

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Christopher M. Klein**

Chief Bankruptcy Judge

Sacramento, California

April 1, 2014 at 2:00 p.m.

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1. [13-36107](#)-C-13 WAGMA SAFI MOTION TO CONFIRM PLAN  
MLA-2 Mitchell L. Abdallah 2-12-14 [[33](#)]

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 12, 2014. Forty-two 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 Debtor 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 as consent to the granting of the motion. *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 Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

**The Motion to Confirm the Plan is granted.** No appearance required. The court makes the following findings of fact and conclusions of law:

The court will approve a plan that complies with 11 U.S.C. §§ 1322 and 1325(a). Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The 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,

April 1, 2014 at 2:00 p.m.

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on February 12, 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. [11-35314](#)-C-13 ANGELA YOUNG MOTION FOR COMPENSATION FOR  
PGM-5 Peter G. Macaluso PETER G. MACALUSO, DEBTOR'S  
ATTORNEY(S), FEES: \$1,590.00,  
EXPENSES: \$0.00  
3-4-14 [\[74\]](#)

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 March 4, 2014. Twenty-eight days' notice is required. That requirement was met.

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

**The court's decision is to grant the motion for compensation.** No appearance is necessary. The court makes the following findings of fact and conclusions of law:

#### FEES REQUESTED

Peter G. Macaluso, Counsel for Debtor, makes a Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is November 16, 2012 through January 28, 2013. Counsel is requesting the Court allow fees and costs of \$1,590.00 for services charged at a rate of \$200.00 per hour.

#### Description of Services for Which Fees are Requested

Services performed include the following:

1. Review and discuss loan modification with Debtor.
2. Prepare and file Motion to Approve Loan Modification.
3. Prepare and file Motion to Incur Debt

4. Prepare and file Motion to Modify
5. Prepare exhibits for Motion to Modify
6. Review Objection to Motion to Modify
7. Review Motion to Dismiss and later Withdrawal of Motion to Dismiss
8. Prepare and file response to Objection
9. Appear on Motion to Modify
10. Review rulings on Motion to Approve Loan Modification and Motion to Incur Debt and prepare letter on outcome for Debtor.
11. Prepare and send Order Modifying Plan to Trustee

#### **FEES ALLOWED**

The hourly rates for the fees billed in this case are \$200.00/hour for counsel for 7.95 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$1,590.00 are approved and authorized to be paid by the Trustee.

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

Attorneys' Fees	\$1,590.00
Costs and Expenses	\$0.00

For a total final allowance of \$1,950.00 in Attorneys' Fees and Costs in this case.

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

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

The Motion for Allowance of Fees and Expenses filed by Peter B. Macaluso having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Peter G. Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter G. Macaluso, Counsel for the Estate Applicant's Fees Allowed in the amount of \$1,590.00 Applicant's Expenses Allowed in the amount of \$0.00, which amount may be paid Counsel by the Chapter 13 Trustee from unencumbered assets, after full credit applied for any retainers or prior amounts paid to Counsel.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Debtor and Debtor's Attorney on March 3, 2014. Fourteen days' notice is required. That requirement was met.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan for the following reasons:

1. Debtors cannot afford to make the payments or comply with the plan. 11 U.S.C. § 1325(a) (6). Debtors do not report on Schedule I a deduction from payroll for a 401K loan of \$453.00 per month or a deduction for voluntary contributions toward 401K of \$100.00 per month. At the Meeting of Creditors, Debtor, Matia Gonzalez, admitted that he has approximately three years left to pay on the 401 K law.

A review of Debtors' pay stubs shows their net income after deductions totals approximately \$3,050.00 per month. Schedule I shows net income of \$3,881.00. Debtors' net Schedule J and plan payment is \$250.00 per month. Based on the pay stubs, it does not appear Debtors can afford their plan payment.

2. The plan does not report all of Debtors' projected disposable income for the commitment period. 11 U.S.C. § 1325(b). A review of Debtors' 2012 tax returns shows that Debtors received a \$6,759 return from the Internal Revenue Service and a \$575.00 return from the Franchise Tax Board. On Schedule I, Debtors report net average income of \$3,881.00 per month. If Debtors contributed their tax refund into their

household income over the course of a year, they would have an additional \$575.75 per month.

3. Debtors' plan does not pass the liquidation analysis test under 11 U.S.C. § 1325(a)(4). Debtors have not listed and exempted their tax refunds on Schedules B and C. Debtors further admitted to expecting tax refunds for 2013 tax refunds, but are not aware of the anticipated amounts. Trustee is unable to determine the amount of liquidation until Debtors report all assets, including the amounts of the refunds.

As described above and in the Chapter 13 Trustee's Objection to Confirmation, Debtors' plan does not comply with 11 U.S.C. §§ 1325(a)(4), (6), & (b). The objection is sustained and the Plan is not confirmed.

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

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on March 14, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Extend Automatic Stay 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 Extend the Automatic Stay.** 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 seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 361(c) extended beyond thirty days in this case. This is Debtor's second bankruptcy case within the last twelve months. Debtor's first bankruptcy case (No. 12-20774) was filed on January 17, 2012 and dismissed on March 24, 2013, because Debtor did not make plan payments. Debtor's second bankruptcy case was filed on April 10, 2013 (13-24924) and was dismissed on January 21, 2014 because Debtor did not make plan payments. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith more than one previous case under any of chapter 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period. 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(c).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); see also Laura B. Bartell, *staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors - including those

used to determine good faith under §§ 1307( and 1325(a) - but the two basic issues to determine good faith under 11 U.S.C. § 362(c)(3) are:

1. Why was the previous plan filed?
2. What has changed so that the present plan is likely to succeed?

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

Here, the presumption of bad faith arises because Debtor had more than one case filed under Chapter 13 pending within the preceding one year period. Debtor states the instant case was filed in good faith. Debtor filed bankruptcy to protect against the sale of her home. Debtor asserts she is eligible for Chapter 13 relief and has complied with the pre-filing requirements. Debtor has filed all schedules, statements, other documents, and a Chapter 13 Plan as of March 11, 2014. Debtor asserts she has fully disclosed her debt and is pursuing bankruptcy protection and relief honestly. Debtor asserts that the reason she missed payments in her last two bankruptcies was due to unforeseen housing repairs. These repairs are not complete and Debtor is receiving an additional \$700.00 per month for the care of her mother. Debtor has sufficient resources to afford her proposed plan.

Debtor has offered clear and convincing evidence to rebut any presumption of bad faith. Debtor has demonstrated a change in circumstances from the last filing that indicates to the court that Debtor will be successful in completing a plan.

The motion is granted and the automatic stay is extended for all purposes, unless terminated by further order of this court.

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

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

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

**IT IS ORDERED** that the Motion is granted and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes, unless terminated by further order of this court.

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 July 5, 2013. 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 court's tentative decision is to deny the Motion to Value Collateral 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 seeks to value the collateral of "Beneficial/HSBC Bank USA, National Association;" however, the court cannot determine from the evidence presented which legal entity the Debtors wish the court to include in the order. A search of the FDIC website and the California Secretary of State Business Search reveals no entity doing business as "Beneficial/HSBC Bank USA, National Association." The court will not issue orders on incorrect or partial parties that are ineffective. Debtor may always use Federal Rule of Bankruptcy 2004 to aid themselves in finding the true creditor.

This court has made it clear on many occasions that it can and will only issue orders against parties properly named in motions and for which there is a colorable basis for the court issuing an order effecting the rights of such party. The Debtor provides no evidence for the court to determine who the proper creditor is on this loan. The Debtor does not testify that she borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred from Beneficial to HSBC or vis-a-versa. The Debtor does not provide the court with any discovery conducted to identify the creditor holding the claim secured by the second deed of trust.

The court will not speculate and hope that it has named a real creditor and that its order will have any legal effect. The Motion is denied without prejudice.

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

Findings of Fact and Conclusions of Law are



stated in the Civil Minutes for the hearing.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Debtor and Debtor's Attorney on March 3, 2014. Fourteen days' notice is required. That requirement was met.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan because it Debtor's plan relies on a Motion to Value the secured claim of "Beneficial/HSBC Bank USA, N.A." If the motion is denied, Debtor cannot afford to make the payments or comply with the plan. 11 U.S.C. § 1325(a)(6).

The court's decision is to sustain the Objection and deny confirmation. Debtor's Motion to Value the secured claim of Beneficial/HSBC Bank USA, N.A. was denied without prejudice at the hearing on April 1, 2014.

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

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

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

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

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

7. [13-33054](#)-C-13 MARIA VEGAS MOTION TO CONFIRM PLAN  
TJW-2 Timothy J. Walsh 2-11-14 [[39](#)]  
[Thru #8](#)

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 February 11, 2014. Forty-two 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. 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 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:

The Chapter 13 Trustee opposes confirmation of Debtor's plan because it appears Debtor either cannot make the payments required under 11 U.S.C. § 1325(a)(6) or the plan is not Debtor's best effort under 11 U.S.C. § 1325(b).

Section 6.01 of the Plan provides:

This section [Section 1.01] is adjusted to allow the debtor to pay directly the current property tax due for Dec. 2013 and April 2014. These payments to the Solano County Tax Collector will be in the amount of \$1,891.56 each. The debtor shall make these payments to the County in the months of November 2013 and March 2014 respectively.

The Trustee questions, where Debtor is proposing to reduce the plan payments to pay the ongoing taxes, whether the Debtor had the money but chose not to pay it to the ongoing mortgage or Debtor cannot afford the plan payments due to reduced income or increased expenses.

The Debtor has provided no evidence to clarify the Trustee's concern and the court lacks sufficient information to act on the Motion to Confirm. The 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.

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

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 5, 2014. Fourteen days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the 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 Dismiss and dismiss the 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:

#### **Prior Hearing**

The court held a prior hearing on the Motion to Dismiss on February 19, 2014. The court continued the hearing on the Motion to Dismiss to April 1, 2014, to be heard in conjunction with Debtor's Motion to Confirm.

#### **Chapter 13 Trustee Motion to Dismiss**

The Chapter 13 Trustee moved to dismiss Debtors' Bankruptcy Case for the following reasons:

1. Debtor is \$4,000.00 delinquent in plan payments to the Trustee to date and the next scheduled payment of \$4,000.00 is due on February 25, 2014. Debtor has paid \$8,000.00 into the plan to date.
2. The case was filed on October 7, 2013 and Debtor has yet to confirm a plan. The Trustee's Objection to Confirmation (NLE-1) was heard and sustained on December 10, 2013 and Debtor has failed to amend the Plan and set a confirmation hearing date. There is unreasonable delay in filing a new plan.

Debtor filed an amended plan and set a hearing on the Motion to

Confirm the plan for April 1, 2014. While Debtor had resolved this portion of the Trustee's Motion, Debtor had not presented evidence that plan payments are also current. Debtor informed the court that the defaults could be resolved upon confirmation of the confirmed plan.

At the hearing on April 1, 2014, the court is not confirming Debtor's Plan because the court lack sufficient information concerning Debtor's ability to make payments and disclosure of income. Therefore, the deficiencies concerning Debtor's case remain and cause exists to dismiss the case.

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

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

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

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

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

Correct Notice Not Provided. No proof of service was filed with the Motion to Confirm.

**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. 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 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:

The Chapter 13 Trustee opposes confirmation of Debtor's plan based on the following:

1. Debtor is \$5,350.00 delinquent in plan payments to the Trustee to date and the next scheduled payment of \$350.00 is due on March 25, 2014. Debtor has paid \$23,550.00 into the plan to date. 11 U.S.C. § 1325(a) (2).
2. The plan does not represent Debtor's best efforts and it does not appear that the plan provides all of Debtor's available disposable income for the applicable commitment period. 11 U.S.C. § 1325(b).

The current case was filed on September 28, 2011 and Debtor paid in \$22,850 despite no plan being confirmed. Debtor converted the case to Chapter 7 on August 10, 2012 and reconverted to Chapter 13 on October 18, 2013. The current plan proposes Debtor commence plan payments effective January 2014, which essentially permits Debtor to not make plan payments from October 2011 through December 2013, without disclosure as to what happened to the money available to make those payments.

Debtor's plan does not propose to pay in tax refunds for the life of the plan. Debtor's plan payments rely solely on her non-filing spouse's income, except for June through September when Debtor will pay in \$125.00 for part-time work. Debtor expects the court to rely on the non-filing spouse to make plan payments and the plan has no requirement that the Trustee be provided with the tax returns, to either confirm ability to pay or whether all income has been contribute toward the plan. Non-filing spouse is unwilling to turnover

tax returns to the Trustee. Debtor has a household of eight, with six children and the Trustee is concerned that Debtor and her spouse receive large tax refunds each year which are not being contributed to the estate.

Debtor has not filed updated income and expense reports. No current Schedules I or J have been filed and the case is two years old. Debtor's Declaration indicates that income and expenses have changed. Trustee is unable to determine whether Debtor has proposed all disposable income into the plan and whether the plan is Debtor's best efforts.

3. Debtor may not be able to make the plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). The case has been pending for over two years and Debtor has not updated Schedules I or J.
4. Debtor's plan calls for payments to J.P. Morgan Chase Bank, N.A./Ocwen in Class 4 of the plan. On February 1, 2012, J.P. Morgan Chase Bank, N.A. filed Claim #7 indicating that Debtor is \$47,791 in arrears with the mortgage at the time of filing. On February 25, 2014, the court denied Debtor's Motion to Approve Loan Modification (Dkt. 245). Based on the delinquency, the claim should be paid in Class 1.
5. Debtor cannot afford to make payments or comply with the plan. 11 U.S.C. § 1325(a)(6) and this renders Debtor's plan not feasible.

Debtor's plan lists Ally Financial in Class 4 and Debtor's Declaration states that the claim is paid in full. On March 11, 2014, the court denied Debtor's Objection to Ally Financial's claim. Debtor's plan does not have sufficient proceeds to pay the claim.

Debtor's plan does not provide for the secured claims of Placer County Tax Collector (Claim 5). Debtor filed an Objection to Claim, which was heard and denied on March 11, 2014. Debtor's plan lacks sufficient funds to pay this claim.

6. Debtor's plan does not provide for the administrative claim of John R. Roberts for \$7,691.44 (Dkt. 183).
7. Upon conversion to Chapter 7 on August 10, 2012, Trustee refunded to Debtor \$2,744.62. Debtor's plan does not provide for Debtor to return that payment or explain what happened to that payment.
8. The Motion to Confirm was not set for hearing on the notice required by Local Bankr. R. 3015-1(d)(1). Debtor did not file a Certificate of Service.

#### **No Proof of Service**

Pursuant to Local Bankruptcy Rule 9014-(e)(2), a proof of service, in the form of a certificate of service, is to be filed with the clerk concurrently with the pleadings of documents served, or not more than three



days after they are filed.

A review of the docket indicates that no certificate of service was filed at the time Debtor's Motion and supporting documents were filed and no certificate of service was filed within three days after the Motion was filed. Upon these grounds alone, the court can find cause to deny Debtor's Motion without prejudice.

The court notes that service and notice issues are currently plaguing Debtor's case. Two recent Objections to Claim were overruled based on ineffective notice and/or service (See Civil Minutes, Dkts. 249 and 251) and the current Motion to Confirm was filed without proof of service. If the Debtor wishes to timely prosecute her Chapter 13 case, she will need to ensure that she adheres to the rules concerning service and notice.

Recently, the court granted two Motions to Value the secured claims of Ocwen Loan Servicing (Dkt. 263) and Key Bank, N.A. (Dkt. 264). Debtor has also re-filed her Objections to Claim on what appears to be sufficient notice. The court hopes that Debtor can continue to reorganize her debts efficiently and move toward confirmation in the near future.

The court agrees with the shortcomings in Debtor's plan as highlighted by the Chapter 13 Trustee. The court lacks sufficient information to confirm the plan as it, among other issues, relies on pending objections, lacks testimony regarding available income for the plan, and is based on outdated Schedules I & J.

The 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.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on March 3, 2014. By the court's calculation, 29 days' notice was provided. Forty-two 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)(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. 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 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:

The Chapter 13 Trustee objects to confirmation of Debtors' plan based on the following:

1. Debtor is \$546.20 delinquent in plan payments to the Trustee to date and the next scheduled payment of \$2,902.20 is due on March 25, 2014. Debtor has paid \$16,867.00 into the plan to date. While Debtor was current under the prior plan payments of \$2,793.00, having made five such payments, when Debtor changed the plan payments they changed them retroactively, causing the delinquency.
2. The plan does not provide a dividend to unsecured creditors in Section 2.15. The plan is not providing for these debts and this may prevent discharge under 11 U.S.C. § 1328(a). Two unsecured claims were filed: \$1,753.22 by Asset System, Inc. For Feather River (Claim 2) and \$1,137.95 for Citibank, N.A. (Claim 3). In the event that Debtors want to propose not less than 0%, they should provide for 0% in the plan.
3. The plan may not be Debtors' best effort under 11 U.S.C. § 1325(b). Trustee cannot determine whether Debtor is above median income. Debtor's amended form B22C indicates that Debtors are under the median income; however, Debtors' prior Form B22C indicated that Debtors were over median income. The Statement of Financial Affairs reflected that the only money Debtors earned year-to-date and the last to years totaled \$7,970.00. (Dkt. 1, Pgs. 22-23). The original Schedule I reflected gross monthly income of \$7,970.00 (Dkt. 1, pg. 20).

Based on these documents, Trustee believes Debtors are above

median income. Unless Debtors had a shortfall of income in the last six months, Debtors are projecting \$7,970.00 on Schedule I, which would result in Debtors being above income.

4. Trustee does not object to the budget changes reflected in Debtors' amended Schedule J.
5. Debtors list Wells Fargo' Second Deed of Trust to be paid in Class 4 at \$0.00; however, not secured may exist based on the value of the property. This debt may need to be listed in Class 2 and a Motion to Value the secured claim be filed if Debtor seeks to treat it as unsecured.

## **Discussion**

Local Bankruptcy Rule 3015-1(d)(1) concerns modified plans proposed prior to confirmation. Here, Debtors are seeking confirmation of a second amended plan proposed prior to confirmation. LBR 3015-1(d)(1) provides:

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

Debtor served parties-in-interest on March 3, 2014 and the hearing date is April 1, 2014. Debtors gave 29 days' of notice, which is insufficient under LBR 3015-1(c)(1). The lack of notice is sufficient grounds for the court to deny the motion without prejudice.

The court agrees with the shortcomings in Debtor's plan as highlighted by the Chapter 13 Trustee. Debtors need to remedy the delinquency issue, clarify treatment of unsecured claims and income discrepancies, and reevaluate the classification of Wells Fargo, N.A.

The 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.

11. [12-32384](#)-C-13 CYNTHIA BARNETT MOTION TO MODIFY PLAN  
SAC-1 Scott A. CoBen 2-13-14 [[29](#)]

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 February 13, 2014. 35 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Confirm the Modified 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. 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 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, opposition to the proposed modifications was filed by Chapter 13 Trustee, David Cusick.

The Chapter 13 Trustee objects to confirmation of Debtors' Modified Plan for the following reasons:

1. The proposed modified plan will complete at 100% in the proposed 60 months only if the Court deems the evidence submitted by Debtor sufficient to reduce the total payment by the Trustee to El Dorado Tax Collector to \$3,102.00.
2. The Original Plan provided that the claim of Green Tree was to be paid as a Class 4 and the monthly payment was PITI, which the Trustee believes means "Property Insurance and Taxes Included." If Trustee is to pay the entire property tax claim, the plan remains overextended and calculates to complete in 63 months.

3. The additional provisions of the plan state that the El Dorado County Tax Collector was paid a total of \$2,470.68 by Debtor's mortgage company and that at the time said creditor file their claim, this amount had not been paid. Debtor filed a document that reads "Barnett tax bill" and an Exhibit (Dkt. 32, pg. 9). The document has an amount of \$2,470.68 circled and within the document it states: "PAID: 12/6/2012." According to Trustee's records, creditor filed a proof of claim (Claim 5) in the amount of \$5,9063.79, and no amended claim from El Dorado County Tax Collector is on file.

**Debtor's Response** (Dkt. 41)

Debtor clarifies that "PITI" is an abbreviation for "Principal, Interest, Taxes, and Insurance.

Debtor states that the additional provisions concerning the Class 2 Claim of the El Dorado County Tax Collector provide the following:

3. The class 2 claim of El Dorado County Tax Collector has been paid \$2,470.68 by Debtor's mortgage company for the property located at 2913 Viona Road, Pollock, Pines, California, 95726. At the time that El Dorado County Tax Collector filed their claim this amount had not been paid.

Additional Provisions to Section 7.02. Debtor asserts that the Tax Collector did not amend its claim because the amount stated on the claim was correct. The evidence establishes that the claim was partially satisfied by a payment from Debtor's mortgage servicing company. In her Declaration, Debtor testifies that the property taxes owed on her residence at 2913 Viona Road, Pollock Pines, California were paid by her mortgage company. (Dkt. 31).

The court is satisfied, based on the testimony presented in Debtor's declaration, that the amount due to the El Dorado County Tax Collector is \$3,102.00. The modified Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

The Motion to Confirm the Modified 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, Debtor's Chapter 13 Plan filed on February 13, 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

**April 1, 2014 at 2:00 p.m.**

**Page 21 of 34**

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

12. [12-30688](#)-C-13 VIANA IRVING MOTION TO MODIFY PLAN  
FF-1 Brian H. Turner 2-21-14 [[30](#)]

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 February 21, 2014. 35 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Confirm the Modified 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. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. In this instance, opposition to the proposed modifications was filed by Chapter 13 Trustee, David Cusick.

1. The Motion to Confirm does not plead with particularity the grounds upon which the requested relief is based, as required by Fed. R. Bankr. P. 9013.
2. Trustee is unable to determine the plan payments proposed. Under the confirmed plan, Debtor's plan payments are \$986.58 for 60 months. Section 1.01 of Debtor's proposed modified plan indicates the monthly plan payments will be \$1,320.00. Section 6.01 states Debtor's plan payment will be \$1,320.00 starting February 25, 2014 through June 25, 2017. Debtor does not specify in Section 6.01 what the payments were for months one (1) through nineteen (19), or the total paid in through that time. Trustee's records reflect Debtor as having paid \$21,347.60 to date.

**MOTION DOES NOT CONFORM TO THE REQUIREMENTS OF FRBP 9013**

On its face, the Motion states with particularity the following grounds upon which the requested relief is based:

- A. Since the confirmation of the plan, the financial circumstances of the Debtor and/or the legal circumstances of the Plan have changed (See the *Declaration in Support of Motion for Order Confirming the Debtor's First Modified Chapter 13 Plan*, filed concurrently with this Motion.) As a result, the Debtor's plan must be modified.
- B. The proposed modified chapter 13 plan has been proposed in good faith and continues to propose to pay the allowed unsecured claims an amount not less than what they would have received if the estate of the Debtor had been liquidated under the provisions of Title 11 US Codes, Chapter 7.
- C. The Debtor has no Domestic Support Obligations, as defined.
- D. Pursuant to 11 US Codes § 1308, the Debtor has filed all applicable Federal, State, and Local tax returns.

Motion, Dkt. 30.

The Motion to Modify does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion merely states that Debtor seeks a modification based on generic references to changed "financial circumstances of the Debtor and/or the legal circumstances of the Plan." Debtor leaves the court to comb through the evidence to cobble together sufficient information to grant the requested relief.

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

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

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is

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

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

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

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

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

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

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

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

Not pleading with particularity the grounds in the motion can be used



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

#### **Inconsistent Plan Payment Information**

As highlighted in the Chapter 13 Trustee's Objection to Modification, it is unclear what plan payments are being proposed. Debtor needs to clarify this issue and specify the total paid in through the first nineteen (19) months of the plan.

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

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

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

The Motion to Confirm the Modified 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.

13. [11-42292-C-13](#) HENRY/VICTORIA FONTES  
PGM-7 Peter G. Macaluso

MOTION FOR COMPENSATION FOR  
PETER G. MACALUSO, DEBTORS'  
ATTORNEY(S), FEES: \$1,950.00,  
EXPENSES: \$0.00  
3-4-14 [[112](#)]

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 March 4, 2014. Twenty-eight days' notice is required. That requirement was met.

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

**The court's decision is to grant the motion for compensation.** No appearance is necessary. The court makes the following findings of fact and conclusions of law:

#### FEES REQUESTED

Peter G. Macaluso, Counsel for Debtor, makes a Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is September 14, 2012 through May 24, 2013. Counsel is requesting the Court allow fees and costs of \$1,950.00 for services charged at a rate of \$200.00 per hour.

#### Description of Services for Which Fees are Requested

Services performed include the following:

1. Review Motion to Dismiss and prepare client letter concerning the Motion.
2. Prepare and file Motion to Modify Chapter 13 Plan
3. Review Objection to Confirmation and prepare a Response
4. Appear on Motion to Modify
5. Communicate with client on hearing outcome
6. Organize short sale of Debtors' residence and file Motion to Sell.
7. Prepare and file supplemental documents concerning Motion to Sell
8. Appear on Motion to Sell and prepare follow-up on the Motion for Debtors.
9. Coordinate with lender on closing of sale and forward to Trustee documents on closing of the sale.

## **FEES ALLOWED**

The hourly rates for the fees billed in this case are \$200.00/hour for counsel for 9.75 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$1,950.00 are approved and authorized to be paid by the Trustee.

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

Attorneys' Fees	\$1,950.00
Costs and Expenses	\$0.00

For a total final allowance of \$1,950.00 in Attorneys' Fees and Costs in this case.

### **Chapter 13 Trustee filed a statement of non-opposition to the Motion.**

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

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

The Motion for Allowance of Fees and Expenses filed by Peter B. Macaluso having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Peter G. Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter G. Macaluso, Counsel for the Estate Applicant's Fees Allowed in the amount of \$1,950.00 Applicant's Expenses Allowed in the amount of \$0.00, which amount may be paid Counsel by the Chapter 13 Trustee from unencumbered assets, after full credit applied for any retainers or prior amounts paid to Counsel.

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 February 13, 2014. By the court's calculation, xx days' notice was provided. 42 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)(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. 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 Plan as moot.** 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 filed an opposition to Debtor's Motion to Confirm second Amended Plan on March 17, 2014. Subsequent to the filing of the Trustee's opposition, the Debtor filed a Third Amended Plan and Motion to Confirm Third Amended Plan on March 18, 2014. The filing of a new plan is a *de facto* withdrawal of the pending plan.

Further, a review of Debtor's proposed amended third plan indicates that it attempts to remedy the following issues highlighted in Trustee's opposition:

1. Classification of Nationstar Mortgage's on-going mortgage payment.
2. Incorporation of future tax refunds into future plan payments.
3. Classification and treatment of claim of Santander Consumer USA, secured by a 2003 Chevy Tahoe.

At the hearing on April 29, 2014, the court consider confirmation of Debtor's Third Amended Plan and any timely filed opposition.

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 as moot and the proposed Chapter 13 Plan is not confirmed.

15. [14-20299](#)-C-13 KENNETH/RAMONA BRADFORD MOTION TO VALUE COLLATERAL OF  
CAH-2 C. Anthony Hughes HSBC MORTGAGE SERVICES, INC.  
3-18-14 [[25](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 18, 2014. Fourteen 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) (2). Consequently, 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 that the Motion to Value Collateral is granted and creditor's secured claim is determined to be \$0.00.** No appearance required. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. 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 3712 Comanche Way, Antelope, California. The Debtor seeks to value the property at a fair market value of \$190,000.00 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 \$359,000. HSBC Mortgage Services, Inc.'s second deed of trust secures a loan with a balance of approximately \$38,279.91. 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 HSBC Mortgage Services, Inc. secured by a second deed of trust recorded against the real property commonly known as 3712 Comanche Way, Antelope, 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 \$190,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on November 23, 2013. 14 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) (2). Consequently, 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 that the Motion to Value Collateral is granted and creditor's secured claim is determined to be \$6,000.00.** No appearance required. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. 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 2004 BMW 745 LI. The Debtor seeks to value the property at a replacement value of \$6,000.00 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 lien on the vehicle's title secures a purchase-money loan incurred in 2007, more than 910 days prior to the filing of the petition, with a balance of approximately \$35,921.43. 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 \$15,675.00. 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 a 2004 BMW 745 LI. , is determined to be a secured claim in the amount of \$6,000.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$6,000.00 and is encumbered by liens securing claims which exceed the value of the Property.



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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on February 20, 2014. By the court's calculation, 33 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 as moot.** 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 opposed confirmation of the Plan on the basis that Debtors cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6) because Debtors' plan relied on two pending Motions to Value secured claims. Debtors filed Motions to Value the Secured Claims of HSBC Mortgage Services, Inc., CAH-2, Dckt. No. 25, and Santander Consumer USA, Inc., CAH-3, Dckt. No. 30, on March 18, 2014. The court continued the hearings on the Objections to April 1, 2014, to be heard concurrently with the Motions to Value.

The court approved both Motions to Value on April 1, 2014. Therefore, the Trustee's objection is rendered moot and the Plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled as moot and the Plan is confirmed.

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

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

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

**IT IS ORDERED** that the Objection is overruled as moot, the Debtor's Chapter 13 Plan filed on January 13, 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.