

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Bankruptcy Judge

Sacramento, California

April 8, 2014 at 3:00 p.m.

- 
1. [13-23705-E-13](#) JENNIFER BURNETT MOTION TO VALUE COLLATERAL OF  
WSS-2 W. Steven Shumway INTERNAL REVENUE SERVICE  
2-25-14 [[32](#)]

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 25, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 5000 Concord Rd., Sacramento, California. The Debtor seeks to value the property at a fair market value of \$86,000.00 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 \$142,751.39. The second deed of trust against the subject property secures a loan with a balance of \$48,028. The IRS filed a claim on April 12, 2013. The secured portion of the claim is in the amount of \$9,385.50. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured

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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 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 lien of Internal Revenue Service against the real property commonly known as 5000 Concord Rd., Sacramento, 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 \$86,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

2. [09-45606-E-13](#) CHARLES/KATHLEEN HIGGINS  
SDB-7 W. Scott de Bie

MOTION FOR ENTRY OF DISCHARGE  
AND/OR MOTION FOR WAIVER OF  
REQUIREMENT FOR JOINT DEBTOR  
KATHLEEN R. HIGGINS TO COMPLETE  
DEBTOR'S 11 U.S.C. SEC. 1328  
CERTIFICATE AND CERTIFICATE OF  
CHAPTER 13 DEBTOR REGARDING 11  
U.S.C. SEC. 522(Q) EXEMPTIONS  
3-6-14 [[86](#)]

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 March 6, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

**The Motion for Entry of Discharge is granted.** No appearance required.

Charles K. Higgins, Debtor, moves the court for an order waiving Debtor's requirement to complete Joint Debtor's 11 U.S.C. § 1328 Certificate (form EDC 3-190) and certificate of Chapter 13 Joint Debtor regarding 11 U.S.C. § 522(q) exemptions (form EDC 3-191) and for an order directing the Clerk of the Bankruptcy Court to enter a discharge in the above-entitled Chapter 13 case.

Debtor states Joint Debtor, Kathleen R. Higgins died on March 5, 2013. Debtor filed a Suggestion of Death and Motion for Substitution on August 29, 2013. The court granted the motion on September 27, 2014. Dckt. 70. Debtor contends it is impossible for the joint debtor, Kathleen R. Higgins, to comply with the requirement to complete Debtor's 11 U.S.C. § 1328 Certificate (form EDC 3-190) and certificate of Chapter 13 Debtor regarding 11 U.S.C. § 522(q) exemptions (form EDC 3-191), as she is deceased.

On February 13, 2014, Chapter 13 Trustee, David P. Cusick, filed Notice to Debtor of Completed Plan Payments and of Obligation to File Documents (form EDC 5-200). The Chapter 13 Trustee filed a non-opposition to

the motion.

Based on the Suggestion of Death and Motion for Substitution, the Notice to Debtor of Completed Plan Payments and Obligation to file Documents, the court grants the Motion to waive the requirements for Kathleen R. Higgins to complete Debtor's 11 U.S.C. § 1328 Certificate (Form EDC 3-190) and certificate of Chapter 13 Debtor regarding 11 U.S.C. § 522(q) exemptions (Form EDC 3-191).

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 Entry of Discharge filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted the requirements for Kathleen R. Higgins to complete Debtor's 11 U.S.C. § 1328 Certificate (Form EDC 3-190) and certificate of Chapter 13 Debtor regarding 11 U.S.C. § 522(q) exemptions (Form EDC 3-191) are waived.

3. [14-22608-E-13](#) GLENN ARMSTRONG  
SS-1 Scott D. Shumaker

MOTION TO EXTEND AUTOMATIC STAY  
3-21-14 [[12](#)]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on March 21, 2014. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

**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 Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 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. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 13-33027-A-13J) was dismissed on March 11, 2014, for failure to timely confirm a Chapter 13 plan and unreasonable delay prejudicial to creditors. See Order, Bankr. E.D. Cal. No. 13-33027-A-13J, Dckt. 67, March 11, 2014. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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 if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 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(c) and 1325(a) – but the two basic issues to determine good faith under § 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, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed, as his prior counsel did not sufficiently explain the case or circumstances. Once he hired present counsel, he realized the schedules he filed were inaccurate. Debtor states he did not understand the documents were being submitted under penalty of perjury or was fully informed of his rights and responsibilities in a Chapter 13 case. Debtor testifies that he has now been made aware of what is required of him, disclosed all of his assets, filed appropriate schedules and documents for a successful plan.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

4. [09-22809](#)-E-13 JON/TERRI HAJEK  
MBB-1 Scott A. CoBen

CONTINUED MOTION TO APPROVE  
LOAN MODIFICATION  
2-21-14 [[53](#)]

CONT. FROM 3-25-14

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 21, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the respondent and other parties in interest are entered.

**The hearing on the Motion to Approve the Loan Modification is continued to 3:00 p.m. on April 22, 2014.**

The hearing on the Motion was continued from the original March 25, 2014 hearing date to afford Movant the opportunity to provide the court with confirmation from Debtors' counsel that the Debtors were supporting approval of the loan modification and that Movant had not bypasses communicating with the counsel who represents the Debtors in this case.

As of the April 4, 2014 review of the Docket, no written confirmation by Debtors' counsel had been filed. Due to a scheduling conflict for the court, the hearing on the Motion is continued to 3:00 p.m. on April 22, 2014.

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

holding that:

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

The Motion to Approve the Loan Modification filed by U.S. Bank NA having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion to Approve Loan Modification is continued to 3:00 p.m. on April 22, 2014.

**IT IS FURTHER ORDERED** that on or before April 15, 2014, if a statement of support for the granting of the Motion signed by Debtors' counsel has not been filed, U.S. Bank, N.A., the Movant, shall file with the court and served on Debtors, Debtors' counsel, the Chapter 13 Trustee, and the U.S. Trustee a statement that Debtors' counsel has been contacted and has failed to file a statement by the Debtors supporting the Motion; the attempts by counsel for Movant to communicate with Debtors' counsel; or if Debtors' counsel has not been contacted, the reasons therefore.



5. [13-31109](#)-E-13 RONALD DICKERSON AND MARY MOTION TO CONFIRM PLAN  
GG-1 SANER 2-20-14 [[50](#)]  
Gerald B. Glazer

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

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

6. [13-35413](#)-E-13 ROBERT JEFFREY  
RJ-4 Pro Se

MOTION TO CONFIRM PLAN  
2-20-14 [[52](#)]

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

Correct Notice NOT Provided. The Proof of Service states that the Notice of Meeting of Creditors & Deadlines, Schedule I and J, Summary of Schedule and Statistical Summary of Certain Liabilities were served on Chapter 13 Trustee, and creditors on February 17, 2014. By the court's calculation, 50 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 and a creditor 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.

#### **SERVICE**

The Proof of Service states that the Notice of Meeting of Creditors & Deadlines, Schedule I and J, Summary of Schedule and Statistical Summary of Certain Liabilities were served on Chapter 13 Trustee, and creditors on February 17, 2014. It does not appear this motion, the plan or any of the supporting documents were served on the appropriate parties based on the Proof of Service filed with this motion. Dckt. 57. This is sufficient to deny the motion.

#### **DECLARATION**

The declaration provided by Mr. Jeffrey does not state that he provides his testimony under penalty of perjury. Dckt. 54.

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides,

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to

law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

Movant has failed to provide the court with competent evidence of the obligation and Movant's interests. As such, the motion is denied without prejudice.

#### **MOTION**

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

- A. I, Robert Jeffrey, (Debtor), amended the Chapter 13 Plan prior to confirmation pursuant to 28 U.S.C. Section 1323. The motion to confirm the Amended Chapter 13 Plan complies with FRBP 2002(b) which requires a twenty eight (28) day notice of the time fixed for filing objections, as well as the Local Bankruptcy Rule 9014-1 (f) (1) which requires a notice of hearing and that the opposition must be filed at least 14 days prior to the date of the hearing.
- B. The Debtor is requesting that the Court approves the Amended Chapter 13 Plan as allowed under 6 U.S.C. 1323 - Modification of the Chapter 13 Plan before confirmation.

The Motion to Confirm 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 requests that the court confirm the modified plan. This is not sufficient for the relief requested.

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."

#### **TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee opposes confirmation on the basis that the Debtor listed Solano County property taxes in Class 1 of the Plan with arrears of \$6,725.17 to be paid 18% interest at the rate of \$170.78 per month with a \$0.00 monthly contact installment amount. No collateral description was given.

Trustee states that Class 1 claims are to be paid the current payment amount as well as the arrears. The Trustee believes the debtor

intends to make the ongoing payments directly and intends this claim to be treated as Class 2A, and the Trustee is not opposed to such treatment.

The Trustee notes that the Debtor may dispute the claim of this creditor in which case an objection to claim will need to be filed as the plan allows claims as filed. The creditor filed a claim on 12/16/2013, (Claim #2), for \$9,116.46, the Debtor filed an amended secured claim on 2/28/2014 for \$6,752.00, and the Creditor filed an amended secured claim in the amount of \$10,736.41 on March 17, 2014. Trustee states the Debtor may not be able to amend the claim as they can only file a claim if no claim was timely filed. 11 U.S.C. § 501(c).

Additionally, Trustee states that the Debtor gave no collateral description in the plan for this creditor, although they gave two different account numbers on Schedule D, (DN #1, Page 13), and the Debtor has four different real properties on Schedule A, (although one property is in Oakland.) The Creditor first filed a claim for Three Rivers and Masters. The Debtor filed an amended claim for Masters and Mahogany, then the Creditor filed an amended claim for Masters and Mahogany.

#### **CREDITOR WELLS FARGO BANK, N.A.'S OPPOSITION**

Wells Fargo Bank, N.A. ("Creditor") opposes the motion to confirm on the basis that the Agreements secured by the Second and Third Deeds of Trust have an End of Draw Period of July 17, 2014, at which time Debtor's monthly payments will change from an interest only payment to a principal and interest payment. While Debtor's Amended Chapter 13 Plan mentioned the end of draw period, the Amended Chapter 13 Plan is unclear as to which loan accounts and properties those provisions are for and which loan accounts and properties are provided for in Section 2.11 as Class 4 Claims.

Creditor further objects to Debtor's Plan in that once Debtor's obligations to Creditor for loan secured by the Second and Third Deeds of Trust have been properly scheduled for repayment hereunder, Debtor cannot feasibly complete the Plan as proposed.

#### **CONCLUSION**

Based on the severe procedural deficiencies of the motion, it is denied without prejudice.

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

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

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

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

7. [14-22518](#)-E-13 BETTE HIMMELMANN  
SDH-1 Scott D. Hughes

MOTION TO ALLOW TESTIMONY BY  
ATTORNEY IN FACT AT MEETING OF  
CREDITORS AND/OR MOTION FOR  
EXEMPTION FROM FINANCIAL  
MANAGEMENT COURSE  
3-24-14 [[15](#)]

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, all creditors, parties requesting special notice, and Office of the United States Trustee on March 24, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion to Allow Testimony and for Exemption of Financial Management Course was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 deny the Motion 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 the court for an order allowing her daughter, Antonina Rosecrans, to testify for her at the meeting of creditors set for April 17, 2014 at 9:00 a.m. and to waive the debtor education requirement for the debtor. The motion contends that the debtor is living at College Oak Nursing Rehab Center and she is not able to testify for herself at the meeting of creditors. Further, that Debtor gave her daughter a Springing Durable Power of Attorney before living in the nursing home and that while it does not specifically grant the daughter the right to file a bankruptcy for the debtor or testify at the meeting of creditors, the debtor believes that the document is specific enough for the court to order that it be allowed. The filing was to stop the foreclosure sale of Debtor's home set for March 24, 2014.

#### **MULTIPLE CLAIMS FOR RELIEF**

The Motion seeks to have the court allow testimony of Debtor's daughter at the meeting of creditors and for the waiver of the debtor education requirement for the debtor. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure allow for a plaintiff to join

multiple claims against a defendant in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014, which does not incorporate Rule 9018 for contested matters.

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

#### **TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee opposes the motion on the basis that the Movant's standing relies on the Springing Durable Power of Attorney filed with the Motion and that two matters have not been established regarding that document. First, no signature of the Debtor appears in the document that the Trustee can discern, potentially there may be a signature page that was not filed with the Exhibit. Second, where the capacity of the Debtor is in question, as set forth by the movant in the motion the movant has not established whether the Debtor was competent when she gave the power of attorney to Michael Rosecrans and Antonina Rosecrans. Trustee states that where the Exhibit reflects treatment dates before and after the 2/7/2008 date of the power of attorney, presumably the attending physician could clarify his opinion to explain if he believed the Debtor was able to manage her medical care decisions and financial affairs prior to the March 19, 2014 date of the opinion letter.

#### **DISCUSSION**

In addition to the procedural issues discussed above, the court echoes the concerns of the Trustee. The Debtor has provided an unsigned Springing Durable Power of Attorney. It appears that page 6 that includes the signatures, if any, is missing. The court cannot infer that his document is signed based on the evidence provided.

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 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 is denied without prejudice.



8. [10-47321](#)-E-13 CLAUDE COLWELL AND  
JSS-3 CAROLINA JOHNSON  
John S. Sargetis

CONTINUED AMENDED MOTION TO  
APPROVE LOAN MODIFICATION  
2-19-14 [[99](#)]

CONT. FROM 3-11-14

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

Correct Notice Not 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 February 7, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion to Approve a Loan Modification has been set for a hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 Approve Loan Modification.** No appearance at the April 8, 2014 hearing is required.

Debtors move for an order to approve loan modification with Bank of America, N.A. The court continued the hearing to allow proper service on the parties. Debtors filed a Notice of Continued hearing and Proof of Service with proper service.

Bank of America, N.A., whose claim the plan provides for in Class 4, has agreed to a loan modification which will reduce the Debtor's monthly mortgage payment from the current \$2,863.31 to \$2,782.82. The modification will capitalize the pre-petition arrears and provides for stepped increases in the interest rate from 2.875% to 4.375% over the next 24 years.

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

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

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

The Motion to Approve the Loan Modification filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Claude and Carolina Johnson, Debtors, are authorized to amend the terms of their loan with

Bank of America, N.A., which is secured by the real property commonly known as 4252 Roberta Lane, Shingle Springs, California, and such other terms as stated in the Modification Agreement filed as Exhibit "B," Docket Entry No. 95, in support of the Motion.

9. [11-21422-E-13](#) SHMAVON MNATSAKANYAN AND CONTINUED MOTION TO APPROVE  
PGM-5 YERMONIYA ARTUSHYAN LOAN MODIFICATION  
Peter G. Macaluso 12-3-13 [[113](#)]

**CONT. FROM 3-25-14, 2-25-14, 2-11-14, 1-14-14**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 3, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 hearing on the Motion to Approve the Loan Modification is continued to 3:00 p.m. on April 22, 2014.**

The hearing on the Motion has been continued several times from the original January 14, 2014 hearing date to afford Movant the opportunity to provide the court with a loan modification agreement which clearly identifies the creditor whose loan is being modified and such creditor is consistent with the Proof of Claim and other evidence presented in this case.

As of the April 4, 2014 review of the Docket, no further pleadings or evidence has been filed. Due to a scheduling conflict for the court, the hearing on the Motion is continued to 3:00 p.m. on April 22, 2014.

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

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

The Motion to Approve the Loan Modification filed by U.S. Bank NA having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion to Approve Loan Modification is continued to 3:00 p.m. on April 22, 2014.

**IT IS FURTHER ORDERED** that on or before April 15, 2014, the Debtor and Creditor entering into the loan modification agreement with the Debtor shall file a status report for the loan modification and completion of the correct and accurate documents.

10.	<a href="#"><u>13-27326-E-13</u></a>	<b>JAMES/MARIAN JOHNSON</b>	<b>MOTION TO MODIFY PLAN</b>
	<b>SDB-1</b>	<b>W. Scott de Bie</b>	<b>3-4-14 [<a href="#"><u>26</u></a>]</b>

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

**Final Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The 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 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 March 4, 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.

11. [12-33237](#)-E-13 FRED SATER  
DEF-3 David Foyil

MOTION TO MODIFY PLAN  
2-24-14 [[75](#)]

**Final Ruling:** The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Modify Plan, the "Withdrawal" being consistent with the opposition filed to the Motion, 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 Modify Plan, and good cause appearing, **the court dismisses without prejudice the Debtor's Motion to Modify 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 Modify 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, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Motion to Modify Plan is dismissed without prejudice.

12. [10-43441](#)-E-13 CARL/CAROLYN FORE  
TJW-3 Timothy J. Walsh

MOTION TO MODIFY PLAN  
2-19-14 [[74](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 19, 2014. By the court's calculation, 48 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes the motion on the basis that there is no current statement of income and statement of expenses on file. The Debtors' are proposing an increased plan payment from \$1,000.00 to \$1,160.00.

While the Trustee would normally support a payment increase, according to the Trustee's records, the last statement of income and expenses was filed on September 1, 2010. Trustee argues that the Debtor should not expect the Court to approve a modification when the Debtor is not disclosing their present income and expenses. The Trustee objected to the last proposed modification for this same reason. In the event that the Debtor does not file a current Schedule I & J, the Trustee may seek an Order Authorizing the Examination of each Debtor under Rule 2004.

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

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

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

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon

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

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

13. [13-35442](#)-E-13 JAMES MCMAHON  
UST-2

MOTION FOR RELIEF FROM  
UNAUTHORIZED AND FRAUDULENT  
BANKRUPTCY FILING  
2-27-14 [[18](#)]

**CASE DISMISSED 12/17/13**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors (*pro se*), Chapter 13 Trustee, and parties requesting special notice on February 27, 2014. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

**The Motion for Relief From Unauthorized and Fraudulent Bankruptcy Filing is granted.**

#### **BACKGROUND**

This Chapter 13 Bankruptcy case was filed on December 6, 2013, the purported Debtor was James McMahon. The petition named only James McMahon, and did not list any co-debtors, and did not provide a social security

number for Mr. McMahon. The address provided on the petition was 7632 Valley Wood Drive, Sacramento, California. The petition was filed without a Chapter 13 Plan, Means Test Form, any Schedules, Statement of Financial Affairs, Statistical Summary, or Summary of Schedules. The petition indicated that it was prepared by a non-attorney bankruptcy preparer by the name of Jeff Thompson, SSN 557-61-6689. The address provided for Mr. Thompson was the same address provided for Mr. McMahon: 7632 Valley Wood Drive, Sacramento, California. An Application to Pay Filing Fee in Installments was filed concurrently with the petition. A Notice of Incomplete Filing was issued by the Clerk's Office on December 6, 2013. No further documents were filed after the Notice of Incomplete filing was issued, and the case was dismissed by the Clerk's Office for failure to timely file documents on December 17, 2013, 11 days after it was filed.

An *Ex Parte* Motion to Reopen the case was filed by the United States Trustee ("UST") on February 27, 2014, the Order Reopening the case was issued the following day, February 28, 2014.

#### **MOTION**

The UST filed the present Motion for Relief From Unauthorized and Fraudulent Bankruptcy Filing. Essentially, the motion asserts that the bankruptcy was fraudulently filed by someone other than the purported Debtor, James McMahon, without Mr. McMahon's authorization or knowledge. Included with the motion are the Declarations of James McMahon and Amy McMahon, Mr. McMahon's wife.

Mr. McMahon's Declaration states that he did not file the bankruptcy case which was filed in his name, and that he did not authorize any other person to do so. Mr. McMahon's Declaration also provides that he has reviewed the petition, that he does not recognize the handwriting, signature, or phone number on the petition, and that he does not know who Jeff Thompson, the purported non-attorney petition preparer, is. In addition, Mr. McMahon states that the address listed on the petition, 7632 Valley Wood Drive, Sacramento, California, ("Valley Wood Property") is his former residence, but that he and his family have not lived there since April of 2013. To substantiate this statement, Mr. McMahon provided copies of his last water bill from the Valley Wood Property, and his first water bill from his current address, 8305 Newfield Circle, Sacramento, California ("Newfield Property"). Mr. McMahon testifies that he, and his family, moved out of the Valley Wood Property because they could no longer afford the mortgage payment, and that he has made no attempt to forestall the foreclosure of the Valley Wood Property. Mr. McMahon received the Notice of Trustee's Sale for the Valley Wood Property which indicated that the sale was scheduled for December 6, 2013, the same day the bankruptcy petition was filed.

In December of 2013, after Mr. McMahon learned of the bankruptcy filing, Mr. McMahon made a report with the Sacramento County Sheriff. In January of 2014, Mr. McMahon received a code enforcement notice about a white Cadillac in the driveway of the Valley Wood Property. Mr. McMahon does not own this vehicle, and he had the vehicle towed off the property. Mr. McMahon found paperwork in the Cadillac indicating that it was registered to a Candice Marie Smith, Mr. McMahon does not know who this person is.

The Declaration of Amy McMahon provides much of the same information as her husband's declaration, namely that she did not prepare, sign, or authorize any other person to prepare or sign, the subject bankruptcy petition. Mrs. McMahon also provides that in January of 2014 she was informed by SMUD that utility service for the Valley Wood Property had been turned on from December 9, 2013 to December 11, 2013 under the name "Eunice Appling." Both Mr. McMahon and Mrs. McMahon state that they do not know who Eunice Appling is.

Based on the foregoing, the motion contends that it may have been the apparent squatter(s) who filed bankruptcy in Mr. McMahon's name in order to delay the trustee's sale of the Valley Wood Property. The UST requests that the court "make a notation in the case docket that this case was fraudulently filed."

## DISCUSSION

As discussed in the moving papers, a fraudulent bankruptcy filing can cause immense harm to the victim of the fraudulent filing. See e.g. Peter C. Alexander, *Identity Theft and Bankruptcy Expungement*, 77 Am. Bankr. L.J. 409, 410, 421 (Fall 2003). The most apparent harm to the victim of the fraudulent filing is that the case information is made available to credit reporting agencies, and the credit rating of the victim will be negatively impacted.

Very few cases deal with the issue of how to remedy a fraudulent bankruptcy filing in order to aid the victim in repairing their credit rating, and other financial affairs. See *In re Dick*, 2006 WL 6544157 (Bankr. N.D. Tex. May 19, 2006); *In re Joyce*, 399 B.R. 382 (Bankr. D. Del. 2009); *In re Storay*, 364 B.R. 194 (Bankr. D.S.C. 2006); *In re Buppelmann*, 269 B.R. 341 (Bankr. M.D. Pa. 2001). *In re Buppelmann* discussed the possible remedies the court can fashion:

"First, I could grant the request for expungement and have all documents filed related to this matter destroyed. Second, I could make a notation in this filing that the petition was fraudulent which would allow any entity that was interested in the course of the bankruptcy to conclude that the matter was, in fact, fraudulent and the filing occurred other than at the request of the Debtor. Third, I could order the Clerk to delete all references to the Debtors' names on the case dockets." *In re Buppelmann* at 343.

Movant does not request the court to either expunge the case or order the Clerk to delete all references to the Debtors' names on the case dockets. As the court in *In re Buppelmann* discussed, expungement and deletion of the purported Debtor's name may not be the best solutions to help a victim repair their credit rating after creditors and/or credit reporting agencies have become aware of the filing. *Id.* As the court in *In re Buppelmann* concluded, this court likewise concludes that the best remedy to aid a victim of a fraudulent bankruptcy filing in repairing their credit is to make a finding of fact that the case was fraudulently filed, and to enter this finding on the record.



## **RULING**

The court finds that the testimony of Mr. McMahon and Mrs. McMahon, through their respective declarations, to be credible. Accordingly, the court finds that the bankruptcy case was filed by a person other than Mr. McMahon, without Mr. McMahon's knowledge or authorization, and that the signatures on the petition and filing fee installment application filed in this case are not those of Mr. McMahon. As such, the petition filed in this case is null and void.

The court will issue an order finding that the bankruptcy petition filed in this case is null and void, and ordering that within thirty (30) days of the purported Debtor, James McMahon, disputing the reporting of this bankruptcy on his credit report, the credit reporting agency shall either: delete any and all references to the filing of this bankruptcy petition from the purported Debtor's credit report, or seek relief from this court.

The court shall issue an 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 Relief From Unauthorized and Fraudulent Bankruptcy Filing filed by the United States 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 Chapter 13 petition filed in this case is null and void, the court having determined that it was not filed by James McMahon.

**IT IS FURTHER ORDERED** that the information concerning this bankruptcy case shall not be listed as information on any consumer report, 15 U.S.C. § 1681a(d), or consumer credit report, Cal. Civ. Code § 1785.3(c), or related to James McMahon on any such report except as permitted by the this court pursuant to further order. Within 30 days after receiving a copy of this order, any consumer reporting agency, 15 U.S.C. § 1681a(f), or consumer credit reporting agency, Cal. Civ. Code § 1785.3(d), shall cease disclosing or including information about this bankruptcy case on consumer report or consumer credit report, for James McMahon, or file a motion for an order authoring such disclose.

This court retains jurisdiction for all purposes relating to this order, including, without limitation the enforcement of this order and violations thereof, and granting relief from this order.

No other or additional relief is granted.

14. [14-21042-E-13](#) STACEY WHITAKER  
TSB-1 Peter G. Macaluso

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
3-13-14 [[15](#)]

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 March 13, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor did not file a Motion to Value Collateral. According to the Trustee, Debtor proposes to value the secured claim of CarMax on a 2006 Nissan Murano, but has failed to file a Motion to Value Collateral to date. The failure to ascertain the value of collateral casts doubt upon Debtor's ability to make the payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6).

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

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

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

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

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

15. [14-21542-E-13](#) NATALIA RINKER  
SDH-1 Scott D. Hughes

MOTION TO VALUE COLLATERAL OF  
BUCKS FINANCIAL SERVICES, LLC  
3-4-14 [[14](#)]

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. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 4608-4610 Myrtle Avenue, Sacramento, California. The Debtor seeks to value the property at a fair market value of \$216,000.00 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 \$241,556.01. Creditor Bucks Financial, LLC's second deed of trust secures a loan with a balance of approximately \$124,000.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Bucks Financial, LLC secured by a second deed of trust recorded against the real property commonly known as 4608-4610 Myrtle Avenue, Sacramento, 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 \$216,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

16. [13-27044](#)-E-13 KEVIN/BREE SEARS  
DBJ-2 Douglas B. Jacobs

CONTINUED MOTION TO CONFIRM  
PLAN  
10-21-13 [[57](#)]

CONT. FROM 3-25-14, 1-28-14, 12-10-13

**Tentative Ruling:** 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.  
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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 21, 2013. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). A creditor 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 deny the Motion to Confirm the Amended Plan.**

**PRIOR HEARING**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Creditor Cory Adams objects to confirmation of the Debtors' Second Amended Plan on the basis of good faith. Creditor states that Debtors' income has increased and the Debtors' expenses have decreased to an amount exactly equal to their proposed plan payment under the plan which pays zero to the general unsecured claims. Creditor states his claim is a general unsecured claim, totaling nearly one-half of the entire amount of unsecured debt. Creditor states he has filed an adversary proceeding to determine that the amounts owed to him are non-dischargeable.

Debtor responds, stating that they filed an amended plan to account for all of the taxes due and allowing for the payment to their mortgage company for ongoing mortgage and all the arrears. In order to make these payments, Debtors state they reduced their monthly food bill, plan on bringing lunch to work, reduce eating out expenses and buying less expensive food. Debtor states that being faced with larger mortgage arrears and tax obligations, he has taken on more work as a public defender and private defense attorney to supplement his income. Debtor states the plan is feasible. Debtor also states that the adversary complaint referenced by Creditor is being litigated and if Creditor is successful, the plan will be modified or the case will be dismissed.

Based on the declaration providing explanations for the change in income and expenses, the court overrules the Creditor's objections. Merely because a debtor dials down otherwise realistic expenses to a lower "battlefield" level which are necessary to make a plan work does not render the expenses not being stated in good faith. Though the court has no idea why the Debtors are filing amended Schedules I and J, Dckt. 63, for post-petition changes in income and expenses, the court will not deny confirmation on those grounds. (Though it could be argued that the Debtors misstating under penalty of perjury post-petition income and expenses as being the income and expenses as of the commencement of this case renders all of the Debtors' testimony unreliable - this Creditor and the Debtor have a bigger fight over the dischargeability of the claim.)

The adversary proceeding appears to be litigating the non-dischargeability of the Creditor's claim and if Creditor is successful, his claim will survive the bankruptcy plan and discharge.

#### **CONTINUANCE**

The court continued the hearing to allow Debtors to present discovery regarding income and contract with the creditor.

On March 18, 2014 the parties filed a Stipulation to continue the hearing for two weeks to allow further discovery by Creditor, Cory Adams.

#### **SUPPLEMENTAL PLEADINGS**

On April 2, 2014, Creditor Cory Adams filed supplemental documents in support of his Objection to Confirmation, stating that he has not received adequate and complete discovery responses to date and that the court deny the pending plan. The discovery Creditor sought was to answer the question whether the Debtors' budgeting \$399.00 per month for estimated tax payments is adequate to cover anticipated income tax liabilities. Creditor states the discovery he was able to obtain was confusing and that Debtors may have more income than

previously disclosed. Creditor states he intends to file a motion to compel responses to discovery but that the plan should be denied.

#### REVIEW OF PLAN TERMS

The court has before it the Debtor's Second Amended Plan. A review of the proposed plans is summarized in the following Chart.

Plan Provision	Original Plan	First Amended Plan	Second Amended Plan
Debtor Monthly Plan Payment	\$ 4,707.53	\$4,781.60	\$19,126.40 Total Pmts for Months 1-4 of Plan (Average \$4,781.60)  \$5,281.61 for Months 5-60.
Plan Term	60 months	60 months	60 months
Debtor's Attorneys' Fees	\$2, 000 Pre-Petition Retainer  \$2,000 Paid Through Plan	\$2, 000 Pre-Petition Retainer  \$2,000 Paid Through Plan	\$2, 000 Pre-Petition Retainer  \$2,000 Paid Through Plan
Monthly Administrative Expenses for Trustee	\$33.33	\$33.33	
Class 1 Claims	Bank of America (Residence) \$3,255.02 (Current Pmt)  \$596.75 (\$35,805.00 Arrearage)	Bank of America (Residence) \$3,255.02 (Current Pmt)  \$596.75 (\$35,805.00 Arrearage)	Bank of America (Residence) \$3,255.02 (Current Pmt)  \$801.38 (\$48,083.02 Arrearage)
Class 2 Claims	BMW \$233.08 (\$12,351 claim)  County Taxes \$151.93 (\$5,983 claim)	BMW \$233.08 (\$12,351 claim)  County Taxes \$151.93 (\$5,983 claim)	BMW \$233.08 (\$11,320.67 claim)  County Taxes \$151.93 (\$5,983 claim)
Class 3	None	None	None
Class 4	None	None	None
Class 5	None	Franchise Tax Board \$4,409.64	Franchise Tax Board \$4,409.64  Internal Revenue Service \$12,052
Class 6	None	None	None

Class 7 (General Unsecured)	0.00% Dividend (\$75,957 Claims Listed)	0.00% Dividend (\$75,957 Claims Listed)	0.00% Dividend (\$75,957 Claims Listed)
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These evolving Plan terms (which are common in bankruptcy cases) are properly considered in the income and expense information provided by the Debtors. The court summarizes the information in the following chart.

	<b>Dckt. 1: Original Schedules I and J</b>	<b>Dckt. 63: First Amended Schedules I and J</b>
<b>Income</b>		
Debtor (Self Employed)	\$10,948	\$11,527
Co-Debtor	\$1,800	\$1,800
Co-Debtor Withholding	(\$111)	(\$111)
Avg Monthly Income	\$12,637	\$13,216
<b>(Expenses): Two Adults and One Adolescent Teenage Son</b>		
Mortgage/Rent	\$0	\$0
Electricity and Heating Fuel	(\$248)	(\$248)
Water and Sewer	(\$130)	(\$130)
Telephone	(\$150)	(\$150)
Internet, Television	(\$163)	(\$163)
Home Maintenance	(\$150)	(\$150)
Food	(\$1,120)	<b>(\$800)</b>
Clothing	(\$150)	(\$150)
Laundry/Dry Cleaning	(\$50)	(\$50)
Medical Expenses	(\$300)	(\$300)
Transportation	(\$400)	(\$400)
Recreation	(\$100)	(\$100)
Homeowner's/Renter Ins	(\$107)	(\$107)
Life Ins	(\$100)	(\$100)
Health Ins	(\$1,866)	(\$1,866)
Auto Ins	(\$230)	(\$230)

Income Taxes	None Listed	(\$399)
Property Taxes	(\$428)	(\$428)
Business Expenses	(\$2,164)	(\$2,164)
Total Expenses	(\$7,856)	(\$7,935)
Monthly Net Income	\$4,782	\$5,282

The Debtor has provided his Declaration to address these changes in Expenses. Dckt. 79. He testifies that since the filing of the bankruptcy case he has learned that he owes more money for prior year income taxes and that the arrearage on their home mortgage is greater than he originally believed. To address these greater debts, the Debtors determined that they could reduce their expenses by economizing and "going out to eat less frequently, and generally being a lot more careful with our grocery bill." *Id.*

The Debtor also testifies that he has been able to increase his income by increasing his work by not only performing on a pre-petition contract with the Butte County Public Defender but, "I was able to increase the amount of work I do as a public defender and I have been able to take on more private criminal defense matters." *Id.*

The Opposition to confirmation of the First Amended Plan includes the contention that the Debtors are not providing all of their projected disposable income to fund the Plan. 11 U.S.C. § 1325(b)(1). Creditor questions the "miraculous" adjustments to income and expenses which produce exactly the right amounts to pay the secured claims and taxes the Debtors need to pay and still yield a 0.00% dividend for creditors holding general unsecured claims.

Creditor is fervent in his opposition, stating that he is a former client of the Debtor with a claim arising as a former client of Debtor. After arbitration before the State Bar, the Debtor was ordered to return a \$30,000.00 fee retainer to Creditor. Creditor has filed an adversary proceeding to have this obligation determined nondischargeable. Adv. 13-2284. A scheduling order has been issued in the Adversary Proceeding, with the Pre-Trial Conference set for July 9, 2014.

#### **PLAN NOT SHOW TO BE FEASIBLE**

What should be one of the simplest of tasks for a debtor is often the most bedeviling - accurately and truthfully stating income and expenses. For some debtors, this disclosure is created out of whole cloth as part of a larger financial fantasy. For others, they are so obsessed with keeping certain property (such as home and cars), they convince themselves that the income and expenses "have to be what they say they are," because that allows them to keep the assets they want, without having to pay other creditors.

The income and expense information provided by Debtors is not credible. First, it appears that the income information is "flexible." When the Debtors were faced with additional income taxes (without providing any



explanation as to how they did not know they owed federal income taxes), the Debtor can just increase his work with the Public Defenders Office and take on private clients. This indicates to the court that the ability to generate a higher income always existed and the Debtors chose not to disclose it. This may have been an attitude of "why should I work harder, it's only going to pay my creditors (including a former client I owe \$30,000 to)," or may have been a more malevolent, "I will not disclose the information now, and maybe nobody will notice when I'm making more money that we don't have to account for in the bankruptcy case." Either is not a good inference for the court to draw.

For expenses, no explanation is provided for why or how the Debtors in good faith stated under penalty of perjury that their food expense was (\$1,120.00,) and then could be reduced easily to (\$800.) The statement that only after the Debtors "discovered" that they owed federal income taxes and the arrearage on their home mortgage was higher then they realized that they needed to eat out less and "generally being a lot more careful with our grocery bills" was appropriate in the bankruptcy case does not indicate Debtors who in good faith filed and prosecuted a Chapter 13 case. Being careful with expenses was a given the day they chose to file the Chapter 13 case, not merely when they decided that a debt they wanted to pay was higher than they thought.

The Debtors are not providing they true, accurate projected monthly disposable income to fund the Chapter 13 Plan.

There are more significant lack of disclosures by the Debtors which impair their ability to confirm the proposed Chapter 13 Plan. On the Statement of Financial Affairs the Debtors list income of \$35,140 for 2013 (first four months), \$69,717 for 2012, and \$67,153 in 2011. Dckt. 1 at 41. The Debtors present to the court that going forward they have income of \$152,976 (gross income on Schedule I, Dckt. 1 at 36) and then \$159,924.00 (gross income on Amended Schedule I, Dckt. 63 at 5).

However, the Objecting Creditor has provided the court with evidence obtained through discovery which shows the following information from the Debtors' 2012 and 2011 tax returns:

- A. 2012 Total Income.....\$86,626
  - 1. From which (\$4,334) for self-employment taxes and \$21,464) for health insurance were deducted.
- B. 2011 Total Income.....\$82,032
  - 1. From which (\$5,795) for self-employment taxes and (\$9,084) for health insurance were deducted.

However, Creditor misreads the tax returns and states only the "Net Profit" from the law practice, not the "Gross Income" from the business. For the 2011 Tax Return, Schedule C upon which Profit or Loss From Business (the law practice) is computed, the Gross Income (Gross Receipts) is \$116,000.00. Exhibit A, Dckt. 88. For 2012 the Debtor's Gross Income from his law practice decreased to \$91,582. Schedule C to 2012 Tax Return, Exhibit B, *Id*.

These gross income amounts are higher than the amounts stated on the Statement of Financial Affairs. Question 1 of the Statement of Financial

Affairs required the Debtors to provide the following information under penalty of perjury,

"1. Income from employment or operation of business

**State the gross amount of income** the debtor has received from employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. **State also the gross amounts** received during the two years immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)"

Statement of Financial Affairs Question 1, Dckt. 1 at 41. The Debtors did not provide that information. FN.1.

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FN.1. The court notes that while the Debtor failed to accurately disclose "gross income," and instead reported only "net profit," the expenses being deducted appear to be exactly those that one would expect for the law practice. It does not appear that the Debtors were burying personal expenses as business expenses and trying to have them hidden from the court and creditors.  
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Further, Creditor's disclosure has also disclosed that the Debtor's gross income from his law practice for 2013 was actually \$210,933.32, not the less than \$70,000.00 as shown on the Statement of Financial Affairs for 2011 and 2012, or the \$159,924.00 which was shown on Amended Schedule A and testified to by the Debtor under penalty of perjury. Declaration, Dckt. 87, and Exhibit C, Interrogatory Question 1. (It appears that Creditor attached the Request for Production of Documents as Exhibit D rather than the referenced Response to Interrogatories.)

If it is true, as stated in the Declaration filed as Exhibit C, that the Debtor's income from his law practice was actually \$210,933.32 in 2013 and that is the correct income to be used in computing the projected disposable income (11 U.S.C. § 1325(b)(1)), then the prior information provided under perjury is inaccurate.

As discussed below, the Debtors are choosing to make monthly payments to retain their 2007 328i BMW. The Debtors own two other vehicles which they claim as exempt, which the Debtors assert have a value of \$11,564.00. Under the Chapter 13 Plan the Debtors keep the two free and clear vehicles, while exercising their rights to make the BMW payment. 11 U.S.C. § 707(b)(2)(B)(iii). Though they may choose to make the payment for the BMW, that does not automatically make keeping the two other free and clear vehicles the good faith prosecution of a Chapter 13 Plan. It is not.

Further, the Expenses appear to be made up in several categories. First, the food expense is "easily reduce" as necessary to achieve the new number for the Debtors to keep everything they desire. Also, the Debtor made no provision for his self employment and income taxes on Original Schedule J so that the "bottom line number" for monthly net income was what it needed to be to confirm the original plan.

Then, when the Debtors needed to amend the plan and the income and expense numbers were changed, which then yielded the new "bottom line number" to allow the Debtors to keep what they desired, \$399.00 a month. This number appears to be extremely low for monthly profit from the Debtor's law practice of at least \$9,364.00 (computed based on \$11,527.00 in monthly gross law practice income and (\$2,163.50) in month law practice expenses listed on Amended Schedules I and J, Dckt. 63).

The copies of the Debtors' 2011 and 2012 tax returns obtained through discovery conflict with the budgeting of \$399.00 a month for income and self-employment taxes.

For 2011, with profit of only \$82,032 the Debtor reported \$10,076 in federal self-employment taxes (Schedule SE, Exhibit A, Dckt. 88 at 8). The 2011 Tax Return Computes a tax liability of \$12,055 (based solely on Debtor's law practice income). 2011 Tax Return, *Id.* at 4. This averages \$1,004.58 in monthly tax obligations based on lower income than stated on Amended Schedule I and the even higher amount stated in response to Interrogatories.

For 2012, with profit of only \$61,352 the Debtor reported \$7,536 in federal self-employment taxes (Schedule SE, Exhibit B, Dckt. 88 at 14). The 2011 Tax Return Computes a tax liability of \$9,595 (based Debtor's law practice income and \$4,585 in wage income for which there was \$1,309 in withholding). 2011 Tax Return, *Id.* at 11. This averages \$799.58 in monthly tax payments, for which only \$109 a month was withheld from the wages.

The \$399.00 a month for taxes appears to be a fictitious number placed on Schedule J solely for the purpose of making the bottom line net monthly income number justify the plan payment. The Debtors in Amended Schedule I and J project significantly higher monthly income for the Debtor from his law practice. The Debtor stated an even higher monthly income in 2013 than projected in Amended Schedules I and J.

The Debtor's 2012 Tax Return Schedule C shows expenses running 33% of the gross income (\$91,582 gross income and \$30,230 expenses). Exhibit B, Dckt. 88 at 12. As the income increases some of the fixed expenses such as office rent do not, while other expenses may increase. Using the Debtor's statement under penalty of perjury on Amended Schedule I (Dckt. 63) that his law practice regular monthly income is \$11,527.00, the court extrapolates an annual gross income of \$138,324.00. On Schedule J the Debtor states under penalty of perjury that his law firm business expenses are only \$2,163.50, 18.7% of gross. *Id.* at 6. This clearly conflicts with the Debtors' own tax returns and defies logic. The court, using the 33% expense ratio as shown on the tax returns, projects a \$92,677.08 profit on which taxes will be computed. Just the self-employment taxes (using the 2012 Schedule SE) would be \$12,326.05 (\$1,027.00). With the additional \$30,000.00 in law practice income it would not be unexpected for the tax obligation to double (with the Debtors having reported \$37,528 in 2012 taxable income after all deductions, yielding a \$4,759.00

income tax) to \$10,000.00 (and most likely higher since the additional income is taxed at the highest incremental tax rate).

Thus, it appears that the Debtors' tax liability for the Income stated on Amended Schedule I (and the court providing for significantly greater business expenses than stated on Amended Schedule J) would be at least \$22,326.00 ----- \$1,860.50 a month, just for federal income taxes. Amended Schedule I provides only for \$111.00 in total payroll and Social Security withholding from wages, so it appears that the (\$399.00) in monthly tax expense is grossly under stated.

The Plan is not feasible. The economic projections of the Debtors are not internally consistent, not consistent with their 2011 and 2012 tax returns, and are not credible.

#### **Computation of Projected Disposable Income - Section 707(b)(A) and (B) Limitation on Expenses**

The Chapter 13 Statement of Current Month Income (Form 22C) computes that the Debtors are above median income. Dckt. 1 at 10-12. As instructed by the Ninth Circuit Court of Appeals in *Drummond v. Welsh*, 717 F.3d 1120, 1128-1130, 1133-1135, (9th Cir. 2012), income debtors, the Ninth Circuit Court of Appeals recently clearly stated that Congress has mandated a "simple" mathematical calculation of expenses in determining current monthly income which is used to determine projected disposable income. While the Bankruptcy Code allows debtors to continue paying whichever secured debts they choose (without the court making a good faith determination as to that choice), over median income debtors are limited in their expenses to those allowed by the Internal Revenue Service Guidelines. 11 U.S.C. §§ 1325(b)(3), 707(b)(2)(A) and (B).

Under the Second Amended Plan the Debtors choose to pay \$4,056.40 a month for their home mortgage (not including property taxes and insurance), and \$213.62 a month for their BMW. In addition to the 2007 BMW 328i for which the payment is to be made, the Debtors also own a 2004 Jeep Grand Cherokee and a 2006 Honda Civic, for a family with only two drivers. The Debtors own the Jeep and Honda free and clear of any liens or encumbrances.

The Debtors have not provided the court with the 11 U.S.C. § 707(b)(2)(A) and (B) analysis of how their expenses projected are within the limitations of 11 U.S.C. § 707(b)(2)(A) and (B), nor that they are reasonable projections of their expenses.

#### **CONCLUSION**

This Chapter 13 Plan appears to be driven around one basic principle - justify the Debtors paying monthly mortgage payments of \$4,056.40 (current plus arrearage payment), with the additional required \$428 property taxes and \$107 homeowners insurance - a \$4,591.40 monthly housing expense. While the Debtors can choose to make that payment, it does not automatically render the plan feasible.

The conflicting and easily adjusted income and expense information has been presented to justify this payment, not to show true and accurate financial

information. The proposed Plan is not feasible based on the financial information provided.

Further, the shifting economic information which at each turn produces exactly the amount necessary to pay the for the assets the Debtors want to keep has not been presented in good faith. It is not consistent with the financial information disclosed in the 2011 and 2012 Tax Returns and is not credible. It is evidence that the Debtors are not and have not been prosecuting a Chapter 13 Plan in good faith.

The proposed Chapter 13 Plan does not comply with 11 U.S.C. §§ 1325 and 1322, and is not confirmed. The Motion is denied.

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

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

The 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 denied and the Second Amended Chapter 13 Plan is not confirmed.

17. [14-20045-E-13](#) TUBAYA/DEBORAH CARTER  
TSB-1 Peter G. Macaluso

CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY DAVID  
P. CUSICK  
2-13-14 [[33](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on February 13, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan relies on a pending Motion to value Collateral of Green Tree Servicing, LLC. The court having denied this motion without prejudice, the objection is sustained.

The Trustee also objects that the Debtors have failed to pay the installment of \$70.00 by February 3, 2014. It appears an installment payment was made on February 20, 2014.

The court continued the hearing to allow the Debtor to resolve the Motion to Value. However, the motion was denied it does not appear the Debtor filed or served a new motion or amended the plan.

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

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

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

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

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

18. [14-21349](#)-E-13 MARK/TRISHELE SWASEY  
AJP-1 Al J. Patrick

MOTION TO VALUE COLLATERAL OF  
ROD FERRERIA AND SUSAN FERRERIA  
2-27-14 [[17](#)]

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, respondent creditor's attorney, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least

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

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

The motion is accompanied by the Debtors' declaration. The Debtors are the owner of the subject real property commonly known as 547 Penstock Drive, Grass Valley, California ("property 1") and 540 Fawcett St., Grass Valley, California ("property 2"). The Debtors seek to value property 1 at \$232,052.00 and property 2 at \$226,200.00 as of the petition filing day. As the owner, the Debtors' opinion of value is evidence of the assets' value. See Fed. R. Evid. 701. see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Property 1 is encumbered by a first deed of trust secures a loan with a balance of approximately \$240,403.00. Property 1 is further encumbered by a second deed of trust securing a loan with a balance of approximately \$53,003.00. Property 2 is encumbered by a first deed of trust securing a loan with a balance of approximately \$247,356.00.

Respondent creditors Rod and Susan Ferreria hold a judgment lien with a balance of approximately \$108,303.31. Therefore, the respondent creditors' judgment lien is completely under-collateralized. The creditors' 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 Rod and Susan Ferreira secured by a judicial lien recorded against the real property commonly known as 547 Penstock Drive, Grass Valley, California and 540 Fawcett St., Grass Valley, California, is

determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the properties are \$232,052.00 and \$226,200.00, respectively. Both are encumbered by senior liens securing claims which exceed the value of the property.

19. [14-21349-E-13](#) MARK/TRISHELE SWASEY  
AJP-2 Al J. Patrick

MOTION TO VALUE COLLATERAL OF  
BANK OF AMERICA

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 27, 2014. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtors' declaration. The Debtors are the owner of the subject real property commonly known as 547 Penstock Drive, Grass Valley, California. The Debtor seeks to value the property at a fair market value of \$232,052.00 as of the petition filing date. As the owner, the Debtors' opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$240,403.00. Creditor Bank of America, N.A. holds a second deed of trust against the subject property. 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 547 Penstock Drive, Grass Valley, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$240,403.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

20. [10-47157-E-13](#) LUKE BREIT  
CAH-2 C. Anthony Hughes

MOTION TO MODIFY PLAN  
3-4-14 [[34](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 35 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 confirm 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 the motion on the basis that the months paid in stated in the Debtor's proposed plan payments differ from the Trustee's records. The Debtor has listed the proposed plan payments as "\$30,400.00 total paid for months 1 through 38, \$100.00 for months 39 through 60" in the additional provisions of the modified plan.

According to the Trustee's records, Debtor has paid in \$30,400.00 through month 39, which is January 2014 where this case was filed on October 12, 2010 so the first payment was due on November 25, 2010. The Trustee will not have an objection to proposed modified plan if corrected in the order confirming.

The court confirms the plan, on the condition that Debtor amends the plan to state the correct amount and the months for which payments are made.

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 granted and Debtor's Chapter 13 Plan filed on March 4, 2014 is confirmed, with the amendment stated in the order confirming the Plan stating that \$30,400.00 has been paid in through January 2014, with is the Thirty-Ninth (39<sup>th</sup>) month of the Plan, 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.

21. [14-20160](#)-E-13 KIM SCOTT  
CYB-1 Candace Y. Brooks

CONTINUED MOTION TO CONFIRM  
PLAN  
2-11-14 [[23](#)]

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 February 11, 2014. By the court's calculation, 42 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). Both the Trustee and Creditor 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:

The court continued the hearing on this matter to permit Debtor's counsel to document the final amendments that will be included in the order confirming the Plan. Civil Minutes, Dckt. No. 34.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee and Creditor U.S. Bank, National Association, both opposed the motion to confirm the Chapter 13 Plan.

#### **Trustee Opposition**

The Trustee opposed confirmation of the Plan on the basis that the Plan does not adequately cover the arrearage of a Class 1 Creditor. Trustee stated that the monthly dividend proposed to Class 1 Creditor, ASC, in the amount of \$100.00 per month will not pay the claim in 60 months, but will rather take 320 months to pay the claim in full.

#### **U.S. Bank, N.A., Trustee Opposition**

U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-81 ("Creditor"), opposed confirmation of the Plan on the basis of its assertion that the amount of pre-petition arrears specified in the Chapter 13 Plan is incorrect. Creditor asserted that the actual pre-petition arrearage is \$42,574.96, and that as a result the Plan does not satisfy the requirements of 11 U.S.C. § 1325(a)(5)(ii) which states that the value of the property distributed under the plan on account of a secured claim be no less than the allowed amount of such a claim. Additionally, Creditor argues that pursuant to 11 U.S.C. § 1322(d), Debtor will have to increase the payments to Creditor under the plan to approximately \$709.58 per month, in order to cure Creditor's pre-petition arrears over a period not to exceed sixty months.

At the time of the filing of its original opposition, Creditor had not yet filed a Proof of Claim. On March 24, 2014, Creditor filed Proof of Claim No. 7, which asserts a pre-petition arrearage of \$42,574.96. In its Opposition, Dckt. No. 31, Creditor states that this figure consists of:

- a) Missed Payments in the amount of \$38,069.08;

- b) Escrow in the amount of \$1,663.70;
- c) Fees in the amount of \$2,473.00; and
- d) Late Charges in the amount of \$369.18.

Creditor's exhibits, filed in support of its Objection, includes the Corporate Assignment of the Deed of Trust; a statement notarizing the transfer of the deed; the Deed of Trust for the property commonly known as 4930 Crestview Drive, Carmichael, California; and the Promissory Note for the loan borrowed by Debtor secured by the subject property. Creditor's Proof of Claim No. 7 includes a Mortgage Proof of Claim attachment, which includes late charges, filing fees and court costs, title costs, recording fees, and other pre-petition fees, expenses, and charges on Debtor's account. The attachment includes escrow account statements, with a chart showing payments and projected escrow (including property taxes and insurance premiums) fees that will become due. The Proof of Claim also includes the Deed of Trust, and a Corporate Assignment of the Deed of Trust.

#### **No Supplemental Pleadings Filed by Debtor**

The court continued the matter to allow Debtor's counsel to prepare draft amendments to the proposed order confirming the Chapter 13 Plan. Civil Minutes, Dckt. 34. A review of the docket shows that nothing further has been filed. No provision has been made to cure the arrearage on the U.S. Bank, N.A., Trustee, claim.

It appears that the Debtor's challenged as increased. On March 28, 2014, the Internal Revenue Service filed Proof of Claim No. 8 which asserts a \$38,114.90 priority claim and a \$2,677.85 general unsecured claim. Proof of Claim No. 8 states that it is for 2012 civil penalties and 2013 income taxes (for which a return has not yet been filed). The Plan provides for payment of only an \$8,515.97 priority claim for the Internal Revenue Service.

Because the Plan does not cure the arrearage on the claim held by the Creditor on the First Deed of Trust on Debtor's property and does not provide for the larger priority claim, the Plan does not comply with 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B), 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 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.

22. [13-34164](#)-E-13 ANGELINA ROBINSON  
MMA-6 Mark Alonso

MOTION TO VALUE COLLATERAL OF  
JOANNE ROBINSON  
3-18-14 [[79](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 18, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required. That requirement was met.

**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 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 358 S. Wall St., Coos Bay, Oregon. The Debtor seeks to value the property at a fair market value of \$75,000.00 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 \$77,970.33. Creditor Joanne Robinson's (Debtor's mother) second deed of trust secures a loan with a balance of approximately \$40,000.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. See 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d

1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Joanne Robinson secured by a second deed of trust recorded against the real property commonly known as 358 S. Wall St., Coos Bay, Oregon, 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 \$75,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

23. [13-34164](#)-E-13 ANGELINA ROBINSON  
MMA-7 Mark Alonso

MOTION TO VALUE COLLATERAL OF  
JOANNE ROBINSON  
3-18-14 [[84](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 18, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required. That requirement was met.

**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 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 63180 Noah Rd., Coos Bay, Oregon. The Debtor seeks to value the property at a fair market value of \$68,000.00 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 \$100,230.00. Creditor Joanne Robinson's (Debtor's mother) second deed of trust secures a loan with a balance of approximately \$30,000.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. See 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Joanne Robinson secured by a second deed of trust recorded against the real property commonly known as 63180 Noah Rd., Coos Bay, Oregon, 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 \$68,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

24. [13-34164](#)-E-13 ANGELINA ROBINSON  
MMA-8 Mark Alonso

MOTION TO VALUE COLLATERAL OF  
JOANNE ROBINSON  
3-18-14 [[91](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on March 18, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required. That requirement was met.

**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 and determine creditor's secured claim to be \$21,610.00.** 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:

Debtor moves for an order valuing the secured portion of the claim held by Joanne Robinson ("Creditor"). The motion is accompanied by the Debtor's declaration. Debtor, Angelina Robinson, states that the Amended Schedule B filed in her case discloses her interest in the following collateral:

1. 2000 Harley Davidson Road King Classic
2. 2004 Honda offroad quadrunner
3. 2002 Honda offroad quadrunner
4. 2004 Arctic Cat Quadrunner,
5. Santa Fe utility trailer- 16' long with two axles
6. 2004 Circle J (3 horse-slant load) horse trailer

Debtor further states that she believes and asserts that the reasonable, replacement value of these assets is \$21,610.00. Declaration at ¶¶ 3-4. Debtor states that the total value of the perfected DMV liens on



the vehicles is \$21,610.00. Exhibit 2, DMV Titles Listing Joanne Robinson (Debtor's mother) as Lienholder, Dckt. No. 94. 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 promissory note held by Creditor Joanne Robinson, however, is for a claim of \$31,700.00. The lien on the vehicle's title secures a purchase-money loan incurred in October 13, 2011 (according to the Certificates of Title filed as part of Exhibit 2 on Dckt. No 94), more than 910 days prior to filing of the petition, with a balance of approximately \$31,700.00.

Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$21,610.00, 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 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 Joanne Robinson secured by assets described as:

1. 2000 Harley Davidson Road King Classic
2. 2004 Honda offroad quadrunner
3. 2002 Honda offroad quadrunner
4. 2004 Arctic Cat Quadrunner,
5. Santa Fe utility trailer- 16' long with two axles
6. 2004 Circle J (3 horse-slant load) horse trailer

is determined to be a secured claim in the amount of \$21,610.00, 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 \$21,610.00 and is encumbered by liens securing claims which exceed the value of the asset.

25. [13-34164-E-13](#) ANGELINA ROBINSON  
MMA-4 Mark Alonso

CONTINUED MOTION TO CONFIRM  
PLAN  
2-3-14 [[52](#)]

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 February 3, 2014. By the court's calculation, 50 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 grant 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:

The court continued the hearing on this matter from March 25, 2014. Dckt. No. 96. The Chapter 13 Trustee initially opposed confirmation of Debtor's proposed Plan based on Debtor's delinquency, and the Plan relying on two Motions to Value which were denied by the court.

Trustee states that Debtor's original plan (Dckt. No. 11), called for payments of \$4,755.00 for sixty months. Debtor's Amended Plan (Dckt. No. 56) called for payments of \$4,755.00 for two months, and then \$4,958.00 for fifty-eight months. Debtor is \$4,957.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of \$4,958.00 is due on March 25, 2014. The case was filed on November 1, 2013, and the Plan in § 1.01 calls for payments to be received by the Trustee no later than the 25<sup>th</sup> day of each month, beginning the month after the order for relief under Chapter 13. Debtor has paid \$9,511.00 into the plan to date.

At the March 25, 2014 hearing on the Motion to Confirm Plan, however, Trustee confirmed that the delinquency has been cured as of the hearing date, thus resolving this portion of Trustee's opposition to the confirmation of Plan.

Trustee further argued that Debtor cannot make the payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6) because Debtor

proposes to value the secured claims of Joanne Robinson on three secured liens; the Motions to Value the Secured Claims of Joanne Robinson, Dckt. Control Nos. MMA-2 and MMA-3 were heard and denied by this court on February 25, 2013. Civil Minute Orders, Dckt. Nos. 71 and 72. Debtor's Motion to Value the Secured Claim, Mma-5, was heard and denied by this court on March 4, 2014. Civil Minute Order, Dckt. No. 75.

However, the court docket shows that Debtor has refiled three motions, following the denial of Debtor's previous three motions, to value the secured claims of Joanne Robinson on three liens. The repayment of these liens are secured by the following real and personal assets; the real property commonly known as 358 S. Wall St., Coos Bay, Oregon; real property located at 63180 Noah Rd., Coos Bay, Oregon; and six vehicles (specifically, a 2000 Harley Davidson Road King Classic, a 2004 Honda offroad quadrunner, a 2002 Honda offroad quadrunner, a 2004 Arctic Cat Quadrunner, and a Santa Fe utility trailer. Dckt. Nos. 79, 84, and 91. The court is granting all three Motions to Value the Secured Claims of Joanne Robinson.

Thus, all grounds for the Trustee's Objection to Confirmation of the Amended Plan have been resolved; the amended Plan now 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 February 3, 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.

26. [14-20464](#)-E-13 MICHAEL/PHYLLIS ENOS  
IRS-1 Eric John Schwab

OBJECTION TO CONFIRMATION OF  
PLAN BY INTERNAL REVENUE  
SERVICE  
3-7-14 [[40](#)]

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's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on March 7, 2014. By the court's calculation, 32 days' notice was provided. 14 days' notice is required. That requirement was met.

**Final Ruling:** The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. 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 sustain the Objection.** No appearance at the April 8, 2014 hearing is required.

#### **Conversion to Chapter 7**

On April 4, 2014, the Debtors filed their Notice of Conversion of this case to one under Chapter 7. Dckt. 47.

The Internal Revenue Service objects to confirmation of the Chapter 13 on that basis that Debtors have failed to file their income tax return for the 2013 income tax year. 11 U.S.C. § 1308(a) provides that debtors must file, with the appropriate authorities, all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition. This must be done no later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341 (a), if debtors are required to file a tax return under applicable nonbankruptcy law.

11 U.S.C. § 1325(a)(9) requires that the debtor file all returns required under 11 U.S.C. § 1308, in order to confirm the Chapter 13 Plan. Debtors have not filed their 2013 tax return.

Additionally, Debtors' Plan does not fully provide for the Internal Revenue Service's secured claim of \$117,155.80. Debtors' plan only provides for secured claim of \$5,728.00. The Internal Revenue Service states that the Debtors' plan also overestimates its priority claim. The Service's priority claim is \$16,993.10.

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 notes that the Chapter 13 Trustee has also filed an Objection to Confirmation of the Plan, TSB-1, in this case, which the court is granting on this hearing date.

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.

27. 14-20464-E-13 MICHAEL/PHYLLIS ENOS  
TSB-1

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
3-13-14 [[43](#)]

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 Debtor's Attorney on March 13, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required. That requirement was met.

**Final Ruling:** The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. 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 sustain the Objection.** No appearance at the April 8, 2014 hearing is required.

#### **Conversion to Chapter 7**

On April 4, 2014, the Debtors filed their Notice of Conversion of this case to one under Chapter 7. Dckt. 47.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Plan is not feasible. Debtors' Plan will not complete within the 60 months as required by 11 U.S.C. § 1322(d). Debtors' Plan provides for the secured Class 2 debt to the Internal Revenue Service for \$5,728.00 at 3% interest, and a Class 5 priority portion of \$72,493.00. Based on the Proof of Claim filed by the Creditor, Proof of Claim No. 2, the secured claim is actually \$117,155.80, and the priority amount is \$16,993.10. According to

Trustee's calculations, the plan will take 102 months to pay all secured and priority claims in full.

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.

28.	<a href="#">14-21066</a> -E-13	WALTER/PATTY KNOWLES	OBJECTION TO CONFIRMATION OF
	TSB-1	Darrel C. Rumley	PLAN BY DAVID P. CUSICK
			3-13-14 [ <a href="#">28</a> ]

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 Debtor's Attorney on March 13, 2014. By the court's calculation, 26 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.

**The court's decision is to continue the hearing to 3:00 p.m. on March 22, 2014, to be conducted in conjunction with the hearing on the motions to value secured claims.** No appearance at the April 8, 2014 hearing is required.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Plan relies on the pending Motions to Value the Secured Claim of Golden One Credit Union and Litton Loan Servicing, which are set for hearing on April 22, 2014. If the motions to value the secured claims of those creditors are not granted, Debtors' plan does not have sufficient monies to pay the claims in full.

29. [09-24071](#)-E-13 MOHAMMAD KHAN AND CINDY CONTINUED MOTION TO MODIFY PLAN  
WW-5 EMERICK-KHAN 2-18-14 [[104](#)]  
Mark A. Wolff

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 18, 2014. By the court's calculation, 35 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 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:

#### **Continuation of March 25, 2014 Hearing**

The court continued the hearing on this matter from March 25, 2014, after counsel for Debtors showed up at the hearing to report that there have been some difficulties in communication with the Debtor clients, who are now in the sixtieth month of the Plan.

No further pleadings have been filed as of the court's April 6, 2014 review of the Docket.

#### **REVIEW OF MOTION**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee opposes 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). Debtors are delinquent \$83.00 under the terms of the proposed modified plan. According to the proposed modified plan, payments of \$36,408.00 have become due. Debtors have paid a total of \$36,325.00 to the Trustee, with the last payment posted on September 10, 2013, in the amount of \$1,170.00. Debtor's modified plan proposes plan payments of \$626.00 for 58 months, then \$100.00 for 2 months.

The court notes that upon a review of the docket, nothing further has been filed to address Trustee's concerns about Debtors' delinquency under the Plan. Thus, the modified Plan still does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is ~~xxxx~~ and the proposed Chapter 13 Plan is ~~xxxx~~ confirmed.

30.	<a href="#"><u>10-49971</u></a> -E-13 CYB-3	RAMON/KELLY YEE Candace Y. Brooks	CONTINUED MOTION TO APPROVE LOAN MODIFICATION 12-17-13 [ <a href="#"><u>51</u></a> ]
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors on December 17, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Approve a Loan Modification was properly set for hearing on the notice required by Local Bankruptcy Rule 3015-1(i)(5) and 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 hearing on the Motion to Approve the Loan Modification is continued to 3:00 p.m. on April 22, 2014.**

The hearing on the Motion has been continued several times from the original January 14, 2014 hearing date to afford Movant the opportunity to provide the court with a loan modification agreement which clearly identifies the creditor whose loan is being modified and such creditor is consistent with the Proof of Claim and other evidence presented in this case.



As of the April 4, 2014 review of the Docket, no further pleadings or evidence has been filed. Due to a scheduling conflict for the court, the hearing on the Motion is continued to 3:00 p.m. on April 22, 2014.

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

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

The Motion to Approve the Loan Modification filed by U.S. Bank NA having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion to Approve Loan Modification is continued to 3:00 p.m. on April 22, 2014.

**IT IS FURTHER ORDERED** that on or before April 15, 2014, the Debtor and Creditor entering into the loan modification agreement with the Debtor shall file a status report for the loan modification and completion of the correct and accurate documents.

31.	<a href="#">10-26472-E-13</a>	RICKEY/SHARON ROBINSON	MOTION TO MODIFY PLAN
	CJY-1	Christian J. Younger	2-27-14 [ <a href="#">44</a> ]

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 and all creditors on February 27, 2014. By the court's calculation, 39 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 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 February 27, 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.

32.	<a href="#"><u>13-35878</u></a> -E-13 NLE-1	MICHAEL JOHN/TARA HOOPER Peter G. Macaluso	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 1-29-14 [ <a href="#"><u>23</u></a> ]
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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on January 29, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required. That requirement was met.

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

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

The court continued the hearing on this matter from February 25, 2014, to this hearing date to permit Debtors to file and serve supplemental pleadings, and for the Trustee to respond to Debtors' additional filings.

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

1. Debtors cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6), as Debtors' Plan relies on the Motion to Value the Secured Claim of the City of Jackson, which is set for hearing on February 25, 2014, the same day as this motion. If the motion to value is not granted, Debtor's plan does not have sufficient monies to pay the claim in full.

The court has granted Debtors' Motion to Value the Secured Claim of the City of Jackson, PGM-1, on this hearing date. Thus, this part of Trustee's Objection is resolved.

2. The Plan is not Debtors' best efforts under 11 U.S.C. § 1325(b), on the basis that Debtor did not report all income, and the status of Debtors' exact expenses are unclear.
  - a. Not All Income Reported: Question #2 of Debtors' Statement of Financial Affairs reports Debtors' Federal Tax Refunds for 2012 and 2011. Debtors received a refund of \$4,463.00 for the tax year of 2012 and \$4,877 for 2011. No future tax refund income is projected on Schedule I. While the Trustee has received and reviewed the tax returns, Trustee has not filed the returns as Exhibits, but will submit the returns if requested.

For the tax year of 2012, Debtors received \$4,463.00 in a federal tax refund based on their total tax payments of \$3,081.00 where \$0.00 tax was due. Of the \$4,463.00 refund, \$1,382.00 was received from Debtors claiming the Child Tax Credit, since Debtors' dependents are reported as ages 10, 7, and 3. Debtors are retaining their real property, and it appears that their tax deductions in the future are likely to remain the same or similar. If Debtors included this income in their monthly income calculation, dividing the income monthly throughout the year, they would have at least \$371.91 per month in additional income. Continued tax refunds appear likely, and Debtors' income should be adjusted to either reflect the tax refund income or a lower tax expense.
  - b. Expenses: On the issue of expenses, Debtors' Statement of Financial Affairs, Question #7 does not list any gifts or charitable contributions made within one year of this case.

Schedule J, line #14 lists donations in the amount of \$200.00. Trustee does not believe that Debtor will have a charitable donation expense in the amount of \$200.00 per month. Debtors' 2012 Federal Tax Return lists gifts to charity in the total amount of \$690.00, or approximately \$57.50 per month.

If Debtor included the what appears to be phantom \$200.00 charitable expense in their plan payment the Trustee, Debtors' Plan payment could be approximately \$721.91 per month ( $\$150.00 + 371.91 + 200.00 = \$721.91$ ).

#### **REPLY BY DEBTORS**

On March 11, 2014, Debtors filed a reply stating that they have amended Schedules I and J, which were filed on February 25, 2015, Dckt. No. 27. The court notes, however, that the Amended Schedules designated as Dckt. No. 27 were actually filed on January 29, 2014.

#### **TRUSTEE'S RESPONSE TO DEBTORS' REPLY**

Trustee states that the amended Schedules I and J on Dckt. No. 27 were filed on January 28, 2014, and that the schedules do not entirely resolve all grounds for the Trustee's objection.

Debtors suddenly admit that they are receiving a tax refund, but estimate the total amount would only be \$1,800 annually (\$150.00 per month listed Schedule I, line #11). Coincidentally, Debtors now claim that they have an additional \$150.00 in expenses each month. Debtors increased their expenses by \$300.00 and have failed to explain how they are meeting these expenses when the tax refund is received once a year. Trustee highlights the following changes in Debtor's Schedule I:

1. Line #4c (home maintenance, repair, upkeep) increased by \$100.00 with no bills or explanation of what Debtors have incurred since this case was filed on December 26, 2013.
2. Line #7 (food and housekeeping supplies) increased by \$200.00 with no bills or explanation of what Debtors have incurred since this case was filed.
3. Line #14 (charitable contributions) decreased by \$150.00 with no receipts or explanation of what Debtor has contributed since this case was filed.

Debtors' tax refund has also apparently disappeared. This refund was listed on Schedules B and C. Tax returns are due on April 15<sup>th</sup> of each year and Debtors have not advised the court when their 2012 tax refund was received.

Schedule B #16 reflects a tax refund in the amount of \$4,463.00. This appears to be a refund for 2012 as it mirrors the amount listed on Debtors' 2012 1040, line #74a. The amount of the 2013 tax refund has not been disclosed. Schedule B #2 lists \$150.00 in checking and \$50.00 in savings as the current value, as of the date of Debtor's voluntary petition,

which was December 19, 2013. The checking and savings accounts does not appear to include any tax refunds.

## **2<sup>nd</sup> Reply of Debtors' to Trustee's Objection**

Debtors acknowledge that while they have amended schedules I & J on 2/25/14, Dckt. No. 27, they have yet to answer the questions posed by the Trustee, and acknowledge that the trustee's concerns must be resolved prior to confirmation.

Debtors are amenable to supplementing this reply with documentary evidence, or file a new motion addressing the concerns raised by the Trustee. Debtors attribute the delay to Counsel and Counsel's inability to meet with the Debtors prior to preparing for this hearing, after notifying the debtors of documentary evidence needed.

Debtors request that the Objection be continued to allow Debtors' counsel time to obtain the documentary evidence to support the needed declaration by Debtors.

## **DISCUSSION**

As the court has addressed with this Counsel in connection with other cases, the flexible changing of Schedules without clear and simple testimony to explain why the prior statements under penalty of perjury were in error and why the current testimony under penalty of perjury should be believed by the court. In too many of Counsel's cases the unexplained "well believe what I tell you now because it means I win" non-explanation is provided.

The Debtors responding that they are "agreeable" to provide further supplemental pleadings to address the Trustee's concerns misses the mark. The Debtors carry the burden of proof in confirming the Plan. They do not merely need to be agreeable for the evidence to be provided – it is required of the Debtors.

The court has already continued this matter to allow Debtors to file supplemental pleadings previously. Debtors have had over two months to gather the information necessary and draft a declaration addressing Trustee's concerns of the status of Debtors' tax refunds income, and the accuracy of Debtors' listing of charitable contributions in their Statement of Financial Affairs. Debtors' Amended Schedules raises additional concerns regarding Debtors' unexplained increase in expenses and the non-disclosure of Debtors' 2012 and 2013 tax refunds.

Further, in responding the Debtors have carefully avoided providing any declarations under penalty of perjury. Rather, they merely trot out their attorney to make arguments Reply by Counsel, Dckt. 33, and Sur-Reply by Counsel, Dckt. 38. From this lack of willingness the court could infer that the Debtors know the information is false and don't want to risk committing perjury.

It appears that the Debtors have falsely stated their expenses under penalty of perjury, for which they offer no explanation under penalty of perjury. The Debtors appear to have discovered that they have an additional

\$100.00 a month in home maintenance expenses, \$200.00 in monthly food expenses, and the \$200.00 a month charitable contribution they stated under penalty of perjury on Original Schedule J is now merely \$50.00. With these financial gyrations the Debtors are now able to produce on Amended Schedule J exactly the same \$150.07 Monthly Net Income they showed on Original Schedule J.

The Debtors' changing expenses to produce the same Monthly Net Income is a strong indication that the expenses stated on Original Schedule J and Amended Schedule J are false and created merely to justify a nominal monthly plan payment, which "coincidentally" is just enough to pay Debtors' counsel and nothing to creditors (other than a 1% dividend on general unsecured claims, projected to be an aggregate dividend of \$1,923.35), while the Debtors seek to strip a lien off of their residence which secures a \$184,000.00 claim.

The "lien strip" in the context of a \$0.00 creditor plan payment and no restructuring of the Debtors' finances (such as curing defaults, paying nondischargeable taxes, making some provision for paying creditors) raises the issues of whether this Plan is in good faith. See discussion by this court of good faith in the Chapter 20 context in *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien stripping" in Chapter 13 case). The ruling of the U.S. Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410, 416 (1992), and this Chapter 13 case merely being a thinly disguised Chapter 7 case to abuse the Bankruptcy Code lays heavily on these Debtors.

The Debtors' continuing failure and unwillingness to provide evidence is not a *bona fide* basis for continuing the hearing further. Debtors' request for a further continuance is denied. The Plan does not currently 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.

33. [08-39481](#)-E-13 ROOSEVELT WILLIAMS AND MOTION TO EXCUSE DEBTOR  
CJY-3 CATHERINE WILLIAMS-SHAW ROOSEVELT WILLIAMS FROM  
Christian J. Younger COMPLETING 11 U.S.C. SECTION  
1328 CERTIFICATE OR CERTIFICATE  
OF CHAPTER 13 DEBTOR RE: 11  
U.S.C. SECTION 522(Q)  
EXEMPTIONS  
2-27-14 [[76](#)]

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 February 27, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Excuse Debtor Roosevelt Williams from Completing 11 U.S.C. § 1328 Certificate 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 Excuse Debtor Roosevelt Williams from Completing 11 U.S.C. § 1328 Certificate is granted.** No appearance required.

Co-Debtor Catherine C. Williams-Shaw ("Movant") seeks an order determining that the requirement to file a 11 U.S.C. § 1328 Certificate, or the Certificate of Debtor Regarding 11 U.S.C. Section 522(q) Exemptions, be waived as to Debtor, Roosevelt Williams. Movant instructs the court to review Movant's Memorandum of Points and Authorities, Dckt. No 80, to ascertain the grounds for the relief requested.

Movant is essentially requesting the court, however, to treat the points and authorities as the "motion," which the court is expected to accept a combined motion and points and authorities ("Mothorities"). The court, Trustee, and other parties in interest are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant.

The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors,

plaintiffs, defendants, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied. FN.1.

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FN.1. Given that Debtors' two attorneys have appeared regularly before this court, the failure to comply with the simple pleading requirements under the Bankruptcy Code is mystifying. The court would be well justified in just denying the Motion without prejudice and make counsel go back and comply with Federal Rule of Bankruptcy Procedure 9013. The court will not do so this time. However, if either attorney further fails to comply with the basic pleading Rules the court shall impose corrective sanctions, beginning with a \$500.00 monetary sanction and suspending telephonic appearance privileges for such attorney so that they actually attend court hearings as part of their continuing education of basic pleading practices in federal court.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

The court proceeds to consider the grounds for the Motion, as set forth by Movant's Memorandum of Points and Authorities. 11 U.S.C. § 1328 states that debtors are required to complete and file a certificate declaring information regarding Domestic Support Obligations; Prior Chapter 7, 11, or 12 Bankruptcy Discharge; Prior Chapter 13 Bankruptcy Discharge; and 11 U.S.C. Section 522(q) Exemptions. Movant and Movant's counsel, however, are advised that for prospective pleadings, Federal Rule of Bankruptcy Procedure 9013 requires that the Motion itself state the grounds upon relief is requested with particularity.

Movant states that Joint Debtor Roosevelt Williams is unable to complete and sign said certificates because of his death.

The court notes that Chapter 13 Trustee filed a non-opposition on March 20, 2014.

Local Bankruptcy Rule 5009-1(b) requires the filing with the court Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. The Supreme Court has recognized the "broad authority granted to bankruptcy judges," pursuant to § 105(a) of the Bankruptcy Code. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 374 (2007). This court can exercise its powers under 11 U.S.C. § 105(a) to "[i]ssue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Here, Joint Debtor Roosevelt Williams died before being able to satisfy this requirement. Debtor having completed all other requirements to obtain discharge, including completing his obligations under the confirmed Chapter 13 Plan, the court waives the requirement to complete the Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate.



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 Order Waiving Debtor's 11 U.S.C. § 1328 Certificate filed by Joint Debtor Catherine C. Williams-Shaw 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 the requirement for Joint Debtor Roosevelt Williams to complete Debtor's 11 U.S.C. § 1328 Certificate is waived, Joint Debtor Roosevelt Williams not being required to file an 11 U.S.C. § 522(q) Exemption Notice.

34.	<a href="#"><u>14-21881</u></a> -E-13	YURIY TONOVAN	MOTION TO AVOID LIEN OF GCFS,
	MS-1	Mark Shmorgon	INC.
			3-5-14 [ <a href="#"><u>14</u></a> ]

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, respondent creditors, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required. That requirement was met.

**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.

**Relief Requested and Grounds Stated**

Federal Rule of Bankruptcy Procedure 9013 (which is similar to Fed. R. Civ. P. 7(b)) requires that the motion itself state both the grounds upon which the relief is based and the relief with particularity. The Motion states the following:

1. Debtor files this motion pursuant to 11 U.S.C. § 522(f)(1)(A) and Federal Rule of Bankruptcy Procedure 9014.
2. Debtor requests that the Court determine GCFS, INC. claim, attached to Debtor's residence as an abstract of judgment, is avoided as impairing debtor's homestead exemption on the following grounds:
  - a. Debtor is entitled to, and has claimed in the bankruptcy schedules, a homestead exemption in his residence pursuant to Cal. Code Civil Procedure § 704.730.
  - b. Creditor, GCFS, Inc. maintains a judicial lien impairing Debtor's claimed exemption and thus avoidable pursuant to 11 U.S.C. §522(f)(1)(A).

From reading the Motion, the court has no idea of the factual grounds upon which Debtor is attempting to avoid the lien of GCFS, Inc. The court has no way to determine, from the Motion, the legal authority on which Debtor requests that relief should be accorded. Debtor does not state the amount of the exemption claimed, or the amount of the lien recorded on Debtor's property. Debtor does not state when, where, and the amount of the judgment issued against Debtor, and on what property the lien is attached. Debtor instructs the court to read the Memorandum of Points of Authorities to determine the bases for this motion. It is not, however, for the court to canvas other pleadings, and wait until the hearing, to receive additional evidence from a movant to "draft the motion" for Debtor.

### **Mothorities**

Debtor are essentially requesting the court to treat the points and authorities as the "motion." Debtor is asking, however, that the court accept a combined motion and points and authorities ("Mothorities") in which the court and Creditor are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Bankr. P. 9013), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant.

The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

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.

Here, Debtor's Motion gives no indication of why Defendants are entitled to relief. The court must turn to Debtor's Memorandum of Points and Authorities to figure out the exact grounds upon which Debtor makes the request to avoid the judicial lien of Creditor, GCFS, Inc. ("Creditor"), pursuant to 11 U.S.C. § 522(f)(1)(a).

#### **REVIEW OF THE MEMORANDUM OF POINTS AND AUTHORITIES**

Debtor states that maintains a 50% interest in real property commonly known as 4859 Samia Court, Carmichael, California. Debtor maintains that the property retains a current fair market value of \$399,000.00, and the Debtor's ownership interest in the property is \$199,500.00.

A judgment was entered against the Debtor in favor of GCFS, Inc., for the sum of \$9,595.69. Exhibit C, Dckt. No. 18. The abstract of judgment was recorded with Sacramento County on February 3, 2014. That lien attached to the Debtor's residential real property commonly known as 4859 Samia Court Carmichael, California. Debtor holds the subject real property in joint tenancy with his wife Jaykush Knyazyan, and maintains a 50% interest in it.

When one of the joint tenants files bankruptcy and seeks to avoid a judicial lien which is his separate obligation, the judicial lien should be deducted from the joint tenant's undivided one-half interest. *In re Nielsen*, 197 B.R. 665, 670-71 (9th Cir. BAP 1996). According to the Ninth Circuit in *Nielsen*, the steps for determining non-exempt equity are as follows: 1) the joint encumbrances are deducted from the total value of the residence; 2) the remaining value is divided to the debtor according to the title; 3) the homestead exemption is subtracted from the debtor's fractional interest; 4) the court looks to see if there is any value left for the judicial lien. *Id.* *In re Squaglia*, No. 04-12017-B-7, 2006 WL 2818803 at \*5 (E.D. Ca. Sept. 29, 2006).

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$399,000.00 as of the date of the petition, and Debtor has an interest in the property totaling \$199,500.00. The unavoidable consensual liens total \$199,207.57 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$100,000.00 in Schedule C. After deducting the encumbrance of \$199,207.57, the subject real property has total equity of \$199,792.43. Debtor has a fifty percent (50%) interest in the total equity which amounts to \$99,896.22.

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). The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A).

#### **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 GCFS, Inc., Sacramento County Superior Court Case No. 34201300145562CLCLGDS, Book 20140203, Page 0793, recorded on February 3, 2014, with the Sacramento County Recorder, against the real property commonly known as 4859 Samia Court, Carmichael, 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.

35. [13-33583](#)-E-13 SUE MARIANO  
Charnel J. James

CONTINUED ORDER TO SHOW CAUSE -  
FAILURE TO PAY FEES  
2-24-14 [[67](#)]

**THE COURT DISCHARGES THE ORDER REQUIRING  
DEBTOR'S COUNSEL, CHAMEL JAMES TO APPEAR  
AT THE APRIL 8, 2014 CONTINUED HEARING  
FOR THIS ORDER TO SHOW CAUSE**

**Final Ruling:** The court issued an order to show cause based on Debtor's failure to pay the required fees in this case (\$1.00 due on February 19, 2014). The court continued the hearing on this order from March 19, 2014, to permit Debtor additional time to pay the \$1.00 delinquency. It was further ordered that Charnel Jones, the attorney of record for Debtor, appear at the hearing on this date, April 8, 2014, to address the initial failure to respond to the Order to Show Cause. Dckt. NO. 86.

However, the court docket reflects that on March 25, 2015, the Debtor paid the fees upon which the Order to Show Cause was based.

**The Order to Show Cause is discharged.** No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

**IT IS FURTHER ORDERED** that the court's prior order, Dckt. 86, requiring the appearance of Chamel James at the April 8, 2014 continued hearing on this Order to Show Cause is discharged, with no appearance required

36. [13-33583](#)-E-13 SUE MARIANO  
Charnel J. James

CONTINUED MOTION TO CONFIRM  
PLAN  
1-23-14 [[47](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Chapter 13 Trustee, and all creditors on January 23, 2014. By the court's calculation, 47 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:

#### **Continued Hearing From March 11, 2014**

The court continued the hearing on the Motion to Confirm from March 11, 2014, to permit Debtor to file a supplemental pleading and amended Schedules I and J showing post petition amendments on or before March 26, 2014. Civil Minutes, Dckt. No. 80.

No Amended Schedules were filed as of the court's review of the Docket on April 6, 2014.

#### **REVIEW OF MOTION**

The Chapter 13 Trustee initially opposed confirmation of the plan on the basis that the plan fails the Chapter 7 Liquidation Analysis, and because it appears that Debtor cannot make the plan payments.

First, the Trustee argues that the Debtor's Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4); Debtor's non-exempt assets total \$49,625.00 on her Amended Schedule C, which was filed on December 20, 2013. Schedule A, filed on November 11, 2013, lists real property with a value of \$91,838.00 and a secured debt on Schedule D of \$84,202.00, or \$7,636.00 in equity with no claim of exemption. Debtor's non-exempt assets total \$57,261.00. Debtor is proposing a 10% dividend to unsecured creditors, which total \$2,510.00.

Debtor has claimed exemptions under California Civil Code of Procedure § 703.140(b), and appears married, but separated based on Schedule I (although the spouse has not joined in the petition). California Civil Code of Procedure § 703.140(b) requires a Spousal Waiver, signed by the Debtor and Debtor's spouse, for use of the claimed exemptions. Trustee has not found any such waiver filed with the court after review of the record. The Trustee's Objection Exemptions, NLE-1, was heard and sustained on this basis on February 11, 2014.

Second, it appears that Debtor cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtor's projected disposable income on Schedule J reflects \$390.12 and Debtor is proposing plan payments of \$1,064.45,.

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

Trustee filed an additional response on March 28, 2014, Dckt. No. 87, pointing out that Debtor has not filed any supplemental pleadings and amended Schedules I and J. Trustee states that his objection remains as to Debtor's failure to meet the liquidation analysis; Debtor's projected disposable income as stated on Schedule J reflects \$390.12 and Debtor is proposing plan payments of \$1,064.45. Debtor filed a second Amended Schedule C on March 11, 2014, the same day as the hearing on the motion to confirm. Trustee did not have a chance to review it prior to the hearing. After a review of the second Amended Schedule C, it appears that the Plan still fails the Chapter 7 liquidation analysis, as an objection to exemptions has been filed by Trustee on March 28, 2014.

Debtor's Amended Schedule C filed on March 11, 2014, changes Debtor's exemptions from California Civil Code of Procedure § 703 et seq. to California Civil Code of Procedure § 704 et seq. Debtor has exempted \$7,636.00 of equity in her real property, which is described as property her ex-husband is living in and making payments for.

It appears that Debtor is not entitled to use this exemption as Debtor does not reside in this property. Debtor has not exempted all of the equity in her 2003 Harley Sporster, which is free and clear. Debtor values the Harley at \$9250.00 and has only exempted \$2,725.00 under California Civil Code of Procedure § 704.010, leaving \$6,525.00 non exempt. Therefore, the total of non-exempt assets is \$14,161.00 and Debtor is proposing a 10% dividend to unsecured creditors, which totals \$2,510.00.

On March 28, 2014, the Trustee filed his Objection to Claim of Exemptions, including the real property in which it is alleged that the Debtor does not live. Dckt. 90.

Based on the foregoing and Trustee's remaining concerns regarding the liquidation analysis of Debtor's Plan, her claims of exemptions and pending objection thereto, and the failure to file Amended Schedules I and J, the 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.

37.	<a href="#"><u>10-21891</u></a> -E-13	WEI CHEN	MOTION TO VALUE COLLATERAL OF
	RWF-2	Robert W. Fong	PNC BANK, N.A.
			3-5-14 [ <a href="#">57</a> ]

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 and respondent creditor on March 5, 2014. By the court's calculation, 34 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 \$0.00.** No appearance required.

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 2111 Mission Ave, Carmichael, California. The Debtor seeks to value the property at a fair market value of \$298,000.00 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 \$366,517.00. Creditor National City, which shortly after the filing of the case was succeeded by PNC Bank, National Association fka National City, holds a second deed of trust which secures a loan with a balance of approximately \$4,020.00. Therefore, the respondent creditor's



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

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

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

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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of PNC Bank, National Association, fka National City secured by a second deed of trust recorded against the real property commonly known as 2111 Mission Ave, Carmichael, 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 \$298,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

38. [09-30096](#)-E-13 CAROL DOYLE  
EJS-7 Eric John Schwab

MOTION TO SELL  
3-18-14 [[121](#)]

**Final Ruling:** The Debtor Movant having filed "Withdrawal of Motion" for the pending Motion to Sell, the "Withdrawal" being consistent with the opposition filed to the Motion, 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 Sell, and good cause appearing, **the court dismisses without prejudice the Motion to Sell.**

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 Dismiss the Bankruptcy Case 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, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Motion to Sell is dismissed without prejudice.

39. [13-30296](#)-E-13 EUBLOGIO OLIVARES  
SJS-4 Scott J. Sagaria

MOTION TO CONFIRM PLAN  
2-25-14 [[52](#)]

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 February 25, 2014. By the court's calculation, 42 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. The Chapter 13 Trustee, however, opposes confirmation of the Plan based on Trustee's contention that the plan may not be Debtor's best efforts under 11 U.S.C. § 1325(b). Trustee's original Objection to Confirmation, Dckt. No. 19, objected to Debtor withholding excessive funds from his wages and thereby receiving large tax refunds. Debtor's 2012 tax refund was \$10,339.00.

Debtor's instant motion states that he has changed his withholdings from his wages, and provided a copy of the new W-4 form dated August 13, 2013. Updated pay advices show that Debtor is now receiving more net pay than listed on Schedule I. The Schedule shows net income on line 16 of \$3,914.04. A review of the most recent paystubs indicates net income of \$4,484.93 per month. Trustee is not aware of any amended Schedules I and J to date, and Debtor has not proposed to increase the plan payments in the amended plan. Dckt. No. 53. Debtor has more net income that may be paid into the plan for the benefit of unsecured creditors.

The 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.

40. [12-33397](#)-E-13 JONATHAN/CORAL PRICE CONTINUED MOTION TO CONFIRM  
JLK-2 James L. Keenan PLAN  
2-5-14 [[50](#)]

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 the Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 5, 2014. By the court's calculation, 48 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 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 tentative decision is to grant the Motion to Confirm the Modified Plan.** No appearance at the April 8, 2014 hearing is required.

#### **Continued March 25, 2015 Hearing**

The court continued the hearing on this matter from March 25, 2015, after Trustee reported that the delinquency addressed in his original opposition was cured, but that there was no confirmation that the March 25, 2014 payment had been made by Debtors.

On April 4, 2014, the Trustee filed a Notice of Withdrawal of his Objection to Confirmation, confirming that the Debtors are current in their Plan payments.

#### **REVIEW OF MOTION**

The Chapter 13 Trustee initially opposed confirmation of the Plan on the basis that it appeared that Debtors could not make the payments or

comply with the plan under 11 U.S.C. § 1325(a)(6). Debtors were delinquent \$696.01 under the terms of the proposed modified plan. The Trustee reported at the March 25, 2014 hearing that the delinquency that was the subject of Trustee's opposition had been cured, but that Trustee could not verify whether Debtors had made the March 25, 2014 payment that had become due.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. The opposition to the Motion filed by the Chapter 13 Trustee has been withdrawn.

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' First Modified Chapter 13 Plan filed on February 5, 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.

41. [14-22552-E-13](#) JAMES/OCTAVIA BOHANON  
MMP-2 Michele M. Poteracke

MOTION TO EXTEND AUTOMATIC STAY  
O.S.T.  
3-28-14 [[18](#)]

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 28, 2014. By the court's calculation, 11 days' notice was provided.

**Tentative Ruling:** The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. 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 Automatic Stay on an interim basis, with the final hearing to be conducted at 3:00 p.m. on May 20, 2014.** 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. § 362(c) extended beyond 30 days in this case.

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

Debtors, JAMES BOHANAN and OCTAVIA BOHANON, hereby move the Court for an Order Extending the Automatic Stay in this case pursuant to 11 U.S.C. §362( c). The motion is based on the Declaration of Debtor, James Bohanon, and on the schedules and plan filed in this matter on March 19, 2014.

Motion, Dckt. 18.

The Motion to Extend the Automatic Stay 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 request that the court reference the Declaration

of Debtor and the schedule and plan filed in this matter. This is not sufficient for the relief requested.

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."

#### **CONSIDERATION OF MOTION BASED ON POSSIBLE HARM TO DEBTORS**

This represents one of those rare situations where the failure to comply with the basic pleading rules in federal court could have disastrous consequences for a debtor and debtor's attorney. In this case the Debtor testifies that he and his wife are more than 70 years old and suffering from health issues which preclude them from working. The Debtors' prior case was premised on the Debtor being able to continue working.



If the court were to deny the Motion due to the defective pleading, the automatic stay would terminate the Debtors fear they would be "hounded" by creditors. A review of Schedule F lists general unsecured claims of just under \$100,000.00 and \$43,004.48 in priority tax claims. Dckt. 1.

The court also notes that the Debtors prior bankruptcy case was not dismissed due to a default in payments, but because the Debtors failed to pay their post-petition income taxes for 2010, 2011, and 2012. Bankr. E.D. Cal. 10-20203, Civil Minutes, Dckt. 103; Motion to Dismiss or Convert Case, Dckt. 88.

The court will consider the Motion on its merits, addressing the defective pleadings with counsel in connection with the final hearing.

#### REVIEW OF MOTION

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtors' second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 10-20203-B-13J) was dismissed on October 23, 2013, after Debtors failed to fully pay their income tax liabilities for the tax years 2010 through 2012, a material default with respect to the confirmed plan. See Order, Bankr. E.D. Cal. No. 10-20203-B-13J, Dckt. 104, October 23, 2013. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

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 if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 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(c) and 1325(a) – but the two basic issues to determine good faith under § 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, Debtor states that this case is different than the last because they have changed their tax withholding and taxes are now being withheld from their social security and pension income. Debtor testifies that with the elimination of outside employment, the problem of calculating

their on-going tax liability will be solved so that the same problem as the prior case will not reoccur.

While the explanation does not fully address why and how they let the prior case be dismissed, it is sufficient for purposes of issuing an interim order extending the automatic stay. Debtor asserts that she will not have to replace her hot water heater, stove or heater unit during this bankruptcy, which was why she could not afford plan payments previously. Debtor now asserts that she has sufficient income that will allow her to perform under the new Chapter 13 plan.

#### **APPEARANCE AT CONTINUED HEARING**

On or before April 11, 2014, counsel for the Debtors shall file and serve a Supplement to the Motion which states with particularity all of the grounds upon which the requested relief is based and any supplemental supporting evidence. Counsel shall not file an "Amended Motion."

Counsel shall appear at the May 22, 2014 hearing, no telephonic appearances to address the issues under this Motion with the court. Additionally, counsel shall confirm her review of Federal Rule of Civil Procedure 7(b), Federal Rule of Bankruptcy Procedure 9013 and 7007, and the Revised Guidelines for Preparation of Pleadings for the Eastern District of California.

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 on an interim basis and the automatic stay is extended through May 30, 2014, pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

**IT IS ORDERED** that the Motion is continued to 3:00 p.m. on May 20, 2014.