes a 36.26% dividend to unsecured creditors.

On January 15, 2014, Debtors filed an Amended Schedule B to include the amount of Joint Debtor Paul Kaiser's 50% interest as a beneficiary of the Estate of Pete Thompson. Debtors report that this amount was previously unknown at the time of the filing of their petition. The $198,202.00 amount is only an approximation as that amount will be reduced by the liabilities incurred by the estate; the Trustee's requested compensation; and the likelihood of Probate Court intervention to resolve the administration issues currently in dispute.

Joint Debtor Paul Kaiser has retained a probate attorney to represent him as a beneficiary in the administration of Pete Thompson and Mary H. Thompson Irrevocable Trust, dated October 16, 2003. Debtor retained this attorney because there has been some difficulty in obtaining information and documentation from the Trustee of the Thompson trust, who is also a 50% beneficiary of the estate. Declaration of Bridget MacKay, Dckt. No. 27. Debtors state that they do not know whether the issues at dispute with Joint Debtor Paul Kaiser's interest in the Thompson trust will require resolution by a probate court. Should the matter require going to the probate court, the administration of the estate could take one to two years to resolve, before any funds are disbursed to the Debtor. Joint Debtor Paul Kaiser has not received any funds from the Thompson trust estate to date.

Debtors propose to provide the Chapter 13 Trustee with quarterly status reports, regarding the progress of the administration of the Pete Thompson estate. Upon final disbursement of funds from the estate, Debtors will modify their plan accordingly.

Federal Court Jurisdiction

Congress provided in 28 U.S.C. § 1334(e) that the United States District Courts and the United States Bankruptcy Courts (having received the referral from the district court) shall have exclusive jurisdiction over all property of the debtor and the bankruptcy estate. That includes any interests in the trust at issue. This court may allow the adjudication of such rights and interests to be conducted in the state court, but leave for such adjudication must be obtained from the federal court. One reason for Congress placing such jurisdiction in the federal courts is that the timely, fair adjudication of the rights of the debtor and estate are critical to the comprehensive federal bankruptcy scheme for the proper adjustment of the debtor-creditor relationship.

The Debtors state that they are having difficulty in obtaining information about the trust and the debtors' and estate's interest therein. The Rules Committee and Supreme Court has addressed that issue in Rule 2004 of the Federal Rule of Bankruptcy Procedure.

Trustee's Reply to Debtor's Response

Trustee acknowledges that Debtors are correct; the plan is proposed at 36.26%, not the 10% listed in the Trustee's Objection. That was a typographical error.

Trustee accepts the Debtors' proposal to provide Trustee with quarterly status reports on the progress of the administration of the Pete Thompson estate. Debtor further proposes that upon the final disbursement of funds, the plan will be modified. Trustee, however, requests that the plan be modified in the order confirming. Trustee requests that should the court allow confirmation of the case, the order confirming should propose that Debtors turn over any non-exempt proceeds of the estate to the Trustee for the benefit of the estate. If Debtor does not wish to resolve this in the order confirming, then the Trustee requests that the court deny confirmation.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtors' Chapter 13 Plan filed on November 22, 2013, with the amendments (1) for the Debtors to file and serve on the Chapter 13 Trustee status reports of their prosecution of the estate's and debtors' interests in the trust and (2) that Debtors immediately turn over all proceeds received from the Estate of Pete Thompson to the Trustee, to which any proper claim of exemption of the Debtors shall attach and be disbursed thereon upon order of the court, is confirmed.
>
> **IT IS FURTHER ORDERED** that 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.

27. 09-33790-E-13 JAMES/CHRISTINA HERRMAN MOTION TO SELL
LC-6 Lorraine W. Crozier 2-3-14 [83]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 3, 2014. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

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

Here, the Debtors propose to sell the real property commonly known as 2545 Sleepy Holly Drive, Shingle Springs, California. The purchase price is $390,000.00 and the named buyers are Kirk C. Van Leuvan and Elizabeth L. Van Leuvan. The terms are set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. No. 86. The Chapter 13 Trustee has filed a statement of non-opposition to Debtors' Motion.

Debtors lay out several of the material terms as follows: all creditors with liens and security interests encumbering the subject property, not voluntarily released, will be paid in full simultaneously with the transfer of title to the buyer or held by the escrow holder until agreement by the parties or further court order. All costs of sale will be paid in full from the proceeds, and the sale price is all cash. Debtors state that the sale is an "arms length" transaction, and the buyers are not related to Debtors.

Debtors also state by way of background information that a prior motion to sell was heard and granted on November 22, 2013. The sale was approved in the amount of $410,000.00. However, the sale did not close because the property did not appraise at the value contemplated in the contract. The contract was appraised at a value of $390,000, which is the current sales price for this property.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to sell property filed by the 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 James W. Herrman and Christina H. Hermann, the Debtors ("Debtors"), are authorized to sell pursuant to 11 U.S.C. § 363(b)to are Kirk C. Van Leuvan and Elizabeth L. Van Leuvan ("Buyers"), the residential real property commonly known as 2545 Sleepy Holly Drive, Shingle Springs, California("Real Property"), on the following terms:
>
> 1. The Real Property shall be sold to Buyer for $390,000.00, on the terms and conditions set forth in the California Residential Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 86.
>
> 2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
>
> 3. The Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> 4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale.
>
> 5. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Debtors. Within fourteen (14) days of the close of escrow the Debtors shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or

paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

28. 13-30194-E-13 SUSAN ZAVALA — MOTION TO CONFIRM PLAN
EJS-3 Eric John Schwab — 1-21-14 [40]

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, and Office of the United States Trustee on January 21, 2014. By the court's calculation, 42 days' notice was provided. 42 days' notice is required. That requirement was met.

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

The Motion to Confirm the Amended Plan is granted. No appearance required.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on January 21, 2014 is confirmed, and

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

29. 11-30195-E-13 SAC-2 | **ANTHONY DOYLE AND ILONA KOTI-DOYLE** | **MOTION TO MODIFY PLAN** | **1-13-14 [56]**
Scott A. CoBen

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on January 13, 2014. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. That requirement was met.

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

The Motion to Confirm the Modified Plan is granted. No appearance required.

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

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

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

IT IS ORDERED that the Motion is granted, Debtors' Chapter 13 Plan filed on January 13, 2014 is confirmed, and counsel for the Debtors 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.

30. 10-34099-E-13 IRS-1 JULIAN/VERONICA CERVANTES John M. O'Donnell CONTINUED MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE TO CHAPTER 7 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.

Tentative Ruling: 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 grant 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.

MARCH 4, 2014 HEARING

At the February 4, 2015 hearing, the court continued the Motion to Dismiss and/or Motion to Convert case to Chapter 7 for a final hearing to March 4, 2014.

As of the February 26, 2014 review of this file, no further pleadings had been filed. Debtors have not offered evidence showing that have become current in their income tax liabilities, and have filed adequate income and employment tax returns for the 2011-2013 fiscal years. 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). The court's decision is to grant this motion and dismiss Debtors' bankruptcy case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 granted and the case is dismissed.

31. 13-21399-E-13 LARRY/MARIANNE HAVENS MOTION TO MODIFY PLAN
HDR-2 Harry D. Roth 1-23-14 [60]

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 and all creditors on January 23, 2014. By the court's calculation, 40 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. The Chapter 13 Trustee opposes confirmation of Debtors' Modified Plan, however, on the basis that Debtors are delinquent $350.00 under the proposed plan.

This case was filed on January 31, 2013, and 12 payments have come due under the plan. Payments totaling $4,200.00 have become due under the proposed modified plan, "$300.00 per month for 4 months, $600.00 per month for 5 months, $0.00 per month for 3 months, $350.00 per month for 9 months, $400.00 per month for 9 months, $745.02 per month for 30 months." Debtors have paid the Trustee $3,850.00, with the last payment of $350.00 posted on January 29, 2014.

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 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 Motion to Confirm the Plan is denied and the proposed Chapter 13 Plan is not confirmed.