UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 3, 2014 at 3:00 p.m.

1.	**14-22500-E-13 NLE-1**	**JOSE ACOSTA GOMEZ AND ANA ACOSTA Mary Ellen Terranella**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 4-24-14 [20]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 24, 2014. By the court's calculation, 40 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan relies on a pending Motion to Value Collateral. The court

having granted the Motion to Value Collateral on April 29, 2014, the Trustee's objection is overruled.

The Chapter 13 Trustee also objects to the plan on the basis that the plan fails the Chapter 7 Liquidation Analysis as the Debtor's non-exempt equity totals $15,103.00 and the Debtor proposes to pay the unsecured creditors a 6% dividend or $6,941.76.

Lastly, the Trustee argues that the Debtor's plan has not been proposed in good faith or is the Debtor's best effort. Trustee states that this is Debtor's second filing and the Trustee's objection filed October 30, 2013 raised in part that the debtors testified that they owned 500 shares in stock which they estimated was worth $50.00 a share (or approximately $25,000.00). The Statement of Financial Affairs in debtors current case, Question #2 reflects the debtors in 2014 sold their stocks in the amount of $39,476.00. (Dckt. 1 at 32.) This sale is not otherwise reflected in the Statement of Financial Affairs or Schedules (bank or investment account), or in any of the forms filed in this instant case when the sale of stocks occurred. The Trustee is concerned that the sale may have taken place without permission while Case #13-32374 was still an open, active bankruptcy.

The Trustee has reviewed bank account statements from Chase and notes that a deposit in the amount of $27,150.40 was made on January 23, 2014. Trustee argues that it is not clear where this large deposit was derived. The Trustee notes that the deposit is $12,325.60 less than the $39,476.00 sale of stock listed on SOFA #2. The Trustee also notes that the Debtors on January 27,2014 made two $11,000.00 withdrawals from their Chase checking account and each deposited or opened a Non-FDIC Investment account with or through J.P. Morgan Securities LLC.

On Schedule B the Debtor's bank accounts total $6,754.00. This is consistent with the bank account balances shown on Schedule B filed in the Debtor's prior bankruptcy case. 13-32377, filed September 22, 2013, Dckt. 1 at 13. However, Schedule B in the current case now lists "IRAs" (no other identification provided) with a value of $22,000.00 (Dckt. 1 at 14), while Schedule B in the first bankruptcy case expressly states "None" for IRAs (13-32377 at 14).

On Schedule B in the current case and in the prior case the Debtors list owing four vehicles (One of which is the 2001 Chevrolet Tahoe which is given a value of $0.00 and stated to be used by son, with the Debtors "on title for insurance purposes only.")

Schedule I lists the Debtor having $1,778.00 a month withheld for taxes, Medicare, and Social Security. This is 20% of the Debtor's gross wage income of $8,468.00 a month. The Debtors also list $4,000.00 a month in rental income. Schedule I, Dckt. 26.

Schedule J lists $2,629.00 a month of payments for principal, interest, taxes, and insurance for the rental property. An additional $350.00 is listed for rental management fee. No expenses are listed for repair, maintenance, utilities, or other normal landlord expenses. *Id.* at 29.

On Schedule J the Debtors list five dependants: three sons, ages 16, 19, 23; mother, age 78; and father, age 83. *Id.* at 51. No income (such as retirement, Social Security, public assistance or aid), economic contribution, or assets for the mother and father.

In response to Question 3 on the Statement of Financial Affairs the Debtor's disclose that an arrearage of $4,473.00 was paid to "Wells Fargo Home Mortgage" in the 90 days prior to the commencement of this second bankruptcy case. *Id.* at 32.

The Chapter 13 Plan in the first bankruptcy case required monthly payments of only $551.00. 13-32374, Dckt. 5. Confirmation of the Debtors' Chapter 13 Plan in that case was denied confirmation based on several grounds. First, the Debtors failed to provide creditors with at least as much as they would receive through a Chapter 7 liquidation. (The Chapter 13 Trustee computing the non-exempt assets to be $40,103.00, which included the theretofore undisclosed stock. The Trustee discovered the existence of the stock by reviewing tax refunds and noting that dividend income was reported.) Second, the Debtors improperly computed their income on Form 22C, and are over-median debtors. *Id.* Civil Minutes, Dckt. 30. The Debtors offered no opposition to the Objection and confirmation of the Chapter 13 Plan was denied by order filed on November 26, 2013. *Id.* Order, Dckt. 32.

The Chapter 13 Trustee then moved to dismiss the Chapter 13 case when the Debtors failed to file an amended Chapter 13 Plan. *Id.* Motion to Dismiss, Dckt. 33. The court filed its order dismissing the case on February 21, 2014. *Id.*, Dckt. 39. The case was dismissed based on the Debtors unreasonable delay which was of prejudice to creditors. *Id.* Civil Minutes, Dckt. 37.

The Debtors offered no opposition to the dismissal of the first bankruptcy case. The Debtors failed to amend Schedule B to truthfully and accurately disclose the $25,000.00 in stocks which had not been listed on the Schedule B filed under penalty of perjury in the first bankruptcy case. The Chapter 13 Trustee did not state in the motion to dismiss an alternative request to convert the case to one under Chapter 7 or state that a grounds for dismissal could have been the failure to disclose the $25,000.00 in stocks and the failure of the Debtors to correct the erroneous statement under penalty of perjury.

It appears that what has transpired is that the Debtors, caught in a deception in the first bankruptcy case took advantage of the Trustee not identifying for the court the deception relating to the unidentified assets. Rather than correcting the erroneous statements under penalty of perjury and properly prosecuting the first bankruptcy case, the Debtors let it be dismissed, liquidated the hidden asset, diverted some of it to other purposes, and now attempt to exempt this non-exempt asset in the first bankruptcy case.

Very serious good faith issues are raised by the conduct of the Debtors. The information provided in this case is incomplete at best, and again intentionally inaccurate at worse.

Based on the foregoing, 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 Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

2. 10-53003-E-13 SCOTT/ANA PANNETTA — MOTION TO MODIFY PLAN
RWH-3 Ronald W. Holland — 4-14-14 [58]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 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).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 14, 2014. By the court's calculation, 50 days' notice was provided. 35 days' notice is required.

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

The court's decision is to deny the Motion to Confirm the Modified Plan.

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 plan filed as Docket No. 59 is not legible. A facsimile copy of the plan was filed and the Trustee is unable to ascertain the numbers in the plan even after enlarging the text.

The Trustee also opposes the motion on the basis that the Declaration provided does not provide facts that allow the court to conclude that the code has been satisfied, such as:

a) The modified plan is the form plan required by the Court

b) The total amount the Debtor has paid into the plan as of a date certain

c) The amount of non-exempt equity, where the Debtor valued the property and claimed the amount of exemptions

d) The treatment of secured claims, and whether it has changed from the confirmed plan

e) The Debtor's employment and length of employment, and if the Debtor had become delinquent under the plan, why the Debtor became delinquent and why the Debtor will no longer fall delinquent under the plan.

The Trustee also states that the Internal Revenue Service was not properly served pursuant to Local Bankruptcy Rule 2002-(c).

Lastly, the Trustee states that he is uncertain as to the attorney representing the Debtors. The petition and all subsequent filings prior to this motion in the case were by Litchney Law Firm, P.C., Lucas B. Garcia, attorney. The current motion has been filed by Hernandez Law Group, Inc, Ronald W. Holland, attorney. The Court's docket reflects both Ronald W. Holland and Sarah Litchney as the debtors attorneys. The Trustee can not locate on the courts docket any substitution of attorneys or order substituting attorneys.

The Supplemental Declaration does testify that Ana Pannetta full time employment was terminated and she has been reduced to a 24 hour a week part-time employee, her wages decreased to $11.00 an hour (from $15.46 an hour for 40 hours a week). The Debtors testify that they have been able to reduce their expenses from ($5,578.00) to ($4,605.00), which was possible due to their mortgage payment being reduced from ($2,992.00) to ($1,082.00) a month. FN.1. Supplemental Declaration, Dckt. 72.

FN.1. It appears that the statement that the mortgage payment was ($2,992.00) is a typographical error, as original schedule J states that the monthly mortgage payment was ($1,992.00) when the case was commenced. If this error occurred in a brief prepared by counsel, the court could readily acklowedge it as a mere error. However, this statement is made by the Debtors under penalty of perjury – after their careful and thoughful consideration fo their testimony under penalty of perjury with their attorney. Two reasons for such a glaring error come to mind for the court. First, the Debtors did not bother to read the declaration and counsel does not make sure that clients read and confirm their testimony under penalty of perjury before it is filed with the court. Alternative, the Debtors read the declaration and did not care what it stated, “so long as it means we win.” Neither bodes well for the Debtors and puts in question their credibility as witnesses.

Debtors has also filed Supplemental Schedules I and J showing adjusted income and expenses for the Debtors. Dckt. 70 at 4-8. The Debtors have a family unit of three persons, and also list an adult niece and grand niece who live with them (but do not show any wage, income, benefits, or assistance for these two additional persons).

On Supplemental Schedule J the Debtors list $650.00 a month for transportation expenses, plus an additional $300.00 a month for maintenance

and registration. However, on Schedule B the Debtors state under penalty of perjury that they own no vehicles. Dckt. 1 at 20. Though the Debtors have amended or supplemented Schedules I and J several times, Schedule B has never been amended.

Though the Debtors state that their mortgage payment has been reduced by $1,910.00 a month, the court cannot identify approving any post-petition credit or modification of any loans. The original plan filed in this case provided for paying "Wells Fargo Home Mortgage" $1,902.20 a month as a Class 4 Claim. It does not appear that there has been any post-petition reduction in the mortgage expense, and as such, it cannot be a basis for the Debtors reducing their expenses to account for Mrs. Pannetta's income.

If there has been an unapproved post-petition change in the mortgage payment, then the issue arises as to when it occurred, why approval was not sought, and for how long the Debtors the Debtors have been taking for undisclosed purposes an additional $900.00 a month in projected disposable income.

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

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

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

3. 10-53003-E-13 SCOTT/ANA PANNETTA
DPC-1 Ronald W. Holland

CONTINUED MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
2-27-14 [53]

CONT. FROM 4-16-14

Tentative Ruling: The Motion to Dismiss Case 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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, and Office of the United States Trustee on February 27, 2014. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is continued to --------- for further hearing and counsel to appear and report who is counsel for this Debtor..

PRIOR HEARING

Delinquent

The Trustee seeks dismissal of the case on the basis that the Debtor is $1,011.00 delinquent in plan payments, which represents multiple months of the $345.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

CONTINUANCE

The court continued the hearing to Dismiss to allow Debtor to file and serve supplemental declaration and pleadings and to give notice of the hearing date on Debtor's Motion to Confirm Chapter 13 Plan.

Though dismissal of this case would be appropriate, it is not clear

which attorneys bear the responsibility for the dismissal. When the case was filed Lucas Garcia, of the Litchney Law Firm, P.C., signed the Petition and was counsel for the Debtors. Dckt. 1.

On February 27, 2014, the Chapter 13 Trustee filed his motion to dismiss due to the Debtors being $1,011.00 delinquent in plan payments. This precipitated the filing of a First Modified Plan and Motion to Confirm by the Debtors – for which Ronald Holland, of the Hernandez Law Group, Inc. appear as counsel for the Debtors. No substitution of attorneys has been filed or motion to substitute counsel if a substitution could not be executed.

Before the court dismisses this case, the various attorneys must appear in court to confirm (1) who is the attorney for Debtors, and (2) how it has come about that the attorney of record has disappeared and a non-attorney of record appears in the case. The court orders the following attorneys to appear at the continued hearing to address the above issues.

Lucas Garcia, Esq.
Sarah Litchney, Esq.
Ronald Holland, Esq.
Kristy Hernandez, Esq.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is continued to 10:00 a.m. on --------, 2014.
>
> **IT IS FURTHER ORDERED** that the following attorneys shall appear at the continued hearing, no telephonic appearances permitted:
>
> Lucas Garcia, Esq.
> Sarah Litchney, Esq.
> Ronald Holland, Esq.
> Kristy Hernandez, Esq.
>
> The Clerk of the Court shall serve each of the attorneys with this order at their most current address listed with this court.

4. 14-23504-E-13 SHERMAN/MAXINE THOMPSON MOTION TO VALUE COLLATERAL OF

SJC-2 Scott J. Sagaria EMC MORTGAGE, LLC
4-23-14 [24]

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 23, 2014. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of EMC Mortgage, LLC, "Creditor," is granted.

The Motion to Value filed by Sherman and Maxine Thompson, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 11 Parkshore Circle, Sacramento, California, "Property." Debtor seeks to value the Property at a fair market value of $321,486.00 as of the petition filing date. As the owner, 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 senior in priority first deed of trust secures a claim with a balance of approximately $480,292.87. Creditor's second deed of trust secures a claim with a balance of approximately $53,850.73. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments in the secured amount of the claim 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 Sherman and Maxine Thompson, "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 EMC Mortgage, LLC secured by a second in priority deed of trust recorded against the real property commonly known as 11 Parkshore Circle, 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 $321,486.00 and is encumbered by senior liens securing claims in the amount of $480,292.87, which exceed the value of the Property which is subject to Creditor's lien.

5. 14-23604-E-13 SHAWN NORWOOD
SAC-1 Scott A. CoBen
MOTION TO VALUE COLLATERAL OF ONEMAIN FINANCIAL, INC.
4-22-14 [15]

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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 April 22, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Onemain Financial, Inc., "Creditor" is granted.

The Motion filed by Shawn Norwood, "Debtor," to value the secured

claim of Onemain Financial, Inc., "Creditor," is accompanied by Debtor's declaration. Debtor is the owner of a 2003 Ford Mustang with 140,000 miles, "Vehicle." The Debtor seeks to value the Vehicle at a replacement value of $4,825.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $10,191.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $4,825.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Shawn Norwood, "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 Onemain Financial, Inc., "Creditor," secured by an asset described as 2003 Ford Mustang, "Vehicle," is determined to be a secured claim in the amount of $4,825.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $4,825.00 and is encumbered by liens securing claims which exceed the value of the asset.

6. 14-22510-E-13 ALFRED/MONICA SALAZAR
NLE-1 Aaron C. Koenig

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
4-24-14 [28]

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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 April 24, 2014. By the court's calculation, 40 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The court's decision is to overrule the Objection as moot.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on April 29, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot and the plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to 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 overruled as moot.

7. 13-35016-E-13 NAMATH KANDAHARI **MOTION TO CONFIRM PLAN**
TJW-2 **4-14-14 [63]**
CASE DISMISSED 4/23/14

Final Ruling: No appearance at the June 3, 2014 hearing is required.

The case having previously been dismissed, the Motion is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

8. 14-23317-E-13 MARIA OCHOA
TSB-1 Harry D. Roth

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
5-8-14 [20]

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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 May 8, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The court's decision is to overrule the Objection as moot.

Subsequent to the filing of this Motion, the Debtor filed a first amended Plan on May 19, 2014. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot and the plan is not confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to 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 overruled as moot.

9. 13-30919-E-13 BUN AUYEUNG AND SOO TSE — CONTINUED MOTION TO AVOID LIEN
PGM-4 Peter G. Macaluso — OF BARTON AND PAULA CHRISTENSEN
1-29-14 [104]

CONT. FROM 4-22-14, 3-4-14

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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

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

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

The court's decision is to continue the hearing on the Motion to Avoid a Judicial Lien to 3:00 p.m. on June 10, 2014.

JUNE 10, 2014 HEARING

The court continued the hearing for a status conference to schedule discovery in connection with a plan, if any. The court notes that Debtor filed and set a Chapter 13 Plan for July 1, 2014.

APRIL 22, 22014 HEARING

The court continued the hearing to allow the parties to brief the specific issue of judicial estoppel.

On March 19, 2014, Barton and Paula Christensen ("Creditor") filed their supplemental brief. Creditor argues that Debtors are confusing the doctrines of equitable estoppel and judicial estoppel. Mr. Macaluso claimed that the element of "reliance" was missing, but this is not an element of judicial estoppel. Creditor argues that because the integrity of the judiciary would be threatened by allowing Debtors to proceed with its Motion on this third attempt and Second Bankruptcy, judicial estoppel is appropriate. Dckt. 129.

On April 1, 2014, Movant filed their supplemental brief, arguing that the particular facts and circumstances here are that the debtors have not adopted any inconsistent positions, no inconsistent statements, which were accepted by the court, or would provide the debtors with an unfair advantage if not estopped. Debtor argues that there are two separate and distinct bankruptcy estates, two filing dates, two case numbers, two exemptions allowances, two fair market values, and two entirely different

cases and as such, judicial estoppel is not applicable. Dckt. 135.

PRIOR HEARING

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

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

CREDITOR'S OPPOSITION

Barton and Paula Christensen ("Creditor") oppose the motion on the basis that the claim has been merged into judgment, *res judicata* and collateral estoppel apply, double recovery applies and the Debtors acted in bad faith.

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

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

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

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

LEGAL STANDARDS

Collateral Estoppel and Res Judicata

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

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

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

Additionally, the determination of value for purposes of 11 U.S.C. § 506(a) is made only for specific purposes and the value may be determined at different times depending on the purpose of the valuation. In *Gold Coast Asset Acquisition, L.P. v. 1221 Veteran Street Co. (In re Veteran Street Co.)*, 144 F.3d 1288 (9th Cir. 1998), the Ninth Circuit Court of Appeals concluded that a valuation of property pursuant to 11 U.S.C. § 506(a) was not binding between the parties when it was not being used for the purpose for which the valuation was made in that case (confirmation of plan).

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

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

The party "asserting collateral estoppel carries the burden of proving a record sufficient to reveal the **controlling facts** and pinpoint the exact issues litigated in the prior action." *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995)(emphasis added); cited by *In re*

Lambert, 233 Fed. Appx. 598, 599 (9th Cir. 2007). If the Court has a reasonable doubt as to what was actually decided by the prior judgment, it will refuse to apply preclusive effect. *Id.*

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

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

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

In the Debtors first Chapter 13 case, which was converted to one under Chapter 7, the court granted the Debtor's motion to avoid Creditor's judgment lien on the Point Pleasant Property. In granting that motion, the court determined the value of the subject real property as of the date of the filing of the petition in order to apply the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A). The Order determined that the judgment lien of Barton and Paula Christensen against the real property commonly known as 6311 Point Pleasant Road, Elk Grove, California, was avoided pursuant to section 11 U.S.C. § 522(f)(1)(A) for all amounts of the judgment in excess of $140,000.00. Order Granting Motion to Avoid Lien that Impairs and Exemption Pursuant to Section 522(f)(1)(A); 09-35065 Dckt. 108. The exemption protected by this avoiding pursuant to 11 U.S.C. § 522(f) was in the amount of $150,000.00 claimed pursuant to California Code of Civil Procedure § 704.730(a)(3).

In the prior Chapter 7 case the Debtors filed a second motion to avoid the lien of creditors, seeking to assert a $150,000.00 exemption pursuant to California Code of Civil Procedure § 704.730(a)(3), based upon one of the Debtors having aged sufficiently during the four years of that case to qualify for a higher exemption. 09-35065 Dckt. 246. The court denied the second motion to avoid the lien, holding that the exemption amount and value of the property and the amount of the exemption were properly determined at the time the case was filed. Civil Minutes, *Id.* at 271.

The Debtors' prior Chapter 7 case was closed on August 19, 2013, four years after the Debtors commenced that case under Chapter 13. The present case was filed on August 9, 2013. In the present Chapter 13 case the Debtors have sought to have the court avoid the Creditor's lien based on the amount of the exemption and value of the Property as of August 19, 2013.

Through the Motion now before the court Debtors seek to have the judicial lien avoided a second time in the present Chapter 13 case. Beginning with the plain language of 11 U.S.C. § 522, the framework for this

analysis is as follows:

a. The term “value” means “fair market value as of the date of the filing of the petition, or with respect to property that becomes property of the estate, as of the date such property becomes property of the estate. 11 U.S.C. § 522(a)(2).

b. The statutory exemption claimed by the Debtors arises under California law. 11 U.S.C. § 522(b)(2), California Code of Civil Procedure § 704.730(a)(3).

c. A debtor may avoid the fixing of any lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled to under 11 U.S.C. § 522(b), if such lien is –

i. A judicial lien securing a debt (other than debt nondischargeable pursuant to § 523(a)(5). 11 U.S.C. § 522(f)(1)(A).

California Code of Civil Procedure § 703.140 states,

(a) In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter, including the homestead exemption, other than the provisions of subdivision (b) are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:

(1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(2) If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision

(b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):

(1) The debtor's aggregate interest, not to exceed twenty-four thousand sixty dollars ($24,060) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence.

Thus, Section 703.140 allows debtors to choose either the exemptions that state law already provides for judgment debtors or to choose the exemptions contained therein.

The Exemption claimed by Debtors arises under California Code of Civil Procedure § 704.730(a)(3) and is in the amount of $175,000.00. The Debtors value the Property at $185,000.00, based on the appraisal testimony of David LaBella.

California Code of Civil Procedure § 704.730(a)(3) provides that the "homestead exemption" is provided to be $175,000.00 if the judgment debtor or spouse who reside in the homestead, at the time of the attempted sale, are (1) 65 years of age or older, (2) physically or mentally disabled, or (3) at least 55 years of age and have a gross income of not more than $25,000.00 if single or not more than $35,000.00 if married.

The section in its entirety states,

§ 704.730. Amount of homestead exemption

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars ($75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars ($100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) One hundred seventy-five thousand dollars ($175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:

(A) A person 65 years of age or older.

> (B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

Cal. Code Civ. Proc. § 704.730.

State law generally determines the existence and scope of the debtor's interest in property. *Butner v. United States*, 440 U.S. 48, 54 (1979). Absent some compelling federal interest requiring a different result, there is no reason why property interests should be analyzed differently simply because one of the parties is in bankruptcy. *Id.* Notwithstanding this general proposition, the role of § 522(f) in providing the debtor a fresh start constitutes such a compelling federal interest that it provides a debtor with greater rights in bankruptcy than generally available under state law. *In re Mulch*, 182 B.R. 569, 574 (Bankr. N.D. Cal. 1995).

It is well-settled that a debtor's exemption rights are determined as of the petition date. *In re Herman*, 120 B.R. 127, 130 (B.A.P. 9th Cir. Cal. 1990). Absent conversion from one chapter to another, the nature and extent of a debtor's exemption rights are determined as of the date of the petition. *Id.*, *see also In re Seyfert*, 97 Bankr. 590 (Bankr. S.D. Cal. 1989); *In re Magallanes*, 96 Bankr. 253, 255 (9th Cir. BAP 1988). As discussed in *In re Herman*, this reasoning is consistent with bankruptcy's fresh start purposes,

> A debtor undergoes the significant detriments inherent in filing bankruptcy in exchange for protection from certain creditors and a "fresh start." The ability to exempt property and avoid certain liens on exempt property is intended to facilitate the fresh start. See *Galvan*, 110 Bankr. at 449-51. If a judgment creditor were allowed to use post-petition events to defeat an exemption or defeat an attempt to avoid a judicial lien under section 522(f), the fresh start purposes of the Code would be significantly eroded. Furthermore, this reasoning does not conflict with the holding of prevailing Ninth Circuit authority such as In re Cole, supra, and In re Golden, 789 F.2d 698 (9th Cir. 1986), neither of which specifically discuss the relevant date for determining the existence of a homestead exemption.

Therefore, the nature and extent of debtor’s exemption rights are determined under the applicable state law as of the date of the petition, August 19, 2013. Petition, Dckt. 1.

Equitable Doctrines

The key difference between the doctrines of claim and issue

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

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

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

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

> Independent of unfair advantage from inconsistent positions, judicial estoppel may be imposed: out of "general consideration of the orderly administration of justice and regard for the dignity of judicial proceedings;" or to "protect against a litigant playing fast and loose with the courts." *Hamilton*, 270 F.3d 778 at 782; *Russell*, 893 F.2d at 1037. Moreover, it may be invoked "to protect the integrity of the bankruptcy process." *Hamilton*, 270 F.3d 778 at 785.

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

In addressing judicial estoppel, the Supreme Court has stated,

"Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (CA5 1993). See In re Cassidy, 892 F.2d 637, 641 (CA7 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (CA4 1982) (judicial estoppel "protects the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (CA3 1953) (judicial estoppel prevents parties from "playing 'fast and loose

with the courts'" (quoting Stretch v. Watson, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (CADC 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell v. Rolfs*, 893 F.2d 1033, 1037 (CA9 1990) (citation omitted)."

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001)

The Supreme Court identified several typical factors to be considered:

A. "[A] party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997)."

B. "[C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See Hook, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939."

C. "[W]hether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See Davis, 156 U.S. at 689; Philadelphia, W., & B. R. Co. v. Howard, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano*, 203 F.2d at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782."

D. "In enumerating these factors, [the Supreme Court does not] establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts."

Id. at 750-751.

In *Ah Quin v. County of Kauai DOT*, 733 F.3d 267 (9th Cir. 2013), the Ninth Circuit Court of Appeals addressed the application of judicial estoppel to bar a debtor from asserting claims in a subsequent law suit with the debtor failed to on the bankruptcy schedules. In deciding whether the debtor was barred from asserting the claims in the subsequent action, the Ninth Circuit determined that even though the debtor had subsequently

amended her schedules to list the claim, three primary factors had been met: (1) misstatement which created an inconsistency, (2) bankruptcy court having accepted the contrary position (the schedules having been filed and relied upon), and (3) it was to the debtor's unfair advantage (attempting to get the claim by the bankruptcy trustee and creditors). The issue for remand to the district court was whether it was an inadvertent misrepresentation or intentional.

DISCUSSION

Prior Rulings and Bankruptcy Case

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

> "Rather than proceeding in good faith to timely comply with the confirmed bankruptcy plan, the Debtors have demonstrated that they are merely engaging in a gamble on the current real estate market. The Debtors are gambling with the creditors' money that the market will rise, allowing the Debtors to pocket more money from a sale. If the market goes down, then creditors can bear the risk (suffer the loss).
>
> The Debtors have obtained two and one-half years of bankruptcy court protection, with all to show is that they will, sometime in the future, do what they have promised to do in the past if they determine that the real estate market has risen high enough for them to make more money by improperly delaying creditors.
>
> The Debtors are not appearing, testifying, and making representations to this court in good faith. Rather, they have acted to mislead the court, creditors, the Chapter 13 Trustee, and other parties in interest.
>
> No evidence is filed in opposition to the Motion to Dismiss, but merely short arguments of counsel. Such argument is not evidence of the facts alleged therein. The absence of such evidence causes the court to infer that such information is wholly unsupported. Even when afforded the opportunity to file supplemental pleadings, the Debtors merely had their attorney file a Supplemental Reply arguing why the case should not be dismissed. The Debtors have been careful not to make any statements under penalty of perjury to the court.
>
> At the January 9, 2013 hearing the Debtors asked the court to continue the hearing to allow Debtors to sell the property. Such would allow them to profit from their misrepresentations to the court. Debtors' supplemental

opposition states that Debtors have obtained a real estate agent and that the sale price is listed as $200,000 instead of the $250,000 initially stated by Debtors. Counsel for the Debtors argues that a modified plan will provide for all increases in value to go to creditors, with the Debtors reducing their exemption. However, the court's review of the docket indicates that a modified plan has not been filed.

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

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

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

The Debtors, in responding to this Motion, have been very careful not to provide any explanation under penalty of perjury as to the efforts they made to market and sell the property. From this lack of testimony the court infers that such testimony would be adverse to the Debtors – showing that they did not attempt to actively market and sell the property as required under the confirmed Fourth Amended Chapter 13 Plan.

...

The Debtors' conduct in this case under the confirmed plan have been in bad faith. Though representing to the

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

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

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

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

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

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

Additional Arguments at the Hearing

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

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

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

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

These Debtors committed as part of their Chapter 13 Plan to conduct an orderly liquidation sale of the property. See November 14, 2011 Order Confirming Plan, Dckt. 182. The court confirmed a plan which allowed the Debtors until September 2012 to complete a sale of the property. This case having been filed in 2009, the Debtors had effectively used the Chapter 13 case to forestall any payment to Christensen for more than 3 years before they had to complete the promised liquidation of the real property. The Debtors convinced the court that the delay in confirming the

plan for two years, and then getting another year to sell the property was reasonable, even though they had not made any plan payments to Christensen.

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

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

...

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

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

The court is also not impressed by the plea that the Debtors are 80 year old people living on retirement pensions. At one point counsel's arguments bordered on contending that his clients were and are incompetent. That cannot be true as they have actively sought and obtained orders from this court, in response to the Trustee's Motion they advanced a modified plan to let them serve as Debtors in a Chapter Plan for 2 more years while the "actively" liquidated the Property, and they successfully prosecuted litigation against Christensen for violating the automatic stay. If the Debtors were not competent or capable of performing a plan which provided for liquidation of the Property, counsel would not have proposed, obtained confirmation of, or seek to have the Debtors fulfill duties under a modified plan for another two years.

Finally, conversion of the case is of little moment to the Debtors if their only concern is the exemption. They have a $150,000.00 exemption they have claim in this

> property. Amended Schedule C, Dckt. 46. If they are correct and the Christensen claim is $30,000, then the property would have to sell for in excess of $200,000 for there to be any money in excess of the Christensen claim and their homestead exemption. (Assumes a $200,000 sales price, 8% seller costs of sale, and prorated real property taxes.) If it is true that the property has a value in excess of $200,000, then it further highlights the Debtors bad faith in not proceeding with the required liquidation by September 2011."

09-35065, Civil Minutes, Dckt. 214.

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

Rulings on Motion to Avoid Lien in Prior Case

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

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

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

> The issue of avoiding the judgment lien between the Debtors and Creditors has been determined by final order of this court in this bankruptcy case. Once a final order or judgment has been entered, relief may be sought by appeal or pursuant to Federal Rule of Civil Procedure 60. Moores Federal Practice Third Edition, § 132.20[2]. Here, the prior order avoiding the judgment lien of creditors was a final

and appealable judgment. The Bankruptcy Code expressly provides that such order remains in full force and effect unless the bankruptcy case is dismissed. 11 U.S.C. § 349(b)(1)(B). No other provision exists under the Bankruptcy Code setting aside a final order avoiding a judgment lien, other than by appeal or relief under Rule 60.

The court concludes that the provisions of 11 U.S.C. § 348(f)(1)(B) and (C) do not work to set aside the final order avoiding the Creditors lien in this case. The focus of these provisions are valuations of claims, for which property must be valued, for treatment of the claims in the bankruptcy case. Commonly, a creditors secured claim is valued pursuant to 11 U.S.C. § 506(a) to reduce the amount which has to be paid as a secured claim through a plan. This allows the debtor to obtain a lien strip and have the lien removed from his or her property upon payment of less than the full amount of the secured debt. See *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), affd., 469 B.R. 803 (ED Cal. 2012) (discussion of lien striping in Chapter 13 case), and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013). The Debtors in this case did not seek to value Creditors secured claim pursuant to 11 U.S.C. § 506(a) or obtain a lien strip through a completed plan. Rather, the Debtors sought and obtained an order avoiding Creditors lien, irrespective of whether the Chapter 13 Plan was ever completed. A reading of 11 U.S.C. § 548(f)(1)(B) shows that it applies to situation where two conjunctive conditions are met, valuations of property and allowed secured claims. The valuation of property which secures a claim is a necessary determination of a secured claim pursuant to 11 U.S.C. § 506(a), which instructs the court the methodology for determining the value of a secured claim (emphasis added),

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

The Ninth Circuit Court of Appeals addressed the issue of the effect of a valuation of property and allowed secured claim pursuant to 11 U.S.C. § 506(a) in *Gold Coast Asset Acquisition, L.P. v. 1441 Veteran Street Co. (In re 1441*

Veteran Street Co.), 144 F.3d 1288 (9th Cir. 1998). In holding that a § 506(a) valuation was binding only to the extent of the purpose for which it was made, the court stated,

> Section 506(a) operates to bifurcate a secured creditor's allowed claim into secured and unsecured interests based upon the bankruptcy court's valuation of the secured property. See *Dewsnup*, 112 S. Ct. at 777. A valuation under section 506(a), however, appears to be linked to its identified purpose - e.g., a plan of reorganization. Section 506(a) instructs the bankruptcy court to value the property "in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a); see *In re Madera Farms Partnership*, 66 B.R. 100, 104 (BAP 9th Cir. 1986) ("The need to look at the purpose of the valuation appears to have achieved virtually universal acceptance."). It follows that when the purpose behind a particular valuation no longer exists, that valuation becomes irrelevant.
> ...
> In the present case, the bankruptcy court valued the Property in light of Veteran's proposed plan of reorganization. Since the bankruptcy court rejected the plan, the valuation of the Property served no purpose under the Bankruptcy Code. Therefore, the valuation should not affect Gold Coast's rights to post-petition rents under section 552.

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

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

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

Central to this claims preclusion doctrine or the concepts of merger and bar. The concept of merger holds that when a plaintiff succeeds in litigation and recovers a valid and final personal judgment, the plaintiffs claim is merged into the judgment, and the original claim and all defenses to it, whether asserted or not, are extinguished. The plaintiffs

> rights and the defendants liabilities are thereafter determined by the judgment. If the plaintiff loses the litigation, the resultant judgment acts as a bar to any further actions by the plaintiff on the same claim, with certain limited exceptions. By definition, merger and bar prohibit claim-splitting. All facts, allegations, and legal theories which support a particular claim, as well as all possible remedies and defenses, must be presented in one action or are lost (see §§ 131.20-131.24).
>
> Moores Federal Practice, Third Edition, § 131.01. The Ninth Circuit Court of Appeals addressed the application of this principal to orders in bankruptcy court (an order approving the sale of property) in Robertson v. Isomedix, Inc. (In re International Nutronics), 28 F.3d 965 (9th Cir. 1993), cert. denied 513 U.S. 2016 (1994).
> ---
> FN.2. Federal Rules of Bankruptcy Procedure 9001 and 9002 defines the term Judgment to mean any appealable order and include any order appealable to an appellate court. The order avoiding the judgment lien issued by the court previously in this case could have been appealed to an appellate court.
> ---
> The court having entered a final order avoiding Creditors judgment lien, it cannot now be relitigated by Debtors. There remains no case or controversy for this court to exercise federal court jurisdiction, all such claims having been merged into the prior final order.

Civil Minutes, Dckt. 271.

Judicial Estoppel

The court finds that the equitable doctrine of Judicial estoppel encompasses this very situation. The court must preserve the integrity of the judicial process, and Debtors clearly are attempting to abuse the process by filing a sham Chapter 13 plan and avoiding the lien of the Christensen. Debtors filed this bankruptcy after the dismissal of the prior bankruptcy, admitting that they would be able to reap the benefit of a higher homestead exemption if they were to refile. Bankr. E.D. No. 09-35065, Civil Minutes, Dckt. 214. The Debtors are not entitled to reap the benefits of an increased exemption and therefore avoiding more of the Creditor’s lien based on their prior bad faith.

While the Debtor attempt to disengage the current bankruptcy filing from their prior case, and their conduct in that case, the federal courts are not so nearsighted. The Debtors intentionally and willfully misrepresented to this court the terms of their Chapter 13 Plan. The court relied on their statements under penalty of perjury in confirming the Chapter 13 Plan in the prior case. Through their misrepresentations, the Debtors management to confirm a plan and exhaust four years of judicial time and resources. This Chapter 13 case is one more step by the Debtors in their plan to delay, abuse (both the Creditors and the court), avoid performing, not following through with the obligations of a Chapter 13

debtor, and taking what they want, when they want it.

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

The Debtors' strategy was to not perform the Chapter 13 Plan in the prior case, going as far (or doing so little) as not engaging an active real estate broker to market and sell the property necessary to fund their Chapter 13 Plan. When caught in their deception, the Debtor and their counsel feigned ignorance that they were required to hire a broker and sell the property – notwithstanding the express term stated in the order confirming the Plan which was prepared by Debtors' counsel.

The Debtors, now are not satisfied with the arguments they made, the positions they took, the rulings made by the court after an evidentiary hearing, and the relief they obtained in the prior evidentiary hearing and bankruptcy case. They want to relitigate the issues, putting the court and Creditor to more cost and expense. Quite likely, if they do not like the result from a new evidentiary hearing, the Debtors will just file another case and re-relitigate the matter.

It is proper for the court to apply judicial estoppel to the Debtors in their repeated quest to abuse the Bankruptcy Code and federal judicial process. The Debtors' strategy of repeatedly litigating the issue in a series of bankruptcy cases, changing what they want puts the Debtors at an unfair advantage to the Christensen.

CHAPTER 13 PLAN IN THIS CASE

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

The Debtors admit that they have no income with which to fund a plan. Debtors' household income totals $1,466.40 and of that amount $50 is received by Bun Auyeung from Social Security, $866.40 is received by Soo Tse from Social Security and the balance $550 is provided by "assistance from daughter." Schedule I, Dckt.1, page 29. Rather than a good faith plan being funded by the Debtors, some other family members appear to be pulling the strings, quite possibly for their own financial advantage. The Debtors appear to be the poor sacrificial lambs who are being deprived of their homestead exemption while other family members appear to be lining their pockets with future gain.

Debtors Do Not Qualify as Chapter 13 Debtors

The court notes that under 11 U.S.C. § 109(e), only an individual with regular income . . . may be a debtor under chapter 13 of this title. The phrase individual with regular income is defined in section 101 of the Code to mean an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title. Many courts have held that gifts do not meet the statutory requirement for a Chapter 13 Debtor to have regular income. *In re Iacovoni*, 2 B.R. 256, 260 (Bankr. Utah 1980) (must be regular income from some source, even if welfare, pensions, or investment income); *In re McGowan*, 24 B.R. 73, 74 (Bankr. N.D. Ohio 1982); *In re Campbell*, 38 B.R. 193 (Bankr. ED NY 1984); *In re Cregut*, 69 B.R. 21, 22-23 (Bankr. Ariz 1986).

See also Tenney v. Terry, (In re Terry), 630 F.2d 634, 635 (8th Cir. 1980) (We think that § 101(24) contemplates that a debtor make payments, and that the debtor's income sufficiently exceeds his expenses so that he can maintain a payment schedule. The key statutory language is "make payments." The debtors in this case have no excess income out of which to "make payments," and therefore, they are not eligible for Chapter 13 relief under § 109(e).); *In re Welsh*, 2003 Bankr. LEXIS 2246 (Bankr. Idaho 2003) (Most courts have concluded that neither § 101(30) nor § 1325(a)(6) can be satisfied by gratuitous or volunteered contributions by nondebtor third parties. *See, e.g., In re Jordan*, 226 B.R. 117, 119-20 (Bankr. D. Mont. 1998); *In re Williams*, No. 97-08824-W, 1998 WL 2016786 (Bankr. D. S.C. Jan. 13, 1998); see also 2 L. King, Collier on Bankruptcy P 101.30[4], p. 101-97 (rev. 15th ed. 2002).).

The Debtors admit that they have not regular monthly income sufficient to fund a plan. Rather, instead of a good faith plan being funded by the Debtors, some other family members appear to be pulling the strings, quite possibly for their own financial advantage. The Debtors appear to be the poor sacrificial lambs who are being deprived of their homestead exemption while other family members appear to be lining their pockets with future gain.

The Debtors will be able to fund only $3,600.00 of the required $16,600.00 require plan payments. First Amended Plan, Dckt. 102. Thus, 78% of the plan must be funded with gifts – not the Debtors' regular income. The Debtors are not individuals with regular monthly income to fund a plan. 11 U.S.C. § 109(e). Rather, they appear to be individuals who are being used for others to "buy" a Chapter 13 Plan through the Debtors.

The Debtors do not quality as Chapter 13 Debtors as required by 11 U.S.C. § 109(e).

The Chapter 13 Plan Was Not Proposed or Prosecuted in Good Faith

As addressed above, the Debtors do not meet the minimum qualifications to be Chapter 13 Debtors. They do not have regular monthly income with which to fund a Chapter 13 Plan. Instead others are funding a Plan solely for the purpose of stripping the judgment lien of Barton and Paula Christensen even more than was previously done in the Debtors' prior Chapter 13 case which was converted to Chapter 7.

This Chapter 13 Plan is not in good faith and is merely a disguised repeat Chapter 7 liquidation filed solely for the purposes of decreasing the lien claim of the Christensen.

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

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

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

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

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

Schedules, Dckt.1.

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

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

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

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

Third, in April 2012, the court granted judgment for the Debtors in the amount of $15,259.95 (of which $3,900.00 was for legal fees) against Christensen. Judgment, 10-2497 Dckt. 72. Though presumably collected, this $15,259.95 is not otherwise accounted for by these Debtors who present themselves as qualified Chapter 13 Debtors. Possibly these monies were taken from the Debtors by those who are calling the financial shots and looking to invest $13,000.00 to take even more through the Debtors' homestead exemption.

This is a very sad state of affairs, which may very well warrant inquiry on many fronts concern the possible abuse of these Debtors. The court reviewed the photos of the home in the appraisal provided by the Debtors. It appears there are severe habitability issues.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the hearing on the Motion to Avoid Judicial Lien is continued to 3:00 p.m. on June 10, 2014.

10. 14-23325-E-13 ESMATULLAH NAYEBKHIL **OBJECTION TO CONFIRMATION OF**
TSB-1 Peter L. Cianchetta **PLAN BY TRUSTEE DAVID P. CUSICK**
5-8-14 [16]

DISMISSED 5-28-14

Final Ruling: No appearance at the June 3, 2014 hearing is required.

The case having previously been dismissed, the Objection is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation of Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is dismissed as moot, the case having been dismissed.

11. 13-22028-E-13 FAITH EVANS
BLG-3 Bruce Charles Dwiggins

OBJECTION TO CLAIM OF SOUTHERN WINE & SPIRITS OF NORTHERN CALIFORNIA, CLAIM NUMBER 12
4-22-14 [94]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on April 22, 2014. By the court's calculation, 42 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

Due to the nature of the objection and the Creditor being provided with all but two days of the extended notice required under the Federal Rule of Bankruptcy Procedure and Local Bankruptcy Rules, the court shortens the notice period to 42 days.

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim number 12 of Southern Wine and Spirits of Northern California is sustained and the claim is disallowed in its entirety.

Faith Evans, the Debtor ("Objector") requests that the court disallow the claim of Southern Wine and Spirits of Northern California ("Creditor"), Proof of Claim No. 12 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $6,200.50. Objector asserts that the Claim has not been timely not timely filed. *See* Fed. R.

Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is July 10, 2013. Notice of Bankruptcy Filing and Deadlines, Dckt. 16.

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

The deadline for filing a Proof of Claim in this matter was July 10, 2013. The Creditor's Proof of Claim was filed March 17, 2014. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety as untimely. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Southern Wine and Spirits of Northern California, Creditor filed in this case Faith Evans, Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 12 of Southern Wine and Spirits of Northern California is sustained and the claim is disallowed in its entirety.

12. 10-46331-E-13 ALEJANDRO/KERRI HOUSER
DPC-1 John David Maxey

CONTINUED DEBTORS' MOTION OBJECTING TO THE TRUSTEE'S NOTICE OF DEFAULT AND APPLICATION TO DISMISS CASE 2-6-14 [138]

CONT. FROM 2-25-14

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Internal Revenue Service, the United States Department of Justice, the Chapter 13 Trustee, and the Office of the United States Trustee on February 6, 2014. By the court's calculation, 19 days' notice was provided. 14 days' notice is required. That requirement was met.

The Motion Objecting to the Trustee's Notice of Default and Application to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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.

The court's decision is to 3:00 p.m. on July 22, 2014 the Debtors' Motion Objecting to Trustee's Notice of Default and Application to Dismiss Case.

PRIOR HEARING

Debtors filed an Amended Chapter 13 Plan on October 19, 2010. The Plan was confirmed on February 18, 2011. Order Confirming Amended Chapter 13 Plan, Dckt. No. 61. Debtors' first payment was made on November 22, 2010. The Amended Plan provides for payments of $275 per month for thirty-six (36) months. Debtors' last payment was due on October 25, 2013. Debtors have made all their plan payments.

In his Notice of Default and Application to Dismiss, Trustee asserts that as of January 14, 2014, Debtors are delinquent in the amount of $550. Dckt. No. 136. Debtors state, however, that they have made all payments required under the confirmed plan, and that they are not in default. Debtors assert that under the Notice of Default, the Trustee's own accounting shows that all of the necessary payments have been made, with the last payment having been posted on October 23, 2013 Dckt. No. 146 at 2-3.

Debtors explain that all claims have been paid, as indicated by the "Trustee's Claim Summary." There is one claim, however, that remains in dispute. Debtors have requested that the Internal Revenue Service withdraw its proof of claim because it is currently the subject of litigation in district court. Debtor's Attorney has been representing Joint Debtor Alejandro Vince Houser in the district court litigation entitled *United States of America, IRS v. Alejandro Vince Houser*, DC No.: 2:11-cv-02062-KJM-AC, for the past two years. Debtors state that they are still negotiating an offer to compromise with the Internal Revenue Service, and

are engaged in the discovery stage of the district court matter.

Counsel for Debtors state that his firm has made substantial efforts to settle the case, including attending settlement conferences and assembling offers to compromise with the Internal Revenue Service. Counsel states that there was a formal settlement offer submitted to the Internal Revenue Service, which rejected in January 2013. Debtors' Counsel was invited to submit an amended offer if it would address the concerns raised by the Internal Revenue Service.

As of February 6, 2014, the offer is still under consideration by the Internal Revenue Service. The Motion states that counsel for the parties have been in active and regular communications to achieve a settlement, and are engaging in good faith efforts to resolve the matter. Debtor's Counsel believes there is substantial likelihood of settlement; Debtor has agreed to entry of a judgment in full, subject to the terms of a payment plan. The unresolved issues in this compromise concern the amount of the lump sum payment, and the payment plan duration. Upon settlement, Counsel believes that the Internal Revenue Service will withdraw its claim and agree not to object to discharge.

If the Internal Revenue Service Proof of Claim is withdrawn, the alleged defect in the plan would be cured and Counsel believes the Chapter 13 Trustee would have no grounds to base his Motion to Dismiss. Debtors request that the case not be dismissed and that the Chapter 13 Trustee agree to defer a request for dismissal of the case for at least ninety days to allow the parties to resolve the issue of the Internal Revenue Service claim.

Trustee's Notice of Default and Application to Dismiss, DPC-1, was issued on the basis of Trustee's assertion that Debtors have failed to make all of the payments due under the plan. Trustee states,

> Debtor has failed to make all payments due under the plan. As of January 14, 2014, payments are delinquent in the amount of $550.00. Additional payment of $275.00 will become due on January 25, 2014. Therefore, a total amount of $825.00 will be due within 30 days from the date of the service of notice. Dckt. No. 136.

Debtors offer the Trustee's Account Ledger to show that Debtors have made all the requisite payments under their Chapter 13 Plan. The court notes that this document is not filed as an Exhibit, but rather an attachment to the Declaration of Counsel for the Debtors. Dckt. No. 140. Debtors are advised that Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. The court will proceed, however, to consider the attached Account Ledger. Debtors also attach a Claim Summary on their bankruptcy case, purportedly showing that all of their claims have been paid off. Debtors state that the Trustee's Account Ledger shows that Debtors have made all payments required under the confirmed plan, and that there is no payment default. The term of Debtors' confirmed plan is 36 months, and the last payment became due on October 2013.

It appears that the "default" arises if the Internal Revenue Service Claim is allowed in the amount stated in the Service's Proof of Claim. The Debtors believe that they will be able to resolve that dispute and have the claim withdrawn. While getting the Internal Revenue Service to withdraw its Proof of Claim is not a sure thing, the amount in dispute represents a minor amount. Before dismissing this case and having the past thirty-six months of plan payments and efforts be for naught, the court will afford the Debtors the requested ninety days.

JUNE 3, 2014 HEARING

The court continued the hearing to allow closure regarding the Internal Revenue Service Claim. On May 27, 2014, the Debtors filed a Status Report. Dckt. 145. It is reported that the Debtors and the Internal Revenue Service have settled the dispute and stipulated to a judgment and payment plan pursuant to an offer and compromise. The parties, as communicated by counsel for the Debtors, request that this hearing be continued for thirty days to allow the parties to finalize the documentation of the agreement.

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 Trustee's Notice of Default 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 Objection to Trustee's Notice of Default and Application to Dismiss Case is continued to 3:00 p.m. on July 22, 2014.

13. 13-21833-E-13 NADA DAGHER **MOTION TO MODIFY PLAN**
WW-2 Mark A. Wolff **4-24-14 [43]**

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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, all creditors, parties requesting special notice, and Office of the United States Trustee on April 24, 2014. By the court's calculation, 40 days' notice was provided. 35 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)(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.

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 April 24, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed

order to the court.

14. 13-36233-E-13 JLB-1 | **MARK/EVELINA PANANGANAN** | **James L. Bianchi** | **CONTINUED MOTION TO VALUE COLLATERAL OF JP MORGAN CHASE BANK, N.A.** | **3-26-14 [40]**

CONT. FROM 4-29-14

Final Ruling: No appearance at the June 3, 3014 hearing is required.

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 Chapter 13 Trustee, respondent creditor, parties requesting notice, and Office of the United States Trustee on March 26, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The court's decision is to grant the Motion to Value Collateral.

PRIOR HEARING

Debtors seek to value the collateral of JP Morgan Chase Bank, N.A. However, service is not proper. Debtors served JP Morgan Chase Bank, N.A. at an address in New York, New York. The address specified on the Federal Deposit Insurance Corporation website is 1111 Polaris Parkway, Columbus, Ohio. The court has no way of determining that service at the New York address complies with Federal Rule of Bankruptcy Procedure 7004, 9014.

The court continued the hearing to allow the movant to properly serve the parties.

SUPPLEMENTAL PLEADINGS

Debtor filed a supplemental proof of service, properly serving Creditor JPMorgan Chase Bank, N.A. Dckt. 61.

Debtor filed a additional declaration, stating that Debtor is the owner of the subject real property commonly known as 5112 Twin Lakes Court, Fairfield, California, "Property." Debtor seeks to value the Property at a fair market value of $364,000.00 as of the petition filing date. As the owner, 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 senior in priority first deed of trust secures a claim with a balance of approximately $503,702.14. Creditor's second deed of trust secures a claim with a balance of approximately $121,570.02. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. 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 Mark and Evelina Pananganan, "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 JPMorgan Chase Bank, N.A. secured by a second in priority deed of trust recorded against the real property commonly known as 5112 Twin Lakes Court, Fairfield, 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 $364,000.00 and is encumbered by senior liens, which exceed the value of the Property which is subject to Creditor's lien.

15. 13-36233-E-13 MARK/EVELINA PANANGANAN
JLB-2 James L. Bianchi

CONTINUED MOTION TO CONFIRM PLAN
4-8-14 [50]

CONT. FROM 5-20-14

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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 April 8, 2014. By the court's calculation, 42 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). The Trustee having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

PRIOR HEARING

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee opposes the plan on the basis of an attorney fee conflict. Section 2.06 of Debtors amended plan indicates that attorney fees of $3,500.00 have been paid prior to filing, and additional fees of $3,500.00 shall be paid through the plan. This conflicts with Debtors original plan filed December 31,2013, indicating that total fees were $3,500.00, which were paid in full prior to filing.

The Trustee also argues that Debtor may not be able to make the plan payments required under 11 U.S.C. §1325(a)(6). Debtors Declaration states that "Payments to my church remain at $650.00 per month". Debtors Schedule J does not disclose any charitable contributions on line 10. The Statement of Financial Affairs does not disclose any gifts at item #7. Debtors 2012 federal tax return listed gifts to charity by cash or check as $5,616.00 (an average of $468.00 per month). Debtors 2013 federal tax return lists gifts to charity by cash or check as $10,130.00 (an average of $844.16 per month). The Trustee is not aware of any amendment to Schedule J to date, and the net income of $217.00 given in the Debtors Declaration is not accurate, given the evidence of charitable contributions each month.

Lastly, Trustee argues that Debtors' plan relies on the Motion to Value Collateral of J.P. Morgan Chase. The Motion was continued to June 3, 2014. If the motion is not granted, Debtor's plan does not have sufficient monies to pay the claim in full and therefore should be denied confirmation.

DEBTOR'S RESPONSE

The Debtor states that the attorney fee was a typo and any reference to an additional attorney fee is removed from the proposed order confirming the plan.

The Debtor also states that post-filing changes to income and expenses are presented in the Declaration of Mr. Panaganan, which arise from their reducing payroll deductions to eliminate a tax refund and stretching their car payments over the 60 month life of the plan. Debtor argues that considering the post-filing changes in income and expenditures, the proposed plan payment of $217 per month is feasible.

Lastly, the Debtor states that the motion to value the second lien on the property was continued to June 3, 2014 and that this motion should be continued to that date as well.

The plan relying on the pending motion to value, the court continued the hearing to be heard in conjunction.

The court having granted the Motion to Value and the Debtor having addressed the concerns of the Trustee, the court grants the Motion to Confirm.

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 is granted, Debtor's Chapter 13 Plan filed on April 8, 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.

16. 13-34540-E-13 LORI SMYLIE **MOTION TO EXTEND TIME**
JMO-1 Richard Kwun **5-15-14 [34]**

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

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

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

Local Rule 9014-1(f)(2) Motion – 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 May 15, 2014. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend Time is denied.

Creditor Greenstone Country Owners Association ("Creditor") moves for a retroactive enlargement of time to file its proof of claim in this case. Creditor states that it filed its proof of claim one day late of the March 12, 2014 deadline. Creditor offers the Declaration of Elly Vigil, Operations Manager for ATC Assessment Collection Group, which performs collections work on behalf of Creditor. The Vigil Declaration states that Ms. Vigil misunderstood the deadline for filing proof of claim, that she believed it was for mailing the proof of claim rather than for actually filing it.

OPPOSITION

Debtor filed an opposition stating that Creditor provides

conclusions rather than valid argument showing that neglect was excusable. Debtor states that Creditor only provides that Ms. Vigil misunderstood but does not explain why that misunderstanding can be classified as excusable.

DISCUSSION

Federal Rule of Bankruptcy Procedure 9006(b) states that the court, for cause shown, may at any time in its discretion on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. Fed. R. Bankr. P. 9006(b)(1). The Supreme Court stated the test for determining excusable neglect is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). The court should consider "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* The court notes that excusable neglect is not limited to cases where the delay was the result of circumstances beyond the moving party's control. "By empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388.

However, courts have uniformly held that no extension of the time fixed by Rule 3002(c) may be granted after the time has passed (except as specifically allowed by the provisions of Rule 3002(c)(1)-(6)). 9 COLLIER ON BANKRUPTCY ¶ 3002.03 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The court has no equitable power to extend the time fixed by Rule 3002(c). *Id.* The excusable neglect standard provided by Rule 9006(b) does not permit the court to extend the time for filing proofs of claim under Rule 3002(c). *See Gardenhire v. IRS (In re Gardenhire)*, 209 F.3d 1145 (9th Cir. 2000); *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428, 1432-33 (9th Cir. 1990). There is no language in Rule 3002 permitting an extension of the 90-day period upon the request of a general, unsecured creditor who does not fall within the ambit of one of the subsections. The language of Rules 3002 and 9006 makes it clear that no such extension may be granted. Gardenhire v. IRS (In re Gardenhire), 209 F.3d 1145 (9th Cir. 2000). FN.1.

FN.1. While the Motion expressly requests that the court retroactively extend the time for filing of a proof of claim, the Points and Authorities filed by Movant provide no basis for retroactive extension of a claims bar date which has expired. Points and Authorities, Dckt. 36. The Points and Authorities cite to no legal points and no legal authorities (either statutory, rule, or case law) in support of the retroactive relief requested.

Additionally, in order to fall within the 90 (or, for non-taxing governmental units, 180) days, the proof of claim must be actually filed within that time. 9 COLLIER ON BANKRUPTCY ¶ 3002.03. Mailing prior to the end of the period is insufficient if the proof of claim is received after the conclusion of that period. *Id.*

Here, the testimony of Ms. Vigil, a Operations Manager for a collection agency, misunderstood the deadline for filing proof of claims. Federal Rule of Bankruptcy Procedure 3002(c) provides the time for filing a proof of claim in a chapter 13 case.

The court cannot grant an extension of the time fixed by Rule 3002(c) after the time has passed and Creditor has not provided any exceptions allowed by the provisions of Rule 3002(c)(1)-(6).

ORDER DETERMINING VALUE OF SECURED CLAIM

Greenstone County Owners Association has filed the $9,243.47 claim as a secured claim in this case. The court notes that on May 29, 2014, this creditor filed a motion for relief from the automatic stay so that it could exercise its lien rights relating to this claim and sell the real property commonly known as 2746 Countryside Drive, Placerville, California.

Though the Points and Authorities filed by Movant contain neither, it does make reference to this court having made a determination that Movant's secured claim has a value of $0.00 for purposes of the bankruptcy plan. The court's order filed on December 18, 2014 states,

> "IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Greenstone Country Owners Association secured by a second deed of trust recorded against the real property commonly known as 2746 Countryside Drive, Placerville, 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 $410,200.00 and is encumbered by senior liens securing claims which exceed the value of the Property."

Order, Dckt. 24. No opposition was filed to the Debtor's motion to value Movant's secured claim. Civil Minutes, Dckt. 22. In the Motion to Value the Debtor requested that the court value the secured claim of Movant. Motion, Dckt. 11. While mistitled as a "Motion to Value Collateral," the relief requested pursuant to 11 U.S.C. § 506(a) is to value the creditor's claim, bifurcating it between a secured claim and general unsecured claim.

The Motion, in apparent acknowledgment that in valuing a secured claim the court necessarily has to determine what the creditor's secured and unsecured claims are in the bankruptcy case, requested,

> "[t]he Court to value the collateral...for the purpose of bifurcating this junior lienholder's claim into an allowed secured claim and a general unsecured claim."

This is in apparent recognition that a creditor is not required to file a claim to protect its lien rights, and that by asking the court to determine that the secured claim had a value of less than the total claim, there has to necessarily be a general unsecured claim for that creditor in the case. FN.2.

FN.2. Though the court has not required it in the past, if the creditor has not yet filed a secured claim which a debtor wants to value, the court could require the Debtor to file a proof of claim before proceeding with a motion to value pursuant to 11 U.S.C. § 506(a).

As addressed by the Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410, 417-418 (1992), a creditor's lien remains on the collateral until foreclosure. A lien travels through a bankruptcy case unimpeded. *Dewsnup*, Citing *Farrey v. Sanderfoot*, 500 U.S. 291 (1991); *Johnson v. Home State Bank*, 501 U.S. 78 (1991). While a Debtor cannot use 11 U.S.C. § 506(d) to strip off a lien and deprive a creditor of lien rights in a Chapter 7 case, a Chapter 11, 12, or 13 Plan may properly provide for the value of the secured claim, as determined pursuant to 11 U.S.C. § 506(a), to be paid through the Plan and the balance be subject to treatment as a general unsecured claim. This court has extensively addressed this issue in several rulings, including, *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case); and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013).

In denying the present motion, the court makes no determination that such relief is necessary for a creditor whose secured claim has been valued pursuant to 11 U.S.C. § 506(a) and the balance bifurcated into a general unsecured claim. To the extent that an objection exists to the current proof of claim filed by Movant, that will be addressed in connection with the Objection to Claim filed by the Debtor.

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 Time filed by Creditor 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.

17. 13-34540-E-13 LORI SMYLIE
RK-2 Richard Kwun

OBJECTION TO CLAIM OF GREENSTONE COUNTRY OWNERS ASSOCIATION, CLAIM NUMBER 2 4-14-14 [28]

Tentative Ruling: The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Written opposition was filed.

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion.

Local Rule 3007-1 Objection to Claim - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 14, 2014. By the court's calculation, 50 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Objection to Proof of Claim number 2 of Greenstone Country Owners Association is overruled.

Lori Smylie, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of Greenstone Country Owners Association ("Creditor"), Proof of Claim No. 2 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $9,243.47. Objector asserts that the Claim has not been timely not timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is March 12, 2014.

OPPOSITION

Creditor opposes the motion, stating that while it does not dispute

that its Proof of Claim was filed one day late of the March 12, 2014 deadline, it has filed a Motion to Enlarge Time for the court to allow its claim.

DISCUSSION

The court denied the Motion to Enlarge Time filed by Creditor.

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

The deadline for filing a Proof of Claim in this matter was March 12, 2014. The Creditor's Proof of Claim was filed March 13, 2014. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

However, the Debtor has sought from this court an order valuing the secured and unsecured claims of Creditor in this case. Debtor obtained an order from this court determining that Movant's secured claim has a value of $0.00 for purposes of the bankruptcy plan. The court's order filed on December 18, 2014 states,

> "IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Greenstone Country Owners Association secured by a second deed of trust recorded against the real property commonly known as 2746 Countryside Drive, Placerville, 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 $410,200.00 and is encumbered by senior liens securing claims which exceed the value of the Property."

Order, Dckt. 24. No opposition was filed to the Debtor's motion to value Movant's secured claim. Civil Minutes, Dckt. 22. In the Motion to Value the Debtor requested that the court value the secured claim of Movant. Motion, Dckt. 11. While mistitled as a "Motion to Value Collateral," the relief requested pursuant to 11 U.S.C. § 506(a) is to value the creditor's claim, bifurcating it between a secured claim and general unsecured claim.

The Motion to Value acknowledged that in valuing a secured claim the court necessarily has to determine what the creditor's secured and unsecured claims are in the bankruptcy case, requested,

> "[t]he Court to value the collateral...for the purpose of bifurcating this junior lienholder's claim into an allowed secured claim and a general unsecured claim."

This is in apparent recognition that a creditor is not required to file a claim to protect its lien rights, and that by asking the court to determine that the secured claim had a value of less than the total claim, there has to necessarily be a general unsecured claim for that creditor in the case. FN.1.

FN.1. Though the court has not required it in the past, if the creditor has not yet filed a secured claim which a debtor wants to value, the court could require the Debtor to file a proof of claim before proceeding with a motion to value pursuant to 11 U.S.C. § 506(a).

The valuation of a secured claim as provided in 11 U.S.C. § 506(a) begins with it address "An allowed claim of a creditor secured by a lien on property in which the estate has an interest..." 11 U.S.C. § 506(a). It further provides that the court shall take the allowed claim and determine the portion which is secured, with the balance to be an "[u]nsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim." *Id.*

As addressed by the Supreme Court in *Dewsnup v. Timm*, 502 U.S. 410, 417-418 (1992), a creditor's lien remains on the collateral until foreclosure. A lien travels through a bankruptcy case unimpeded. *Dewsnup*, Citing *Farrey v. Sanderfoot*, 500 U.S. 291 (1991); *Johnson v. Home State Bank*, 501 U.S. 78 (1991). While a Debtor cannot use 11 U.S.C. § 506(d) to strip off a lien and deprive a creditor of lien rights in a Chapter 7 case, a Chapter 11, 12, or 13 Plan may properly provide for the value of the secured claim, as determined pursuant to 11 U.S.C. § 506(a), to be paid through the Plan and the balance be subject to treatment as a general unsecured claim. This court has extensively addressed this issue in several rulings, including, *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case); and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013).

In this case the Debtor has come to the court, stated that Creditor has a claim, and requested that the court value the secured and unsecured portions of the claim. Since the claim was secured, Creditor was not under any burden to file a proof of claim. The court, based on the relief that Debtor sought, then determined the portions of the claim which were allowed as secured and unsecured.

The Debtor attempts to argue that while she admitted that Creditor had a claim in the case and expressly requested that the court determine the secured and unsecured portions of the claim, she now requests that the court disallow any claim for Creditor because there was not a proof of claim filed. Presumably, if there was no proof of claim, and the lack of such precludes there being a claim in this case, then there would be no basis for the court having entered its order valuing the secured and unsecured claims of Creditor which had to be provided for in any plan in this case.

The court overrules the Objection to Claim. The Debtor cannot have it both ways. The creditor "has a claim so that it can be valued at $0.00 secured and the balance to be allowed as unsecured," but the creditor does not have a claim for purposes of any plan in this case.

Based on the evidence before the court, the Objection to the Claim of Greenstone Country Owners Association, Proof of Claim No. 2, as a general unsecured claim is overruled, the court having previously determined this creditor's secured and unsecured claims pursuant to 11 U.S.C. § 506(a) upon the Motion of Debtor. The court has previously entered a final order, (Dckt. 24) determining that this Creditor's secured claim in this case has a value of $0.00.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Greenstone Country Owners Association, Creditor filed in this case by Lori Smylie, Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 2 of Greenstone Country Owners Association is overruled as it relates to this Creditor asserting an unsecured claim in the case. The court has previously entered a final order, (Dckt. 24) determining that this Creditor's secured claim in this case has a value of $0.00.

18. 14-21142-E-13 LBG-2 THOMAS LISLE AND BARBARA TREAT Lucas B. Garcia

MOTION TO CONFIRM PLAN 4-11-14 [34]

Final Ruling: No appearance at the June 3, 3014 hearing is required.

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, all creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2014. By the court's calculation, 53 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). 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.

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 April 11, 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.

19. 14-20150-E-13 MICHAEL/DEBORAH SOUZA — MOTION TO CONFIRM PLAN
DJC-2 Diana J. Cavanaugh — 4-18-14 [40]

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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 April 18, 2014. By the court's calculation, 46 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). 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.

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 April 18, 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.

20. 14-21955-E-13 STEVEN/DEBRA RAZWICK — OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK
NLE-1 Andrew E. Bakos — 4-24-14 [24]

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

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

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

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 April 24, 2014. By the court's calculation, 40 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors cannot make the payments under the plan or comply with the plan. Trustee states that the Internal Revenue Service filed a claim on April 7, 2014 for $251,242.07, with $52,200.54 secured. Debtor's plan lists the amount claimed as $46,472.66. The amount entitled to priority is listed

as $150,869.63. Page 3 of the claim states no returns were filed for tax period 2010-2013. The debtors scheduled the Internal Revenue Service in Class 5 for a total of $66,118.00.

Trustee states that the debtors admitted at the First Meeting of Creditors held April 17, 2013 they filed an extension to file their 2013 tax returns on or around April l5, 2014.

Additionally, the Trustee argues that the Debtor's plan is not their best effort. Schedule I lists income for Steven in the amount of $1,495.00 and Debra's income is listed in the amount of $11,845.00. Neither filed an attached statement showing gross receipts and ordinary business expenses. Trustee argues that it is not clear if the income listed on Schedule I is net, or gross. The Statement of Financial Affairs lists Steven's 2013 self-employed income as $47,567.63 or $3,963.96 per month and Debra's 2013 income as $182,746.66 or $15,228.88 per month. To date, the Trustee has not received any form of verification of Debra's income.

Lastly, the Trustee states that while the plan proposes to pay the attorney $1,000.00 through the plan under LBR 2016-l(c), the Disclosure of Compensation of Attorney for Debtors, appears to list in item 6 that the attorney services do not include some services required under LBR 2016-l(c), such as relief from stay actions. The Trustee believes that the Attorney is effectively opting out of 2016(c)(l) and will oppose attorney fees being granted under that section, requiring a motion for any attorney fees.

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

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

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

21. 14-21458-E-13 JIMMY/DENISE MOORE — MOTION TO CONFIRM PLAN
SJS-1 Scott J. Sagaria — 4-17-14 [24]

Final Ruling: No appearance at the June 3, 3014 hearing is required.

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 April 17, 2014. By the court's calculation, 47 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). 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.

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 April 17, 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.

22. 14-20160-E-13 KIM SCOTT
CYB-1 Candace Y. Brooks

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

CONT. FROM 4-8-14

Tentative Ruling: The Motion to Confirm Plan 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.

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.

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 decision is to grant the Motion to Confirm the Amended Plan.

PRIOR HEARING

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.

SUPPLEMENTAL PLEADINGS

Debtor filed supplemental pleadings on May 19, 2014. The Debtor states that she has had her 2013 income tax returns prepared and she does not owe any taxes for the year 2013. Debtor argues that the Corporation has been a paying its past and current tax obligations, including the civil penalties

that were assessed to her. Debtor states the Corporation will be paying her a higher draw/distribution to cover the tax obligations in the amount of $314.00.

Debtor also states that Creditor shall receive a stated dividend of $100.00 per month commencing with the March 2014 payment and continuing until the thirteenth month of the plan, at which time the payments will increase to $642.00 and continue for the remaining duration of the plan. Creditor has signed off on this treatment in the proposed order confirming the plan.

RULING

Because the Plan cures the arrearage on the claim held by the Creditor on the First Deed of Trust on Debtor's property and now provides for the larger priority claim, the Plan complies with 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B), 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 6, 2014 is confirmed as modified by the proposed order filed as Exhibit A, Dckt. 37, 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.

23. 14-22763-E-13 PHILIP BROWN
TSB-1 Joseph M. Canning

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
5-8-14 [25]

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

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

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

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 May 8, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor may not be able to make the plan payments required. Trustee states that Debtors Schedule I lists on line 2 gross wages of $7,000.00 per month. According to the pay advices provided to the Trustee, Debtor earns $33.65 hourly and is paid bi-weekly. Debtors gross pay is actually $5,832.66 per month according to the paystubs provided. On May 7, 2014, Debtor provided a notice of wage change to the Trustee, which is dated Apri1 28, 2014 and states that Debtors wages are increasing to $2,980.77 per pay period. This amounts to $77,500.02 annually, or $6,458.33 per month. Trustee also notes that Class 4 of Debtors plan lists a second mortgage to Bank of America for $243.00 per month, but is not listed on Schedule J. Trustee argues that the net income on Schedule J is not accurate and Debtor

cannot afford the plan payments.

Additionally, Trustee argues that Debtor's plan may not be the Debtors best effort under 11 U.S.C. § 1325(b). Schedule J lists support on line 18 of $600.00 per month. Trustee states that Debtor testified at the First Meeting of Creditors held on May 1, 2014 that this is for child support, and his children are 15 and 17 years old. Debtor stated that support for the 17 year old will end when the child turns 18, and there is no agreement to extend the support beyond the age of 18. Domestic Support Obligation Checklists provided to the Trustee indicate that both obligations will last 2.6 more years, which conflicts with the Debtors testimony. Trustee argues that all disposable income is not being paid into the plan for the benefit of unsecured creditors after the child support ends.

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.

24. 14-21964-E-13 JVP-2 DAVE/MICHELLE SMITH James V. Phelps

MOTION TO VALUE COLLATERAL OF TRI COUNTIES BANK 4-21-14 [30]

Tentative Ruling: The Motion to Value 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 by the court.

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 21, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Tri Counties Bank, "Creditor," is denied without prejudice.

The Motion to Value filed by David and Michelle Smith, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration.

However, the Motion on its face identifies the creditor as being Tri Counties Bank, which is a federally insured financial institution. Congress created a specific rule to provide for service of pleadings, including this contested matter, on federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(h), which provides

> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution

unless–

> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Here, Debtors served Creditor at two locations, including at the address stated on the FDIC website for the Bank, but neglected to serve any of the addresses by certified mail as required by the Federal Rules of Bankruptcy Procedure. None of the exceptions in Federal Rule of Bankruptcy Procedure 7004(h) apply.

Therefore, the motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by David and Michelle Smith, “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.

25. 14-21964-E-13 DAVE/MICHELLE SMITH
JVP-3

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.
4-21-14 [36]

Tentative Ruling: The Motion to Value 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 by the court.

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 21, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Bank of America, N.A., "Creditor," is denied without prejudice.

The Motion to Value filed by David and Michelle Smith, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration.

However, the Motion on its face identifies the creditor as being Bank of America, N.A., which is a federally insured financial institution. Congress created a specific rule to provide for service of pleadings, including this contested matter, on federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(h), which provides

> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution

unless–

> (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Here, Debtors served Creditor at two locations, including at the address stated on the FDIC website for the Bank, but neglected to serve any of the addresses by certified mail as required by the Federal Rules of Bankruptcy Procedure. None of the exceptions in Federal Rule of Bankruptcy Procedure 7004(h) apply.

Therefore, the motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by David and Michelle Smith, “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.

26. 14-21964-E-13 DAVE/MICHELLE SMITH — MOTION TO CONFIRM PLAN
JVP-4 James V. Phelps — 4-21-14 [48]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 21, 2014. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

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

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

The Trustee opposes confirmation offering evidence that the Debtor is $1,382.78.00 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Trustee also argues that the Debtor may not be able to make the payments required under the plan because Debtor lists the Subaru to be paid in Class 4 of the plan at $401.55 per month, but the Debtor failed to list this expense in Schedule J.

Lastly, the Trustee states that the plan relies on two pending motions to value collateral that must first be granted.

RESPONSE

Debtors filed a response, stating that the Debtors were unaware of the delinquency and paid it to the Trustee on May 1, 2014.

Debtors respond that the Subaru was not indicated on Schedule J because it was not considered a personal household expense, as the monthly payment on the Subaru is paid directly by Debtor's business as a building inspector. Debtor states the payment for the Subaru is included on Schedule I as net income derived from debtor's occupation as a building inspector (Smith Building Services, LLC). Debtors state they will file concurrent with this Response, amended Schedules I and J indicating that the Subaru is a business expense that is paid by debtors' business and that the payment is accounted for on Line 8a of Schedule I. Debtors will also attach to Schedule I a profit loss statement showing the Subaru payment.

Debtors agree that the motions to value must be granted before the plan can be confirmed.

The court having denied the motions to value without prejudice, the plan cannot be confirmed.

The amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 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.

27. 14-23365-E-13 FLOYD/DAWN WEBB **OBJECTION TO CONFIRMATION OF**
TSB-1 Peter G. Macaluso **PLAN BY DAVID CUSICK**
5-8-14 [23]

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

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

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

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 May 8, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the last four years of tax returns may not be filed. Debtor may have failed to file all pre-petition tax returns required for the four years preceding the filing of the petition pursuant to 11 U.S.C. §1308 and §1325(a)(9). Internal Revenue Service filed Proof of Claim No. 4 indicating that federal tax returns have not been filed for tax years 2011 and 2013.

Additionally, The Trustee argues that Debtors' plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtors non-exempt assets total $4,563.25 and Debtor proposes to pay 0% to general unsecured creditors and $1,965.36 to priority unsecured creditors. According to Schedules A, B, and C, non-exempt equity of $2,288.25 exists in Debtors

real property, $2,000.00 in a 1997 Chevy, and $275.00 in a 2002 Ford Mustang.

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. 10-38967-E-13 TIM/KATY JOHNSON
DPC-3 Al J. Patrick

OBJECTION TO CLAIM OF BANK OF THE WEST, CLAIM NUMBER 9
4-22-14 [45]

Final Ruling: No appearance at the June 3, 3014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on April 22, 2014. By the court's calculation, 44 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim number 9 of Bank of the West is sustained and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee ("Objector") requests that the court disallow the claim of Bank of the West ("Creditor"), Proof of Claim No. 9 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $19,292.09. Objector asserts that the Claim has not been timely not timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case is November 17, 2010. Notice of Bankruptcy Filing and Deadlines, Dckt. 8.

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

The deadline for filing a Proof of Claim in this matter was November 17, 2010. The Creditor's Proof of Claim was filed September 29, 2011. No order granting relief for an untimely filed proof of claim for Creditor has been issued by the court.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety as untimely. The Objection to the Proof of Claim is sustained.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Bank of the West, Creditor filed in this case by David Cusick, Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 9 of Bank of the West is sustained and the claim is disallowed in its entirety.

29. 13-23469-E-13 MET-2 RONALD/JILL SHAFER Mary Ellen Terranella

CONTINUED MOTION TO CONFIRM PLAN
3-20-14 [61]

CONT. FROM 5-6-14

Tentative Ruling: The Motion to Confirm Plan 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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on March 20, 2014. By the court's calculation, 47 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). 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). 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 Motion to Confirm the Amended Plan to is deny confirmation of the Chapter 13 Plan.

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

TRUSTEE'S OBJECTION

The Chapter 13 Trustee opposes the motion on the basis that the Debtor has failed to file a Motion to Value the secured claim of WestAmerica Bank.

The Trustee also argues that the Plan is not the Debtor's best effort. The Debtor is over the median income and proposes plan payments of $248.00 for 12 months, then $477.00 for 48 months of the 60 month plan, with a 3% dividend to unsecured creditors, which totals $3,704.65. The Creditor's Objection to Confirmation was heard and sustained on October 22, 2013 and the Court's decision stated that the plan was under funded by $229.00 per month. Dckt. 53. The Debtor filed the present amended Plan on March 20, 2014, approximately 5 months after the order was entered by the Court. The Plan calls for payments of $248.00 for 12 months (April l4, 2013 through March 25, 2014), then $477.00 for 48 months (beginning April 25, 2014). The Debtor's Plan increases the plan payments by $229.00 as per the Court's order, however it fails to increase the plan payments until April 25, 2014 and the Court's order was entered on October 22, 2013. The Debtor has failed to indicate what happened to funds that have not been paid into the plan, since the order was entered.

WESTAMERICA BANK'S OBJECTION

WestAmerica Bank ("Creditor") objects to the plan on the basis that the plan is not feasible, as Debtors have not shown that their income from Burger City Corporation will continue even though the corporation is being sued for non-payment and facing a seizure of its assets.

Creditor also argues that the plan does not provide for the allowed amount of their secured claim and that Debtors have not moved to value their secured claim.

Lastly, Creditor argues that the amended plan has not been filed in good faith. Creditor states the Debtors' Amended Plan proposes to pay Westamerica $212.00 per month on its secured claim, with interest at 4% per annum; however, in order to pay the Bank the allowed amount of its $40,000 secured claim over 60 months, without any interest, the payments must be at

least $666.67 per month. Creditor states that the Amended Plan proposes to pay $3,121.00 per month on the Debtors' home loan, which represents 49% of the Debtors' monthly take home pay. Creditor argues that the court should also consider that the seriously overencumbered residence is a significant burden to the Estate, and seriously interferes with the Debtors' ability to pay their creditors.

DEBTORS' RESPONSE

Debtors respond, stating they have now filed a Motion to Value the secured claim of Westamerica Bank, which is set for June 3, 2014. Debtors state that, as shown in their originally filed Schedules I and J, they had $248.00 per month available in net disposable income to fund their Chapter 13 plan. Debtors state that their budget is not extravagant, and included modest charitable contributions as well as school expenses for their minor daughter. Debtors state that when the Court issued its ruling in October 2013, the debtors had to adjust their budget to afford the higher plan payment. As their budget was not excessive to begin with, they had to consciously decide what expenses would be cut in order to make the higher plan payment. This was a process that took several months to implement, and included eliminating their charitable contributions, reducing the amounts spent on their minor daughter's school activities, reducing recreational expense, for a family of three, to $100.00 per month, and reducing their home maintenance. They have accomplished their budget paring, but it did take some time. Debtors contend that, if the Court requires them to make up the five months of the increased payment, or $1,145.00, they will provide for that amount in the later months of their plan, when they are more able, financially, to do so.

Debtor argues that there is no certainty, whatsoever, that Westamerica Bank will prevail in its lawsuit against Burger City, Inc. and that the debtors have had steady, stable income from Burger City, Inc, since 1997. Debtors state that they have decades of experience in the restaurant industry and even in the unlikely event Westamerica Bank does prevail in its lawsuit against Burger City, Inc., debtors are confident in their abilities to procure comparable positions in the restaurant business.

DISCUSSION

The court continued the hearing to June 3, 2014, to be heard in conjunction with the Motion to Value Collateral of Westamerica Bank.

On May 27, 2014, the Debtors and Westamerica Bank filed a Stipulation resolving the Motion to Value the Bank's secured claim. The Stipulation provides for the secured claim of Westamerica Bank to be valued at $18,270.00. Stipulation, Dckt. 92.

The Motion to Value having been resolved, the Creditor's objection is overruled.

The Trustee, however, raises a valid concern. The Debtor filed the present amended Plan on March 20, 2014, approximately 5 months after the order was entered by the Court sustaining the Trustee's objection which stated that the plan was under funded by $229.00 per month. Dckt. 53. While the Debtor's Plan increases the plan payments by $229.00 as per the Court's

order, it fails to increase the plan payments until April 25, 2014 and the Court's order was entered on October 22, 2013. Debtors testify that they adjusted their budget to afford the higher plan payment, which included eliminating their charitable contributions, reducing the amounts spent on their minor daughter's school activities, reducing recreational expense, and reducing their home maintenance, but that it took five months to do so.

This does not explain as to why the lower "projected disposable income" is proper than computed by the court previously. There is not a premium to the delay cause by the extended dispute with Westamerica Bank, during which time the Debtor was allowed to "pocket" the additional monies.

The Debtors' declaration does not state why they could not pay the amount – merely that they took time to adjust their budget. What the Debtors miss in this discussion is that while they have the right to pay the secured debt, it is their conscious choice. They have chosen to spend 50% of their monthly net income to retain their home ($3,121.00 payment with $6,374.00 monthly net income. Memorandum Opinion and Decision, Dckt. 53.

Debtors argue that they should be forgiven under-funding the plan because they do not live "extravagantly." Alternatively, if the court is going to make them actually fund the plan with their projected disposable income, then they should be allowed to pay the previously unfunded amounts over the life of the plan.

There is a certain extravagance in choosing, as a Chapter 13 Debtor, to retain a home which consumes (principal, interest, taxes and insurance) 50% of the Debtors' monthly net income. The Debtors offer no new value for this property as of confirmation, now more than a year after this case was filed. This property is stated by the Debtors under penalty of perjury to have a value of $378,200. Schedule A, Dckt. 1 at 12. This property is subject to liens totaling ($555,331.00). This lien amount exists after, in reliance on the $378,200.00 valuation, the court determined that the secured claim of the creditor having the junior deed of trust on the property had a value of $0.00.

The Debtors choosing to spend 50% of their monthly net income to pay a mortgage on a property in which there is a ($200,000) negative equity, the court concludes that they had the ability to pay the full amount of the projected disposable income since the commencement of this case. The court only requires the Debtors to pay what they are required to pay – and corresponding, the Debtor have to pay what they are required to pay, not merely pay what they choose if it is financially convenient.

The Debtors failing to properly fund their plan, the Motion to Confirm 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 Motion to Confirm the Plan is denied.

30. 13-23469-E-13 MET-3 | **RONALD/JILL SHAFER** | **Mary Ellen Terranella** | **MOTION TO VALUE COLLATERAL OF WESTAMERICA BANK** | **4-29-14 [75]**

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

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.

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, Chapter 13 Trustee, resopndent creditor, and Office of the United States Trustee on April 29, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Value has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Value the Secured Claim of Westamerica Bank, "Creditor," is granted pursuant to the stipulation of the parties.

The Motion to Value filed by Ronald A. Shafer and Jill E. Shafer, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtors' declaration. Debtors are the owner of restaurant equipment ("Property"). Debtors do not specify in their Motion, however, what equipment they seek to have valued by the court. Debtors merely state that they have "use and possession of the property and are familiar with the age and condition of the same."

VALUATION OF EQUIPMENT BY DEBTORS

In their Declaration, Debtors state that they operate a restaurant called Burger City in Vacaville, California, through a corporation known as Burger City, Inc. In 2006, Debtors borrowed money from Westamerica Bank to open a new restaurant, Pasta City Express, to be located in Fairfield, California. The loan amount was $150,000.00. Debtors state that they have come to believe that the loan would be secured by the equipment that Debtors purchased for Pasta City Express, as well as the equipment from Burger City. ¶ 3, Declaration of Debtors, Dckt. No. 77.

Debtors state that much of the Pasta City Equipment was stolen after the restaurant closed because of the failure of a shopping center in which the restaurant was closed. Debtors wish to continue to operate Burger City by paying Westamerica Bank through their Chapter 13 plan for the value of the equipment used as collateral to secure the loan. The equipment includes tables, chairs, bar stools, televisions, silverware, freezers, microwaves, burner stoves, slicers, garbage cans, vending machines, shelves, cabinets,, racks, etc. Debtors seek to value the Property at the "in-place, in-use" price of $11,540.00 as of the petition filing date. As the owner, 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).

Debtors obtained an appraisal from Donna Bradshaw, who testifies to being an accredited appraiser of the International Society of Appraisers, whose valuation is attached as a "Summary Desktop Appraisal" as Exhibit A to the Motion. Dckt. No. 79.

According to Proof of Claim No. 4 on the claims registry, filed by Westamerica Bank, the Property secures a claim with a balance of approximately $137,566.39 under a Commercial Security Agreement entered into between Joint Debtor Ronald A. Shafer and Creditor. Debtors' estimated value of the property is $11,540.00. Therefore, Debtors argue that the Creditor's claim secured by a lien on the assets is under-collateralized.

OPPOSITION BY CREDITOR

Westamerica Bank filed a Proof of Claim on August 16, 2013, asserting that the value of the collateral is $40,000.00. Westamerica objects to the appraisal offered by Debtors and conducted by Donna Bradshaw of West Auctions. Arguing that the Debtors made the extraordinary assumption that the equipment was in the condition described to Ms. Bradshaw by her clients, and even cautioned in her report that there are limitations involved in appraising from photos and written descriptions provided by the Debtors, and for greater reliability in the value conclusion, the property should be available for personal inspection. ¶ 3 of Letter dated June 17, 2013, Exhibit A, Dckt. No. 90). Debtors object to the Summary Desktop Appraisal presented by Debtors as inadmissible hearsay under Federal Rule of Evidence 802.

Creditor estimates that the value of the collateral is $40,000. In 2006, before the Creditor made the subject loan, Debtors and Burger City, Inc., had already owned equipment. During 2007, Debtors and Burger City, Inc. purchased additional equipment at a cost of $211,998.64, which was used for two years until the Debtors closed the Pasta City restaurant. Creditor estimates that the new equipment alone is now worth about $40,000 based upon

generally accepted depreciation rates.

Westamerica Bank states that after the Debtors filed their Motion to Value on April 29, 2014, Westamerica Bank requested access to the collateral to inspect and appraise the equipment. The Debtors' counsel did not respond until May 13, 2014, with a reply that instructed Creditor to contact the Debtors directly. Creditor's Counsel, Gloria Oates, states that Debtor's counsel called her and stated that the Bank should contact the Debtors directly to arrange a time to inspect the subject property. ¶ 2, Declaration of Gloria M. Oates, Dckt. No. 89.

STIPULATION OF THE PARTIES

On May 27, 2014, the Parties filed a Stipulation determining the value of Westamerica Bank's secured claim to be $18,270.00. This is consistent with the evidence presented to the court. The court grants the Motion determining the secured claim to be in the amount as stipulated.

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 Ronald Allan Shafer and Jill Elaine Shafer, "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 pursuant to 11 U.S.C. § 506(a) is granted and the claim of Westamerica Bank secured by a personal property described as "Equipment" (Proof of Claim No. 4, Commercial Security Agreement Attachment), is determined to be a secured claim in the amount of $18,270.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The liens securing claims exceed the value of this Property.

31. 13-29769-E-13 JOHN JAMES **MOTION TO CONFIRM PLAN**
PGM-5 Peter G. Macaluso **4-14-14 [90]**

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on April 14, 2014. 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). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, the Chapter 13 Trustee has filed opposition to the proposed plan.

First, Trustee argues that the Plan is not feasible, because the Plan will complete in 69 months as opposed to the 60 months proposed . On February 2, 2014, the Internal Revenue Service filed Amended Court claim NO. 1, which indicates that Debtor owes $54,987.75 in priority unsecured tax. Debtor's plan proposes to pay the Internal Revenue Service $37,757.84. According to the Trustee's calculations, the Plan will complete in 69 months, as opposed to the 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

Second, Trustee states that the amount of payments has been misrepresented. Debtor's Plan proposes to pay $900 per month for 60 months. As of April 2, 2014, Debtor has paid in a total of $7,200.00 for a total of eight payments. Debtor's motion indicates that Debtor paid only $3,600.00

through April 2, 2014, which is incorrect.

Third, Debtor has not demonstrated that he can set aside the monies to afford the plan payment with an additional unpaid tax liability for 2013. On Debtors' Schedule J and Amended Schedule J, Debtor deducted $500.00 for a tax offset. Where the Debtor has incurred an unpaid 2013 tax liability, the Debtor has not proven that they will set aside the monies to afford the plan payment under 11 U.S.C. § 1325(a)(6), and the plan does not provide any reporting requirement so that the Trustee can make certain that these monies were set aside, such as a quarterly reporting of the balance in the account by supplying bank statements to the Trustee, along with copies of his state and federal tax returns for each year. In addition, any portion of funds held for this purpose not used to pay the tax should be turned over to the trustee for additional payment toward unsecured claims, Trustee argues.

These concerns had been raised in the Trustee's previous opposition to the Motion to Confirm Plan, filed on December 3, 2013, Dckt. No. 51, and on February 25, 2014. Dckt. No. 78.

Fourth, Trustee states that not all assets have been reported. Debtor did not disclose a potential claim against Victoria Casteneda on Schedule B, nor does the Debtor list his pending action, #13SC03813 filed in Sacramento County on Statement of Affairs Question No. 4.

DEBTOR'S RESPONSE

Debtor's counsel argues in a Response (no evidence having been presented) that the unsecured priority claim of the Internal Revenue Service should be reduced to $21,998.00 and the Internal Revenue Service general unsecured claim increased by $5,000.00.

Counsel responds that the misstated payment amount can be corrected to $3,600.00. However, the Trustee's objection is that the Debtor has actually paid $7,800.00 – indicating that the proposed correction perpetuates the misstatement.

Counsel argues that the Debtor "appreciates" the Trustee's concern that the Debtor cannot make the required tax payments, and that the Debtor will make non-specific proof of quarterly tax payments as a condition of confirmation. Counsel does not argue that the Debtor will establish a segregated tax account to be funded monthly, which can be documented by the Trustee, but merely that each month the Debtor will pay the amounts (which the Debtor has defaulted previously).

Counsel argues that the Debtor will amend his Schedule B and the Statement of Financial Affairs to disclose the labor claim. However, no explanation is provided as to why this asset was not previously disclosed or why it has taken until the eve of an objected to confirmation hearing for the Debtor to be dragged into disclosing the existence of this asset.

In his declaration in support of confirmation the Debtor provides no disclosure about this asset, its value, and what it will cost to prosecute. While the Debtor states under penalty of perjury "all of my assets are exempt," such is not necessarily an accurate statement. There is an undisclosed asset of unknown value which has not been claimed as exempt.

The Debtor has refrained from providing a supplemental declaration where he can truthfully and accurate explain this asset – further keeping the court in the dark.

The Third Amended Plan does not provide for the prosecution of the labor claim or it proceeds. Rather, it appears that the Debtor has failed to disclose its existence, fails to provide for it in the plan, and intends to divert this asset from creditors. While the Debtor has filed several amended schedules to add creditors or restate his expenses, he has failed to amend Schedule B, failed to disclose this asset to the court, and failed to provide for it in the Third Amended Chapter 13 Plan.

The amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 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.

32. 14-22571-E-13 NLE-1 | **IGNACIO/YOLANDA OROZCO** | **Gerald B. Glazer** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK** | **4-24-14 [22]**

Final Ruling: The Chapter 13 Trustee having filed a Withdrawal of the Trustee's Objection to Confirmation, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the** Trustee's Objection to Confirmation **was dismissed without prejudice, and the matter is removed from the calendar.**

33. 14-23271-E-13 ROBERT/CINDY LANDINGHAM
TSB-1 Kristy A. Hernandez
OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
5-8-14 [17]

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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 May 8, 2014. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

The court's decision is to continue the hearing on the Objection to 3:00 p.m. on June 10, 2014.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that there is no Motion to Value the Secured Claim of HSBC Mortgage Services. Debtors cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6) because the Debtors have proposed to value the secured claim of HSBC Mortgage Services on a second deed of trust on Debtors' residence, but have failed to file a Motion to Value to date.

A review of the docket shows that the Motion to Value the Secured Claim of HSBC Mortgage Services, Inc. was filed on May 23, 2014, Dckt. No. 36. Hearing on that Motion is set for June 10, 2014.

The court continues the hearing on the Objection to confirmation so that it can be conducted after ruling on the Motion to Value.

34. 14-22679-E-13 DENNIS FLORES
RMD-1 Mark Lapham

OBJECTION TO CONFIRMATION OF PLAN BY NATIONSTAR MORTGAGE, LLC
4-30-14 [38]

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

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

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

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, and Office of the United States Trustee on April 30, 2014. By the court's calculation, 30 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

Nationstar Mortgage, LLC ("Creditor") opposes confirmation of the Plan on the basis that Debtor's Plan does not reference or classify the Creditor's claim.

Creditor states that on or about October 20, 2006, Debtor Dennis Flores ("Debtor") executed and delivered to First Magnus Financial Corporation, an Arizona Corporation ("Lender"), a Promissory Note in the principal sum of $344,000.00 (the "Note"). Debtor made, executed and delivered to Lender a Deed of Trust, granting Lender a security interest in the real property located at 911 Yosemite Way, Suisun City, California.

Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned and transferred to the Creditor. The Creditor argues that the Chapter 13 Plan fails to provide for Objecting Creditor's claim, including its arrears. The creditor is currently finalizing its Proof of Claim in this matter, but submits the following objection to timely preserve its rights and treatment under the proposed plan.

The estimated pre-petition arrearage on Objecting Creditor's Objecting claim is in the sum of $44,776.41. This amount does not include any late charges, escrow advances, attorneys' fees, costs, or other fees and charges that might otherwise be included once the Proof of Claim is finalized. Creditor states that the estimated arrears are subject to change pending completion of Proof of Claim.

The proposed plan does not list Objecting Creditor's claim or provide for any treatment of the claim. Creditor argues that in order to comply with 11 U.S.C. §§ 1322(b)(2), (3), and (5), and 11 U.S.C. § 1325(a)(5), the plan must specify the Debtor's intentions with regard to the Creditor's claim and collateral. The plan payment proposed is $564 for 60 months. This amount is insufficient to cure Creditor's arrears of approximately $44,776.

The Plan does not appear to provide for the secured claim of Nationstar Mortgage, LLC, which holds the deed of trust at Debtor's real property located at 911 Yosemite Way, Suisun City, California. The Plan does not propose to cure the Creditor's pre-petition arrearage of $44,776.41.

FAILURE TO PROVIDE EVIDENCE OF ALLEGED CLAIM

Though an Objection to Confirmation was filed by a person who argues it is a creditor, no evidence has been provided. No Proof of Claim has been filed. No simple declaration of an employee or office of the person asserting to be a creditor has been filed. Only an argument presented by an attorney. Though exhibits are presented to the court, they have not been authenticated. Fed. R. Evid. 901.

Merely because someone has their attorney show up in court and argue does not constitute providing the court with evidence to support the demands being asserted.

The Objection to Confirmation is overruled. FN.1.

FN.1. The rejection of this objection may be but a Pyrrhic victory for the Debtor. If this asserted creditor is correct and an unprovided for arrearage exists, the court can envision shortly seeing a motion for relief from the stay. At that point, the Debtors and counsel would have to prepare a modified plan, motion to confirm modified plan, evidence to support the modified plan, notice a hearing, and conduct a hearing on the proposed modified plan. Any such proceedings because of the unprovided for cure of the arrearage would be clearly anticipated work to be covered by the no-look fee and likely not be reasonable additional costs and expenses if counsel has chosen to opt out of the no-look fee.

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 Creditor Nationstar Mortgage, LLC, 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 overruled. No determination is made concerning any claim being asserted by the Objecting party.

35. 14-22679-E-13 TSB-1 DENNIS FLORES Mark Lapham

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 5-8-14 [43]

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

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

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

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 May 8, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized

by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to sustain the Objection.

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

1. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341 on May 1, 2014. The Trustee does not have sufficient information to determine whether or not the cause is suitable for confirmation with respect to 11 U.S.C. § 1325. The meeting has been continued to May 29, 2014 at 10:30 am.

   The Trustee's Report of the May 29, 2014 meeting is that Debtor and counsel appeared, with the meeting being concluded. May 30, 2014 Docket Entry. This resolves this specific objection.

2. Debtor has not provided Trustee with a tax transcript or copy of her Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists under 11 U.S.C. § 521(e)(2)(A); FRBP 4002(b)(3). This is required seven days before the date first set for the meeting of creditors, 11 U.S.C. § 521(e)(2)(A)(1).

   Docket Entries 53 and 54 are copies of 2012 and 2013 Tax Returns for the Debtors. They show the Debtors having total income in excess of $100,000.00.

3. The Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv).

4. Debtor is $594.67 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $594.67 is due by May 25, 2014. The case was filed on March 17, 2014, and the Plan in § 1.01 calls for payments to be received by the Trustee no later than the 25th day of each month, beginning the month after the order for relief under Chapter 13.

5. Section 2.06 of the Plan indicates that $0.00 attorney fees have been charged and paid in this case. The Plan fails to indicate if counsel is to comply with Local Bankruptcy Rule 2016-1(c) or file a motion for fees. The Statement of Financial Affairs, Item No. 9, indicates that Counsel was paid $1,000 for filing this case, though the date of that payment is omitted. The Disclosure of Compensation, Dckt. No. 13, also indicates that Counsel received $1,000 prior to filing.

6. The Plan fails to provide for the debt of Nationstar on Debtor's residence. Debtor lists this debt on Schedule D, and indicates a secured claim against the property of $180,000.00. While treatment

of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment may indicate that Debtor either cannot afford the plan payments because of additional debts, or that Debtor wishes to conceal the proposed treatment of a creditor.

7. Debtor has claimed exemptions under California Code of Civil Procedure §703.140, and appears to be married based on Debtors' Statement of Current Monthly Income, Dckt. No. 15. Debtor's spouse has not joined in the petition. California Code of Civil Procedure §703.140(2)(2) requires Debtors to file a spousal wavier, signed by Debtor and Debtor's spouse, for the use of claimed exemptions.

California Code of Civil Procedure § 703.140, subd. (a)(2), provides:

> If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

The Trustee has had not found any such waiver failed with the court after reviewing the docket.

A review of the court's docket shows that on May 19, 2014, Debtor filed his 2013 Tax Returns and his pay status as evidenced by a letter from the City of Fairfield City Manager's Office. Additionally, Debtor claims that on May 15, 2014, Debtor mailed two payments totaling $1,189.34 of plan payments to the Trustee's office.

Debtor has not, however, addressed the Trustee's objections to the proposed plan regarding the attorney's fees paid in the case and the treatment of the secured claim of Nationstar Mortgage, LLC, under the plan. Additionally, the Debtor has not filed a spousal waiver required to be able to claim spousal exemptions under the California Code of Civil Procedure. 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 Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

36. 13-28480-E-13 CHARLES/TAMYRA HEARD — MOTION TO APPROVE LOAN MODIFICATION
PGM-4 Peter G. Macaluso — 5-1-14 [82]

Tentative Ruling: The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rules 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).

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.

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, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on May 1, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

The Motion to Approve the Loan Modification is denied without prejudice. No appearance required.

Debtors Charles H. Heard and Tamrya L. Heard, seek authorization from the court to enter into a loan modification agreement with a person identified only as "Lender."

Debtors are the owners of real property commonly known as 1685 Hickam Circle, Suisun City, California. The Debtors state that they have completed trial loan modification payments and have been offered a permanent loan modification that will modify their monthly payment to $1,542.56 at 2.0000%, the first payment for which will be due on May 1, 2014.

Debtors state that the modified principal balance of the Note will include all amounts and arrearages that will be past due as of the Modification Effective Date (including unpaid and deferred interest, fees, escrow advances and other costs, but excluding unpaid late charges, collectively, "Unpaid Amounts") less any amounts paid to the Lender but not previously credited to the loan. The principal balance of the loan that will be $331,711.34, and $38,038.66 of the New Principal Balance shall be deferred and no interest or monthly payments will be made on this amount. The modification proposes a Short Term Principal Reduction of $331,893.63, and an estimated balloon payment of $49,293.59 will be due and payable by April 1, 2051.

UNIDENTIFIABLE PARTY TO LOAN MODIFICATION

The Motion to Approve Loan Modification does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not state with particularity the grounds upon which the requested relief is based. Debtors do not identify the Lender party to the subject loan modification. The motion merely states that Debtors wish to enter into a permanent loan modification agreement with an unidentified "Lender." This is not sufficient.

Here, it appears as if Debtors have carefully avoided identifying the Lender by name, by referring to the lending party as "Lender" in their Motion instead of listing the exact identity to the creditor. Dckt. No. 82. The Loan Modification Approval Letter filed by Debtors as Exhibit "A" in support of the motion dated March 21, 2014, is from the Home Preservation Department of America's Servicing Company, and includes the modification proposal for Debtors' residence. Dckt. No. 85. Debtors do not identify, however, whether America's Servicing Company is the party contracting with Debtors to modify the subject loan, and/or the holder of the underlying claim.

The court had previously raised this issue in its ruling on the Motion Debtors brought to approve a trial loan modification with the same unidentified creditor. In its ruling on the previous Application to Approve Loan Modification filed by Debtors, PGM-3, the court stated:

> Debtors state that they have entered into a loan modification agreement, but do not describe the lender that is party to this agreement. Instead, Debtors describe the lender using the imprecise, ambiguous term of "US

Bank/America's Servicing Company" in their motion. In effect, Debtors are asking the court to issue an order against unidentifiable entities. Debtors do not elaborate on the relationship between the two entities in the motion, and the evidence offered further muddles the court's understanding of the identity of the real creditor in interest.

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

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

A Motion to Approve a Loan Modification that does not identify the responding lender does not set forth the relief requested with the particularity required by Federal Rule of Bankruptcy Procedure 9013. The court cannot grant relief against a respondent who is unidentified, or against a respondent whose identity is ambiguous. Fed. R. Bankr. P. 9013. Debtors fail to identify the lender who has allegedly entered into an agreement to modify their home loan, rendering the court unable to issue an order affecting the rights of a specified party. A motion that does not identify clearly the responding party does not comply with Rule 9014(a) because a motion that is ambiguous about the respondent cannot give reasonable notice and opportunity for hearing to the party against whom relief is sought. Fed. R. Bankr. P. 9014(a)...

The Motion suffers from another major defect, however; it does not appear that the relief is requested by Debtors with any recognizable legal entity US Bank/Americas Servicing Company. The court cannot identify any such entity after

> searching the FDIC website for federal insured financial institutions, the Comptroller of the Currency website for national banks, or the California Secretary of State website for corporations, limited liability companies, and limited partnerships. The court will not issue an order purporting to have an binding effect on a person or entity that the court does not have a good faith belief exists.

Civil Minutes on the Motion to Approve Loan Modification Filed by Debtor Charles Henry Heard Jr., Joint Debtor Tamyra Lakeesh Heard, Dckt. No. 73. Once again, Debtors fail to identify the responding lender in this Motion, and are asking that the court to issue a blank check allowing the Debtors to enter into a loan modification with an unidentified entity that the court can not be certain exists.

There is no excuse for hiding from the court the identity of the party with whom the Debtors are entering this post-petition modification of credit. In addition to not disclosing the identity with home this post-petition credit is being obtained, the Debtors have failed to provide a copy of the credit agreement. They provide only a letter with some terms. The court has no idea of what the complete terms are for the modification.

The parties will have to accurately and correctly identify the "Creditor" who is entering into this Loan Modification Agreement, have the Agreement properly identify the creditor, and if the Agreement is being executed by an agent, that the agent be correctly identified and proof of its authority provided to the court. The current motion is deficient because it does not meet the requirements of Federal Rule of Bankruptcy Procedure 9013 in stating the grounds for relief with particularity, and does not comply with the provisions of 11 U.S.C. § 364(d).

The Debtors and "Lender" will have to provide the court with a copy of the actual post-petition credit agreement. Fed. R. Bankr. P. 4001(c)(1). The court does not grant *carte blanche* authority to persons to impose any and all types of terms they desire on debtor under the guise of a court authorized post-petition credit transaction. Quite possibly "Lender" may try to impose unreasonable conditions (such as a 100% default penalty, 25% interest rate, mandatory insurance from "Lender" owned entities, and the like), which "Lender" would later defend as being ordered by the court.

The Motion to Approve the Loan Modification is denied without prejudice. FN.1.

FN.1. To the extent that the Debtors believe they are stuck between a rock and a hard place, this court not being willing to waive the Federal Rule of Bankruptcy Procedure for an unidentified third-party and give carte blanche authority for "Lender" to do whatever it wants with the Debtors, most lenders are highly regulated. Some federal and state agencies which come to mind are the U.S. Comptroller of the Currency, the Federal Trade Commission, the federal Consumer Financial Protection Bureau, and the California Attorney General.

If "Lender" had been accurately identified and there was an agreement providing that specific amendments, and only those specific amendments were made to the existing loan documents, the court could craft

an order authorizing the post-petition credit, using the terms stated in the amendment agreement with the Debtors. Even that has not been provided to the 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 Approve the Loan Modification filed by Debtors Charles Henry Heard Jr. And Tamyra Lakeesh Heard ("Debtors"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve the Loan Modification is denied without prejudice.

37. 14-23385-E-13 MICHELE WILLIAMS — MOTION TO VALUE COLLATERAL OF LAND ROVER CAPITAL GROUP
PGM-1 Peter G. Macaluso — 5-2-14 [18]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 2, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Value secured claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Creditor having filed an opposition, the court will address the merits of the motion. If it

appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Value secured claim of Land Rover Capital Group, "Creditor" is granted, and the value of the Creditor's secured claim is determined to be $12,000.00.

The Motion filed by Michele A. Williams, "Debtor," seeks to value the secured claim of Land Rover Capital Group, "Creditor," is accompanied by Debtor's declaration. Debtor is the owner of a 2006 Range Rover, "Vehicle." The Debtor seeks to value the Vehicle at $12,000.00 as of the petition filing date.

The lien on the Vehicle's title secures a purchase-money loan incurred in May 14, 2008, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $33,577.74. Therefore, Debtor argues that the Creditor's claim secured by a lien on the asset's title is under-collateralized.

OPPOSITION BY CREDITOR

Land Rover Capital Group ("Creditor") opposes Debtors' Motion to Value the Secured Claim of Land Rover based upon Debtor's "failure to present evidence" support her contention that the replacement value of the vehicle is $12,000.00. Creditor argues that Debtor's valuation of $12,000.00 lacks credible evidentiary support.

Creditor offers its competing valuation of $20,375.00 for the subject vehicle, based upon the "retail" value of the vehicle. Creditor attaches a copy of a NADA Guide retail value online report, which references the Vehicle's retail value. The Creditor files the Declaration of Danielle Walker, Dckt. No. 37, who describes herself as an Account Services Representative for Creditor, and one of the custodian of books, records, and files for the Creditor company, to authenticate the NADA Office Used Car Guide printout dated May 9, 2014, that has been filed in support of Creditor's Opposition.

An examination of Ms. Walker's Declaration, however, shows that Ms. Walker does not present testimony asserting that the Guide printout is what it purports to be under Federal Rule of Evidence 901, and Ms. Walker does not testify that she has personal knowledge under Federal Rule of Evidence 701 as to how the report was prepared, and who in the Creditor company inputted what values to generate the value of the subject vehicle.

Ms. Walker merely attests that Creditor "regularly relies upon the *NADA Guides* in estimating values of vehicles in the normal course of business," without specifying who has prepared the report, when it was actually made, and what information the individual who prepared the report used to produce the listed values.

REPLY BY DEBTOR

Debtor responds to Creditor's Opposition by arguing that the Creditor has not requested an opportunity to retain an expert with personal

knowledge to inspect the vehicle, and that the Creditor has not supplemented the record with additional admissible evidence. Debtor asserts that the Creditor has not met its "burden of persuasion" that the Debtors' valuation of the vehicle is incorrect, since it has only submitted commercial publication evidence as to what retail price a similar car in excellent condition would be sold, and not for the particular subject vehicle and its specific condition. Debtor's Reply to Opposition, Dckt. No. 40.

CONSIDERATION OF THE EVIDENCE

The Creditor's printout consists of a "price report" dated May 9, 2014, with estimated base prices for the rough, average, and clean trade-in and retail values for Debtor's 2006 Land Rover Range Rover V8-4WD. Those prices are then adjusted for a car with 85,000 miles. Exhibit C, Dckt. No. 38. There is no explanation for the mileage value listed on the summary. Ms. Walker's Declaration does not indicate how the base prices were calculated, and how Creditor arrives at the 85,000 mileage amount. Ms. Walker does not specify which values were entered into the system to generate the stated used car value.

A deduction is made for the estimated mileage of the vehicle (which differs substantially from the first NADA Guide report offered by Creditor as Exhibit B in its Proof of Claim Attachment, and does not match Debtor's mileage figure), but no other adjustments for value are made to take into account the car's condition or need for repairs.

The Declaration of Debtor, Michele A. Williams provides a more comprehensive description of the vehicle and its necessary repairs. Williams' Declaration, Dckt. No. 20, states that the vehicle is in poor condition, that there are approximately 125,000 miles on the vehicle, and that the following items are broken, damaged, and/or in need of repair: tear suspension/rear height sensor, a cracked windshield, a dent in back driver's side, torn leather seats, bald tires, and poor brakes. *Id*. at ¶ 6.

Debtor concludes that it would cost between $5,000.00 and $7,000 to make the necessary repairs to her vehicle. Based on the adjustments for the problems in the condition of Debtor's vehicle, Debtor states that it is her opinion that the vehicle's retail value on the date of filing is $12,000. 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.

Even considering the Creditor's unauthenticated NADA Report, the court finds Debtor's valuation of the subject vehicle more credible and determines the creditor's secured claim is determined to be in the amount of $12,000.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted. FN.1.

FN.1. The court can anticipate Creditor's response, "well judge, where do you think this came from if I didn't prepare it." The answer is, "the judge doesn't know." It is the party's responsibility to properly authentic evidence presented to the court. It is very plausible that the "witness" providing the "testimony" is little more than a file clerk who is assembling documents prepared by others – with no knowledge of how the documents were

prepared or whether they are accurate. For the court to just "assume that it must be correct" would open the floodgates for strawman witnesses to be stuff by attorneys with whatever information was to be portrayed as evidence because it allowed the attorney to prevail.

This need to have an actual witness who could properly authentic exhibits or provide personal knowledge testimony is nothing new in this court. Fed. R. Evid. 601, 602, 901. For more than four years it has been required. To the extent that a party wants to argue, "the other judges don't make us comply with the Federal Rules of Evidence," such protestations are meritless. (As well as substantially incorrect in 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 for Valuation of Collateral filed by Michelle Williams, "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 Land Rover Capital Group, "Creditor," secured by an asset described as 2006 Land Rover Range Rover, "Vehicle," is determined to be a secured claim in the amount of $12,000, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $12,000 and is encumbered by liens securing claims which exceed the value of the asset.

38. 14-23385-E-13 MICHELE WILLIAMS
PGM-2 Peter G. Macaluso

MOTION TO VALUE COLLATERAL OF AMERICREDIT FINANCIAL SERVICES, INC.
5-2-14 [23]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 2, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Value secured claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Value secured claim of Americredit Financial Services, Inc. dba GM Financial, "Creditor" is granted, and the value of the Creditor's secured claim is determined to be $6,372.00.

The Motion filed by Michele A. Williams, "Debtor," seeks to value the secured claim of Americredit Financial Services, Inc., "Creditor," is accompanied by Debtor's declaration. In the Motion, Debtor states that the collateral at issue in this matter is a 2006 Range Rover. Dckt. No 23. However, the Declaration of Debtor, Dckt. No. 25, and Opposition of Creditor, Dckt. No. 32, references a 2009 Dodge Charger.

It appears that Debtor made a typographical error in her Motion, most likely because Debtor forgot to change the description of the subject vehicle from her concurrently filed Motion to Value the Secured Claim of Land Rover Capital Group, PGM-1, in which the property was a 2006 Land Rover, to the vehicle at issue in the instant Motion to Value the Secured Claim of Americredit Financial Services, Inc., dba GM Financial, PGM-2,

which concerns a 2009 Dodge Charge (VIN ending in the last four digits of #5471).

With respect to this Motion, Debtor is the owner of a 2009 Dodge Charger, "Vehicle." The Debtor seeks to value the Vehicle at $6,372.00 as of the petition filing date. The lien on the Vehicle's title secures a purchase-money loan incurred in August 26, 2010, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $18,866.68. Therefore, Debtor argues that the Creditor's claim secured by a lien on the asset's title is under-collateralized.

OPPOSITION BY CREDITOR

Americredit Financial Services, Inc. dba GM Financial ("Creditor") opposes Debtors' Motion to Value the Secured Claim of Land Rover based upon Debtor's "failure to present evidence" support her contention that the replacement value of the vehicle is $6,732.00. Creditor argues that Debtor's valuation of $6,732.00 lacks credible evidentiary support. Dckt. No. 32.

Creditor offers its competing valuation of $14,350.00 for the subject vehicle, based upon the "retail" value of the vehicle. Creditor attaches a copy of a NADA Guide retail value online report, which references the Vehicle's retail value. The Creditor files the Declaration of Aaron Rangel, Dckt. No. 32, who describes himself as the Vice President of Special Accounts for Americredit Financial Services, Inc. Dba GM Financial, and one of the custodian of books, records, and files for the Creditor company, to authenticate the NADA Office Used Car Guide printout dated April 22, 2014, that has been filed in support of Creditor's Opposition as Exhibit "C" in support of the Creditor's Opposition. Dckt. No. 34.

An examination of Mr. Rangel's Declaration, however, shows that Mr. Rangel does not present testimony asserting that the Guide printout is what it purports to be under Federal Rule of Evidence 901, and Mr. Rangel does not testify that he has personal knowledge under the lay testimony requirements of Federal Rule of Evidence 701 as to how the report was prepared, and who in the Creditor company inputted what values to generate the value of the subject vehicle. Mr. Rangel merely attests that Creditor "regularly relies upon the *NADA Guides* in estimating values of vehicles in the normal course of business," without specifying who has prepared the report, when it was actually made, and what information the individual who prepared the report used to produce the listed values. Dckt. No. 33.

REPLY BY DEBTOR

Debtor responds to Creditor's Opposition by arguing that the Creditor has not requested an opportunity to retain an expert with personal knowledge to inspect the vehicle, and that the Creditor has not supplemented the record with additional admissible evidence. Debtor asserts that the Creditor has not met its "burden of persuasion" that the Debtors' valuation of the vehicle is incorrect, since it has only submitted commercial publication evidence as to what retail price a similar car in excellent condition would be sold, and not for the particular subject vehicle and its specific condition. Debtor's Reply to Opposition, Dckt. No. 42.

CONSIDERATION OF THE EVIDENCE

The Creditor's printout consists of a "Vehicle Summary NADA Values" dated April 22, 2014, the source of which appears to be the NADA Official Used Car Guide. Exhibit C, Dckt. No. 34. The summary includes the base prices for the rough, average, and clean trade-in and retail values for a 2009 Dodge Charger-V6. Those prices are then adjusted for a car with 72,500.00 miles. Exhibit C, Dckt. No. 38. There is no explanation for the Mileage value listed on the summary. Mr. Rangel's Declaration does not indicate how the base prices were calculated, and how Creditor arrives at the 72,500.00 mileage amount. The Declaration does not specify which values were entered into the Used Car Guide program to generate the stated used car value.

Creditor appears to have adopted the "clean retail price," the highest figure offered on the values spectrum, as its estimated value of the subject vehicle. No adjustments for value are made to take into account the car's condition or need for repairs, according to the NADA Vehicle Summary.

The Declaration of Debtor, Michele A. Williams, however provides a more comprehensive description of the vehicle and its necessary repairs. The Debtor's Declaration, Dckt. No. 25, states that the vehicle is in poor condition, that there are approximately 85,000 miles on the vehicle, and that the following items are broken, damaged, and/or in need of repair: a cracked windshield, bald tires, dents, worn brakes, and "scratches all over." *Id*. at ¶ 6.

Debtor concludes that it would cost between $3,000.00 and $5,000 to make the necessary repairs to her vehicle. Based on the adjustments for the problems in the condition of Debtor's vehicle, Debtor states that it is her opinion that the vehicle's retail value on the date of filing is $6,732.00. 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.

Even considering the Creditor's unauthenticated NADA Report, the court finds Debtor's valuation of the subject vehicle more credible and determines the creditor's secured claim is determined to be in the amount of $$6,732.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Michelle Williams, "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 Americredit Financial

Services, Inc. Dba GM Financial, "Creditor," secured by an asset described as 2009 Dodge Charger, "Vehicle," is determined to be a secured claim in the amount of $6,732.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is $6,732.00 and is encumbered by liens securing claims which exceed the value of the asset.

39. 14-23385-E-13 MICHELE WILLIAMS
TSB-1 Peter G. Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
5-8-14 [28]

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

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

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

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 May 8, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor has not provided her tax return, and that the Plan relies on pending Motions.

Debtor has not provided Trustee with a tax transcript or copy of her Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required, or a written statement that no such documentation exists under 11 U.S.C. § 521(e)(2)(A); FRBP 4002(b)(3). This is required seven days before the date first set for the meeting of creditors, 11 U.S.C. § 521(e)(2)(A)(1).

Debtor's Plan also relies on the Motions to Value the Secured Claims of Land Rover Capital Group and Americredit Financial Services, which are set for hearing on this date. If the motion to value is not granted, Debtor's plan does not have sufficient monies to pay the claims in full.

On this hearing date, the court is granting Debtor's Motions to Value the Secured Claims of Land Rover Capital Group and Americredit Financial Services Inc, Dckt. Control Nos. PGM-1 and PGM-2, respectively, thus resolving the second portion of Trustee's Objection.

The docket does not reflect, however, that Debtor has provided the Trustee with a tax transcript or a copy of her federal income tax return, or a statement that no such documentation exists.

The Plan therefore 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 Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

40. 14-22586-E-13 OSCAR/MARIA SAEZ — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
TSB-1 Dan Nelson — 5-8-14 [23]

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

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

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

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, Chapter 13 Trustee on May 8, 2014. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan for three reasons. First, the Debtors did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341 on May 1, 2014. The Trustee does not have sufficient information to determine whether or not the cause is suitable for confirmation with respect to 11 U.S.C. § 1325. The Meeting has been continued to May 29, 2014 at 10:30 a.m.

Second, Debtors are delinquent $819.00 in plan payments to the Trustee to date, and the next scheduled payment of $819.00 is due on May 25, 2014. The case was filed on March 14, 2014, and the Plan in § 1.01 calls for payments to be received by the Trustee no later than the 25th day of each month, beginning the month after the order for relief under Chapter 13.

Third, Debtors cannot make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtors proposed to value the secured claim of the Internal Revenue Service, but have not filed a Motion to Value to date.

Based on the foregoing, 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 Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

41. 14-24786-E-13 LINDLEY FREEMAN MOTION TO EXTEND AUTOMATIC STAY
SCG-1 Sally C. Gonzales 5-20-14 [14]

Tentative Ruling: The Motion to Extend the 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.

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

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

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

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 May 20, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing **----------.**

The Motion to Extend the Automatic Stay is granted.

Debtors 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 Debtor's second bankruptcy petition pending in the past year. The Debtors' prior bankruptcy case (No. 13-028909) was dismissed on April 2, 2014, after Debtor defaulted on their plan payments. *See* Order, Bankr. E.D. Cal. No. 13-28909-E-13C, Dckt. 19, April 2, 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, the Motion merely asserts that Debtor acted in good faith, and that the dismissal of the prior case did not occur as a result of the willful inadvertence or negligence on the part of the Debtor. ¶ 6, Motion, Dckt. No. 14. The Motion further states that the "Debtor's attorney hereby avers that the present case was, indeed, filed in good faith and that the dismissal of the Prior Case was NOT due to the willful inadvertence or negligence on the part of the Debtor." Unfortunately, mere recitations of good faith are commonplace in the pleadings reviewed by this court, but don't carry much stock unless such assertions are supported by factual contentions and evidentiary support.

Although the Motion does not provide sufficient details to determine whether the case was filed in good faith, Debtor's Declaration provides more information on why Debtor's previous case was dismissed, and what has changed in Debtor's circumstances that will allow the present case to succeed. In his Declaration, Dckt. No. 16, Debtor testifies that he had significant medical issues that prevented him from completing my prior case.

Debtor states that he was diagnosed with skin cancer and underwent treatment that caused him to become so ill that he could not work in the time period from October 29, 2013 to March 2, 2014. During that time, Debtor's income decreased by a third of his normal pay, and Debtor states that he could not afford to make his plan payments. Debtor states that he has now completed his treatment and has resumed a normal work schedule that enables him to take home his normal pay, which will allow him to complete his Chapter 13 Plan. Debtor insists that he would have completed the prior plan if he had not become ill. *Id.*

The Debtor's testimony provides the necessary details as to why Debtor's previous case was dismissed, and information on what has changed in Debtor's current situation to allow Debtor to make timely payments and complete his Chapter 13 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.

42. 12-27387-E-13 ERROL/MELANI LAYTON
Mary Ellen Terranella

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JPMORGAN CHASE BANK, N.A.
5-23-12 [30]

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

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

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

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, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2012. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was not 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). Creditor JPMorgan Chase Bank, N.A., did not correctly set the motion for hearing. Pursuant to Local bankruptcy Rule 3015-1(c)(4) objections to confirmation must be set for hearing in compliance rule Local Bankruptcy Rule 9014-1(a)-(e), (f)(2), and (g)(1). Though the notice of hearing states that written opposition must have been filed 14 days before the hearing, no written opposition was required. This matter must be set for hearing under Local Bankruptcy Rule 9014-1(f)(2) which does not require written opposition. The court will consider the matter brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). FN.1.

FN.1. The moving party is also reminded that the Local Rules require the use of a new Docket Control Number with each motion or objection. Local Bankr. R. 9014-1(c). Here the moving party did not assign a Docket Control Number. This is improper. The Court will consider the motion, but counsel is

reminded that noncompliance with the Local Rules is grounds, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The court's decision is to set the Evidentiary Hearing for the Objection to Confirmation for xxxxx x.m. on ---------, 2014.

JPMorgan Chase Bank, N.A., the Objecting Creditor in this matter ("Creditor") holds a deed of trust secured by the Debtor's residence, real property commonly known as 106 Suisun Court, Vacaville, California.

On July 13, 2005, Creditors made a loan in the amount of $440,00.00 to Debtors. In exchange for the loan, the Debtors executed and delivered a note in the original principal amount of $44,000.00 to Creditor. As additional consideration, and security for repayment of the loan, Debtor made, executed, and delivered to Creditor as beneficiary a Deed of Trust dated July 13, 2005.

Creditor filed a timely proof of claim, in which it asserted $52,376.21 in pre-petition arrearages. The Plan does not propose to cure these arrearages. Because the Plan does not provide for the surrender of the collateral for this claim, the Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

OPPOSITION BY DEBTORS

Debtors' Opposition, filed on June 5, 2012, Dckt. No. 36, disputes the amount of arrearages claimed by Creditor, specifically arguing that the tax advances were not properly accounted for. Debtors state that Creditor's Proof of Claim dated June 1, 2012, indicating that Debtors owe pre-petition arrears in the amount of $52,376.21, of which $35,669,.46 is tax advances, cannot possibly be accurate. Debtors state that the Creditor's Transaction History shows that Debtors made mortgage payments, including an impound for taxes and insurance, through December 2011, and possibly more, given that some entries on the transaction history are not clear.

Debtors argue that only $33,502.00 in property taxes have come due since Debtors purchased the property. The advance is almost the exact same number that Creditor filed in its proof of claim in Debtors' previous Chapter 13 case, Case No. 08-28167. As of June 2008, only $13,734.00 in property taxes had come due. Debtors objected to the Proof of Claim filed by Creditor in the previous case, and the court determined that the correct pre-petition arrearage was $18,186.75. Civil Minute Order, January 16, 2009, Exhibit F. Dckt. No. 38.

Debtors also point to the Objection to Claim that they failed against Chase Home Finance, LLC, in the previous bankruptcy case (Case No. 08-28167-B-13J, Dckt. Control No. MET-4). Debtor states that Creditor Chase Home Finance, LLC, acknowledged that as of the hearing date on Debtors'

objection to claim, Debtors were current on pre-petition and post-petition payments, and the only pre-petition claim was for a tax advance. Through the Debtors' previous Chapter 13 case, Creditor Chase Home Finance, LLC, received payments from the Trustee on its claim in the approximate amount of $11,790.00. Debtors question why there would be any advanced for taxes when their payment includes an impound, and Debtors were supposedly current on their payments as of June, 2008.

Additionally, during their previous Chapter 13 case, Debtors were notified by the Creditor that they had escrow surplus in the amount of $29,368.42. Exhibit G, Chase Annual Escrow Account Disclosure Statement, dated April 13, 2010, Dckt. No. 38. Debtors state that no response to the inquiry regarding this surplus was ever provided, and Debtors point to this as a basis for its assertion that there are serious discrepancies in the accounting of Debtors' loan by Chase Home Finance, LLC, and its assignee, JPMorgan Chase Bank, N.A.

PROCEDURAL HISTORY

At the court's initial hearing on the Objection on June 19, 2012, the court continued the matter to allow both parties to file and serve status reports and updates on the matter by July 18, 2012. Civil Minutes, Dckt. No. 40.

On July 18, 2012, Dckt. No. 45, the Debtors and JP Morgan Chase Bank, N.A. filed a joint status report concerning the Objection to Confirmation. The statement acknowledged that the dispute between the parties related to the computation of the arrearage asserted by the creditor and alleged advances for taxes. Though not resolved, the parties reported,

> "Creditor and Debtors are very hopeful that an informal settlement and stipulation with regard to the proper amount of arrearages can be reached without the need for an evidentiary hearing. Counsel for both parties have already participated in fruitful discussions of the issues to be resolved, and Creditor is currently looking into the matter of the tax advances. Creditor and Debtors respectfully request that the court continue the status conference for at least sixty (60) days in order to allow Creditor and Debtors sufficient time to work out a settlement and stipulation."

The parties represented that they were actively engaged in settlement discussions, that they are effectively communicating, and that further time extended to the parties would be consistent with the proper administration of this case. The hearing on the Objection to Confirmation was continued to October 17, 2012.

On October 3, 2012, the parties filed a second status report, stating that Creditor's counsel anticipated that an amended proof of claim will be filed that resolves the issue of arrearages resulting from escrow advances before the hearing date. The report stated that Creditor's counsel spoke with Debtors' counsel on October 2, 2012 to inform her that Creditor's counsel was in the process of receiving final approval to amend the proof of claim. Dckt. No. 51.

On May 24, 2013, the court issued a scheduling order setting a status conference date for September 24, 2013. Dckt. No. 72. Throughout the months of May to July of 2013, the parties filed various orders and joint stipulations to extend the discovery cut-off dates set out in the court's scheduling orders, in order to "informally resolve their disputes relating to Chase's proof of claim." Dckt. No. 77.

An order granting a stipulation to continue the hearing on the confirmation of Debtors' Plan from December 17, 2013 to March 25, 2014, was signed and filed on November 2, 2013. Dckt. No. 90. The parties entered into their self-described Fourth Joint Stipulation to again extend the cut-off and related deadlines for the discovery stage of their litigation was signed and filed on February 18, 2014. Dckt. No. 94. The hearing on the matter was continued to this hearing date, with the discovery cut-off dates in connection with the Objection and Debtor's Plan extended to April 30, 2014.

On May 27, 2014, Creditor's Counsel filed a Notice of Continuance of the "Confirmation Hearing on Debtors' Chapter 13 Plan" (although this matter concerns Creditor's Objection the Chapter 13 Plan, and not a Motion to Confirm the Plan), confirming that the confirmation hearing on Debtors' Plan is set for this date. Nothing further on this matter and relating to the issue of the pre-petition arrearage on Creditor's loan has been filed on the docket, however, since the initial submission of Creditor's Objection and Debtors' responsive pleadings to Creditors' arguments concerning the plan's failure to cure the pre-petition arrearage specified on its Proof of Claim.

The Creditor filed Proof of Claim No. 3, on October 9, 2012, asserting a claim of $431,779.28. The amount of arrearage that is currently claimed by the Creditor is $28,370.95. The party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). The Proof of Claim includes a Mortgage Proof of Claim Attachment, showing the Creditor's calculation of the total fees, expenses, and charges owed by Debtors, as well as the subject deed of trust, and a Corporate Assignment of the Deed of Trust.

Debtors filed Exhibits on June 5, 2012 in this matter, Dckt. Nos. 37 and 38, but did not file declarations or testimony to authenticate the offered exhibits under Federal Rule of Evidence 901. Debtors did not provide declarations testifying that the exhibits are what they purport to be. Thus, the court does not have admissible evidence from the Debtors to challenge and meet the burden of proof in overcoming the prima facie validity of Creditor's listed values for the arrearage owed by Debtors in this case.

There exists a clear evidentiary dispute concerning the amount of arrearage owed on the Creditor's claim, and the court lacks sufficient evidence to determine the amount at this time. The court cannot yet determine whether the Debtors' Chapter 13 Plan, filed in April 17, 2012, complies with 11 U.S.C. §§ 1322 and 1325(a).

This matter will be resolved only through an Evidentiary Hearing. The court has on multiple occasions, on the Stipulation of the Parties, extended the discovery in this Contested Matter. Discovery has now closed. Final Order Extending Discovery, Dckt. 96.

The "factual disputes" which are the subject of the discovery in this Contested Matter are ones that should be readily determinable. This Objection to Confirmation was originally filed on May 23, 2014. Now two years later these Parties are lumbering through discovery.

The court shall issue an Evidentiary Hearing Order substantially in the following form holding that:

a. Jurisdiction exists for this Contested Matter pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding arising under 11 U.S.C. § 1325 and pursuant to 28 U.S.C. § 157(b)(2)(L).

b. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.

c. On or before ----------, 2014, Errol Layton and Melani Layton, ("Debtors") shall file and serve on JPMorgan Chase Bank, N.A. and the Chapter 13 Trustee a list of witnesses which Debtor will present as their witnesses for their case in chief (excluding rebuttal witnesses).

d. On or before ----------, 2014, JPMorgan Chase Bank, N.A. ("Creditor")shall file and serve on Debtors and the Chapter 13 Trustee a list of witnesses which Creditors will present as their witnesses for their case in chief (excluding rebuttal witnesses).

e. Debtors, shall lodge with the court and serve their Testimony Statements and Exhibits on or before ----------, 2014.

f. Creditor, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 2014.

g. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 2014.

h. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before —----------, 2014

i. The Evidentiary Hearing shall be conducted at -------.m. on ----------, 2014.

43.	**14-22789-E-13 MDE-1**	**DAVID COTA AND KAREN SLAVICH-COTA Julius M. Engel**	**OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 4-17-14 [14]**

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

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

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

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, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 17, 2014. By the court's calculation, 47 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

Wells Fargo Bank, N.A. ("Creditor"), opposes confirmation of the Plan on the basis that the Plan does not provide for the curing of the default on its secured claim. Creditor states that it will file its Proof of Claim in the approximate amount of $71,519.31, including arrearage in the approximate amount of $3,282.23. The Creditor's claim is secured by the real property commonly known as 7984 Keith Winney Circle, Sacramento, California.

Creditor argues that pursuant to 11 U.S.C. §1322(b)(5), the plan fails to provide for the curing of the default on Secured Creditor's claim.

Both Debtors' originally filed plan and Debtor's Amended Plan, filed on May 16, 2014, only provides for an arrearage of $50,464.80 on Creditor's Proof of Claim. The Plan indicates that Debtors intend to avoid the second mortgage of the Creditor. Debtors have not filed a Motion to Value the Secured Claim of the Creditor.

Creditor argues that under these circumstances, the claim should be fully provided for in the Plan, with arrears in the approximate amount of $3,282.23.

Because Debtors have not filed a Motion to Value the Secured Claim of Creditor Wells Fargo Bank, N.A., 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 b Creditor Wells Fargo Bank, N.A. 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.

44. 11-26396-E-13 MAURA LEWIS **MOTION TO SELL**
WW-2 Mark A. Wolff **4-24-14 [43]**

Final Ruling: No appearance at the June 3, 3014 hearing is required.

Tentative Ruling: The Motion to Sell Property 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.

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, parties requesting special notice, and Office of the United States Trustee on April 24, 2014. By the court's calculation, 40 notice was provided. 35 days' notice is required.

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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 Sell Property is granted.

The Bankruptcy Code permits the Chapter 13 Debtor, Maura Lewis ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here, the Movant proposes to sell the "Property" commonly known as 909 Alvarado Avenue, #8, Davis, California. Debtor owned this property free and clear of mortgage liens, but the property is subject to some past due property taxes.

At the time this case was filed, Debtor listed her property on Schedule A with an estimated value of $150,000.00. Debtor claimed a homestead exemption of $175,000.00. Debtor had no unexempted property and the holders of unsecured claims were to receive 0.00%. Debtor states that she would like to sell her property because her employment situation has change. At the time that Debtor's petition was filed, Debtor was employed with Davis Ace Lumber, but is now unemployed as she lost her job with Davis Ace Lumber on October 23, 2013. Debtor applied for unemployment. Debtor is receiving social security in the amount of $1,007.00.

Because of her unemployment, Debtor is having trouble affording plan payments and living expenses, and is therefore interested in selling the house and paying off her Chapter 13 Plan. Debtor is filing a Motion to Confirm a modified plan.

Debtor is in the 37th month of her confirmed Chapter 13 Plan. At the time of her petition filing, Debtor was below median income, with an annual income of $22,413.00. Debtor proposed a 60 month plan as she is not able to afford paying what she needed to in a 36 month plan. The Plan payments under the confirmed plan are $300.00 per month for 60 months. The payoff to complete the plan with a lump sum payment equaling the remaining payments due under the Chapter 13 plan is $7,200.00. Debtor proposes to payoff the Chapter 13 Plan with the proceeds from the sale of the property.

Debtor received an offer for the purchase of property with the proposed purchase price of $195,000.00. The proposed purchaser of the Property is Nicholas Bali, who Debtor states is not a relative or a friend (Dckt. No. 45), and the terms of the sale are summarized in the California Residential Purchase Agreement and Joint Escrow Instructions filed concurrently with this Motion as "Exhibit A," Dckt. No. 46. Debtor states that the proposed buyer was located by a real estate agent retained for the purpose of marketing the property.

Debtor has reviewed the offer to purchase the property, and believes that the purchase price represents a fair value for the subject property given the current economy. After all fees, expenses, and commission are paid, it is estimated that Debtor will receive $170,985.41 from the sale. Debtor is considering using these funds to purchase another property after completing her Chapter 13 Plan. Debtor states that security interests encumbering the property will be paid in full before or simultaneously with the transfer of the title or possession to the buyer. All costs of sale, such as escrow fees, title insurance, and broker's commission will be paid in full from the sale proceeds.

The Chapter 13 Trustee filed a statement of non-opposition to the Motion on May 12, 2014.

At the hearing ----------.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

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 Sell Property filed by Maura Lewis, the Chapter 13 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 Maura Lewis, the Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Nicholas Bali, the Property commonly known as 909 Alvarado Avenue, #8, Davis, California ("Property"), on the following terms:

1. The Property shall be sold to Buyer for $195,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. No. 46, and as further provided in this Order.

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

3. The Chapter 13 Debtor be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen (14) days of the close of escrow the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

45. 11-26396-E-13 MAURA LEWIS **MOTION TO MODIFY PLAN**
WW-3 Mark A. Wolff **4-24-14 [47]**

Final Ruling: No appearance at the June 3, 2014 hearing is required.

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 April 24, 2014. By the court's calculation, 40 days' notice was provided. 35 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)(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.

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 Chapter 13 Trustee filed a statement of non-opposition to confirmation of the Plan on May 12, 2014. 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 April 24, 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.

46. 14-24955-E-13 ANTOINETTE TRIGUEIRO **MOTION TO EXTEND AUTOMATIC STAY**
SCG-2 Sally C. Gonzales **O.S.T.**
5-28-14 [17]

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.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all creditors, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on May 28, 2014. By the court's calculation, 8 days' notice was provided.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing **----------.**

The Motion to Extend the Automatic Stay is granted.

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. 14-23989-B-13) was dismissed on May 6, 2014, after Debtor failed to file the required documents in a timely manner. *See* Order, Bankr. E.D. Cal. No. 14-23989-B-13, Dckt. 11, May 6, 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 states that she filed her prior case in *pro per*, in an attempt to save her home from foreclosure. Debtor states that she has been working diligently with her tax CPA to have all required tax documents filed before the 341 meeting. Debtor argues that she now has legal counsel and understands her obligations in this Chapter 13 in order to save her home and pay her creditors.

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.