UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 10, 2014 at 3:00 p.m.

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1. 12-38500-E-13 DARLENE GRAY — MOTION TO MODIFY PLAN
CFH-5 Curt F. Hennecke — 4-15-14 [113]

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, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on April 15, 2014. By the court's calculation, 56 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 Trustee opposes confirmation offering evidence that the Debtor is $16,276.00 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 opposes the motion on the basis that the Debtor filed current Schedule I & J on incorrect forms.

The modified Plan complies 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.

2. 13-22901-E-13 VICTOR/SANDRA GARCIA — MOTION TO MODIFY PLAN
PGM-5 Peter G. Macaluso — 5-5-14 [106]

Final Ruling: No appearance at the June 10, 2014 hearing is required.

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 May 5, 2014. By the court's calculation, 36 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 continue the hearing on the Motion to Confirm the Modified Plan to 3:00 p.m. on June 24, 2014.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The modified plan is not proposed in good faith, 11 U.S.C. § 1325(a)(3). The Debtor initially proposed a plan paying $500.00 per month. No domestic support obligation appeared on Schedule I or J. The Trustee objected that the plan was not the Debtor's best effort, among other reasons, which was sustained. The Debtor subsequently amended the plan and declared that they had a domestic support obligation that ended in 13 months. The Debtors confirmed a plan that incorporated an increased payment based on this detail. The Debtors now declare they were unaware that their payment needed to increase, so they continued making the same payment. Debtors state their domestic support obligation is still ongoing and are

uncertain when it will end.

Trustee argues that the Debtor now proposes to defer the payment increase called for by the confirmed plan without providing the Court evidence of current pay- such as a copy of current paystubs - and without proving specific details as to the domestic support obligation to the Court. The Trustee requests paystubs from both Debtors.

DEBTOR'S RESPONSE

Debtors respond, stating that the last two pay stubs were provided to the Trustee on June 3, 2014. Debtors request more time to allow the Trustee to review the paystubs and provide additional documentation to the Trustee if needed.

As the Debtors have just recently provided the paystubs to the Trustee, the court allows a brief continuance for the Objection to Confirmation to June 24, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to 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 continued to 3:00 p.m. on June 24, 2014.

3. 14-22409-E-13 ROBERT/MARY LYTLE MOTION TO INCUR DEBT
LBG-3 Lucas B. Garcia 5-27-14 [41]

Tentative Ruling: The Motion to Incur Debt 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 May 27, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Incur Debt 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 Incur Debt is denied without prejudice.

The motion seeks permission to purchase a 2011 Honda CRV, which the total purchase price is $23,486.86, with monthly payments of $499.08.

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). In re Gonzales, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, "including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions." Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. Id. at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

Here, the Debtor does not address the reasonableness of incurring debt to purchase a used 2011 Honda CRV while seeking the extraordinary relief under Chapter 13 to discharge debts. The proposed transaction is not best interests of the Debtor. The loan calls for a substantial interest charge – 14.95%.

The Motion states with particularity (Fed. R. Bankr. P. 9013) that,

A. Debtors are current in their plan payments;

B. Debtors seek court authorization to obtain post-petition credit to purchase a 2001 Honda CRV or similar vehicle;

C. The Debtors intend to borrow $23,486.86 from Consumer Portfolio Services, Inc. to purchase a vehicle;

D. Other documents who that Debtors want to purchase the vehicle as soon as possible;

E. Debtors have been informed that court approval is required for them to incur post-petition debt;

F. The monthly payment to Consumer Portfolio Services, Inc. Will be $499.08 a month, and Debtors have filed Updated Schedules I and J to demonstrate that they have the ability to pay this additional amount.

Motion, Dckt. 41. No copy of the post-petition credit agreement has been provided to the court. The terms and conditions of such post-petition credit has not been disclosed to the court, Chapter 13 Trustee, U.S. Trustee, Creditors, and other parties in interest.

Excluded from the Motion and buried in the declaration are the terms of the post-petition credit. For the 2011 vehicle the Debtors will,

A. Incur $23,486.86 in debt;

B. To purchase an unidentified vehicle of unstated value;

C. For which they will pay 14.95% interest;

D. For a 72 month term (at the end of which a 2011 vehicle will be 11 model years old); and

E. Will make monthly payments of $499.08.

Declaration, Dckt. 43. The Declaration provides no information as to the necessity of purchasing the 2011 vehicle for an unknown price, other than saying that Debtor needs to attend doctor’s appointments and the Co-Debtor works out of town five days a week.

The Declaration also states that the Debtors believe that a 14.95% interest rate “are the best we could achieve,” but the declaration is bereft of any testimony about where they sought credit, the terms they were quoted

by lenders, and possible sources of post-petition credit.

The proposed Amended Chapter 13 Plan in this case (Dckt. 26) requires the Debtors to make $382.00 a month payments for sixty months. This includes a Class 2 payment to Capital One Auto Finance of $209.16 a month for a 2008 Honda Accord with 91,000 miles (stated to be in good condition). Schedule B discloses that the Debtors own two vehicles, a 2008 Honda Accord and a 2007 Toyota Tundra (61,000 miles, stated to be in good condition). Dckt. 1 at 15. Schedule D lists two secured claims, a $29,093 claim secured by the Tundra (which is listed as having a value of $18,445) and an $11,357.00 claim secured by the 2008 Honda Accord (which is listed as having a value of $10,648.00). *Id.* at 18.

On Schedule I the Debtors list having $6,362.20 a month in gross income. This consists of $3,737.50 in net income from business for the Co-Debtor and $2,624.70 in Social Security income. *Id.* at 27. The Debtors have no dependants listed on Schedule J. On Schedule J the Debtors list $6,007.00 in necessary monthly expenses. *Id.* at 28-29. No car payments are provided for in the Schedule J budget.

Thought the Debtors state that they have significant monthly income from a business, they fail to provide a statement of the expenses relating to that income. The court has no way of identifying what reasonable (or unreasonable) expenses are deducted from the gross income to generate the net number.

The Original Chapter 13 Plan provided to pay the grossly undersecured claim of Santander Consumer USA, for which the 2007 Toyota Tundra as collateral, as a Class 4 Claim payment of %538.79 directly by the Debtors. Based on the financial information provided under penalty of perjury on Schedule J (Dckt. 1), the Debtors clearly did not have the monies to make the proposed Class 4 payment.

Though this case was filed only on March 10, 2014, the Debtors have amended the financial information provided on Schedule J under penalty of perjury two time since then. The First Amended Schedule J was filed on April 25, 2014. Dckt. 25. The First Amended Schedule J reduces the monthly expenses to $5,972.79. This yields a monthly net income of $389.41. A car payment of $535.79 has been added to the expenses – which is the amount of the Class 4 payment to be made for the grossly undersecured claim secured by the Toyota Tundra.

To manufacture money to pay this vehicle payment but still maintain the monthly net income number the Debtors decrease their “necessary medical and dental expenses” by $300.00 a month, Food and House Keeping Supplies by $90.00 a month, and Transportation by $125.00 a month. For the Food and House Keeping Supplies, the original budget amount was $325.00 a month, which strikes the court as being unreasonably low. The Debtors now state under penalty in perjury in the First Amended Schedule J that this expense is “really” only $200.00 a month. This changing of testimony and unreasonably low amount for two adults is not credible.

The Debtors also decreased their transportation expense from $300.00 a month to $200.00 a month. This is an unreasonably low expense for two vehicles.

On May 27, 2014, the Debtors again changed their expense information being stated under penalty of perjury with a Second Amended Schedule J. Dckt. 40. The Debtors now state under penalty of perjury that their expenses are only $5,936.08 a month. The vehicle payment provided on Second Amended Schedule J is $499.00.

The Amended Chapter 13 Plan which is set for a confirmation hearing on June 24, 2014, provides for a $209.16 a month Class 2 payment for the claim secured by the Honda Accord and a $535.79 a month Class 4 payment for the 2007 Toyota Tundra. Now the Debtor wants to add a $499.00 payment for a third car.

The court does not know what to believe from the various statements under penalty of perjury by the Debtors. The actual information concerning their business is hidden from the court, with none of the expenses disclosed. The Debtors seek to pay the grossly undersecured claim of the Toyota Tundra in full as a Class 4 claim. The Debtors have unreasonably and unrealistically stated expenses. The only conclusion which can be drawn from the evidence presented is that Schedules I and J are not accurate, truthful statements of Income and Expenses, but only fabrications to produce a result by which the Debtors avoid paying the amounts required under the Bankruptcy Code. The fact that the Debtors are represented by counsel who regularly appears in bankruptcy court makes the situation even more problematic – both for the Debtors and counsel.

Therefore, the motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

4. 10-46214-E-13 ROMULO/CRISELDA AGUIRRE — MOTION TO APPROVE LOAN MODIFICATION
DLS-1 Debra L. Slone — 5-5-14 [60]

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

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

Below is the court's tentative ruling.

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 May 5, 2014. By the court's calculation, 36 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Approve Loan Modification is denied without prejudice.

The Motion to Approve Loan Modification filed by Romulo and Criselda Aguirre ("Debtor") seeks court approval for Debtor to incur post-petition credit. The creditor with whom the Debtors seek authorization for the post-petition credit is stated on the Motion to be "Wells Fargo Home Mortgage." FN. 1.

FN.1. The confirmed Chapter 13 Plan lists "Wachovia" as a creditor having the only Class 4 secured claim to be paid under the Plan. Dckt. 34. No other secured claims are provided for to be paid in this case. A proof of claim for a secured claim has been file by Wells Fargo Bank, N.A. Proof of Claim No. 11. An attachment to the Proof of Claim also identifies that the creditor, Wells Fargo Bank, N.A., was formerly known as Wachovia Mortgage, a Division of Wells Fargo Bank, N.A., Wachovia Mortgage, FSB, and World Savings Bank, SFB. Wells Fargo Bank, N.A. does not state that it is "Wells Fargo Home Mortgage." No proof of claim has been filed by an entity

identified as Wells Fargo Home Mortgage.

The Debtor has not provided the agreement as required by Fed. R. Bankr. P. 4001(c). Attached to the declaration of the attorney for Debtors is an "orphan" document which is unsigned and contains no identifying information. At the top in a black box are the words "Home Mortgage." The documents consists of a chart with two columns identified as "Current Terms" and two columns identified as "Proposed Modified Terms." While the court could engage in speculation and conjecture that this sheet states some of the proposed terms for a current loan modification, the court should not have to guess. The Exhibit does not identify the creditor making the proposal to modify the existing loan.

In her declaration, the attorney for the Debtor states under penalty of perjury that the loan modification is for the loan with "Wells Fargo," the name of yet another entity. The California Secretary lists the following active entities authorized to do business in the state of California with the words "Wells Fargo" in their names:

A. Charter Holdings, Inc., which will do business in California as **Wells Fargo** CHI, Inc.

B. **Wells Fargo** & Company

C. **Wells Fargo** Bank LTD

D. **Wells Fargo** Central Pacific Holdings, Inc.

E. **Wells Fargo** Credit, Inc.

F. **Wells Fargo** Equipment Finance, Inc.

G. **Wells Fargo** Equity Leasing Corporation

H. **Wells Fargo** Financial California, Inc.

I. **Wells Fargo** Financial Leasing

J. **Wells Fargo** Housing Advisors, Inc.

K. **Wells Fargo** Insurance Services Investment Advisors, Inc.

L. **Wells Fargo** Insurance Services of West Virginia, Inc.

M. **Wells Fargo** Insurance Services USA, Inc.

N. **Wells Fargo** Insurance, Inc.

O. **Wells Fargo** Home Mortgage, Inc.

P. **Wells Fargo** Oil, Inc.

Q. **Wells Fargo** Small Business Investment Company, Inc.

R. **Wells Fargo** Trade Capital Services, Inc.

S. Hines Sacramento **Wells Fargo** Center GP LLC

T. Hines Sacramento **Wells Fargo** Center LP

U. NHT XIV **Wells Fargo** Tax Credit Fund, L.P.

V. **Wells Fargo** Advisors Financial Network, LLC

W. **Wells Fargo** Advisors Insurance Agency, LLC

X. **Wells Fargo** Advisors, LLC

Y. **Wells Fargo** Capital Finance, LLC

Z. **Wells Fargo** Commodities, LLC

AA. **Wells Fargo** Distribution Finance, LLC

BB. **Wells Fargo** Funds Management, LLC

CC. **Wells Fargo** Gaming Capital, LLC

DD. **Wells Fargo** Home Mortgage, LLC

EE. **Wells Fargo** Institutional Securities, LLC

FF. **Wells Fargo** Merchant Services, L.L.C.

GG. **Wells Fargo** Mortgage Foreclosure Unit, LLC

HH. **Wells Fargo** Prime Services, LLC

II. **Wells Fargo** Securities Lending Cash Investments, LLC

JJ. **Wells Fargo** Securities, LLC

KK. **Wells Fargo** Wealth Brokerage Insurance Agency, LLC

http://kepler.sos.ca.gov/. For corporations, limited partnerships, and limited liability companies, including those suspended, surrendered, and merged out, there are 155 entities listed by the Secretary of State with the words "**Wells Fargo**" in their names.

On the FDIC website, there are five federally insured financial institutions listed with the words "**Wells Fargo**" in their names. http://www3.fdic.gov/idasp/main.asp.

Additionally the exhibits provided are not authenticated are required by Fed. R. Evid. 901.

The exhibits provided were filed within the Declaration. This is

not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

The motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 4001(c)(1)(B), the court will not waive the defect since the declaration filed in this matter does not provide enough information. The court does not approve post-petition credit on non-specific terms.

Neither the Motion nor the Exhibit state that the only modifications to the existing loan documents are those stated on the exhibit. Rather, the Motion requests the court approve post-petition creditor in the loan modification on any and all terms which the creditor (whomever it is) may impose.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Romulo and Criselda Aguirre, 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.

5. 13-35315-E-13 STUART/TAMMIE CLARK
WSS-4 W. Steven Shumway
MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
4-29-14 [51]

Final Ruling: No appearance at the June 10, 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 29, 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 Wells Fargo Bank, N.A., "Creditor" is granted.

The Motion filed by Stuart and Tammie Clark, "Debtor","to value the secured claim of Wells Fargo Bank, N.A., "Creditor," motion is accompanied by Debtor's declaration. Debtor is the owner of a 2003 Dodge Ram 1500, "Vehicle." The Debtor seeks to value the Vehicle at a replacement value of $3,200.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in January 20, 2007, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $8,507.00. 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 $3,200.00. *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 Stuart and Tammie Clark, "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 Wells Fargo Bank, N.A., "Creditor," secured by an asset described as 2003 Dodge Ram 1500, "Vehicle," is determined to be a secured claim in the amount of $3,200.00, 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 $3,200.00 and is encumbered by liens securing claims which exceed the value of the asset.

6. 13-35315-E-13 STUART/TAMMIE CLARK — MOTION TO CONFIRM PLAN
WSS-5 W. Steven Shumway — 4-29-14 [55]

Final Ruling: No appearance at the June 10, 2014 hearing is required.

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 29, 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). 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 grant the Motion to Confirm the Amended Plan.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee opposes the motion on the basis that the plan relies on a pending Motion to Value Collateral. The court having granted the motion, the court overrules the Trustee's Objection.

The amended Plan complies with 11 U.S.C. §§ 1322, 1323 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 30, 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.

7. 13-34917-E-13 AARON CATUBIG — MOTION TO CONFIRM PLAN
SJS-2 Scott J. Sagaria — 4-24-14 [32]

Final Ruling: No appearance at the June 10, 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, 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 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.

8. 14-22518-E-13 BETTE HIMMELMANN — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
NLE-1 Scott D. Hughes — 4-24-14 [29]

Tentative Ruling: The Objection to Debtor's Claim of Exemptions 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 and Debtor's Attorney, on April 24, 2014. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

The Objection to Debtor's Claim of Exemptions 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.

No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court.

The Objection to Debtor's Claim of Exemptions is overruled without prejudice.

The Chapter 13 Trustee objects to Debtor's homestead exemption based on the Debtor's testimony at the First Meeting of Creditors held April 17, 2014 that no homestead has been filed.

However, the Chapter 13 Trustee has failed to provide any evidence in support of his objection.

It is well established in the Ninth Circuit that a claimed exemption is presumptively valid. *In re Carter*, 182 F.3d 1027, 1029 n.3 (9th Cir. 1999). The objecting party has the burden of proving that the exemptions are not properly claimed, requiring the objecting party to produce evidence rebutting the presumption and ultimately bear the burden of persuasion. Fed. R. Bankr. P. 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. BAP 2005); *In re Carter*, 183 F.3d at 1029 n. 3.

On Schedule C the Debtors have claimed an exemption in the amount of California Code of Civil Procedure § 704.950 in the amount of $136,384.78. That section protects a homestead from a judgment lien when a declared homestead is recorded. No evidence of a declared homestead having been executed and recorded has been presented to the court. While California Code of Civil Procedure § 704.720 provides for the "automatic" homestead exemption in California, that section has not been asserted by the Debtor in this case.

Based on the limited record provided to the court, the objection is sustained, and the Debtor is given leave to file an Amended Schedule C on or before July 30, 2014 to restate the exemptions claimed in this case. If the Debtor asserts having a pre-petition declared homestead exemption, a certified copy of the recorded homestead declaration shall be attached to the amended Schedule C 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 Objection to Debtor's Claim of Exemptions filed by 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 the exemption claimed by the Debtor pursuant to California Code of Civil Procedure § 704.950 in the real property commonly known as 4400 Northampton Dr., Carmichael, California, is disallowed, without prejudice to the Debtor filing an amended Schedule

C.

IT IS FURTHER ORDERED that on or before July 30, 2014 to restate the exemptions claimed in this case. If the Debtor asserts having a pre-petition declared homestead exemption, a certified copy of the recorded homestead declaration shall be attached to the amended Schedule C filed by the Debtor.

9. 10-48732-E-13 SDH-1 MARK/ANTOINETTE MUSCOVITCH — MOTION TO SELL 5-7-14 [67]

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 - 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, parties requesting special notice, and Office of the United States Trustee on May 7, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to sell the real property described as 1927 Garden Meadow Avenue, Fairfield, California (the "Property").

The proposed purchaser of the Property is Khalid Backhar and the terms of the sale are for $417,500.00, 45 days after approval, seller to pay transfer fees. FN.1.

FN.1. The court notes there is a **$12,500.00** discrepancy between the Purchase Agreement and the Declaration. The Motion and the Declaration state that the purchase price is $417,500.00. **However, the Purchase Agreement states the total purchase price is $405,000.00. Exhibit A, Dckt. 70. Counsel shall address the discrepancy at the hearing.**

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

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 Mark and Antoinette Muscovitch the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Mark and Antoinette Muscovitch, the Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Khalid Backhar ("Buyer"), the Property commonly known as 1927 Garden Meadow Avenue, Fairfield, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $417,500.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 70, 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 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.

10. 10-40834-E-13 PAUL COSTA AND KAROLYN CONTINUED MOTION TO APPROVE

PGM-2 COLE LOAN MODIFICATION
12-18-13 [54]

CONT. FROM 3-25-14, 2-25-14

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 18, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The court's decision is to deny the Motion to Approve Loan Modification.

MARCH 25, 2014 HEARING

This matter was continued from January 28, 2014, to allow Ocwen Loan Servicing, LLC to provide evidence that it is the creditor or that it is authorized as the named principal to modify this loan as requested. No additional evidence has been presented to date.

As discussed below, Proof of Claim No. 12 has been filed by Onewest Bank, FSB, which is based on this debt to be modified. Though provided an extensive period of time, neither the Debtors nor Ocwen Loan Servicing, LLC has provided the court with competent evidence that either (1) Onewest Bank, FSB is the creditor and Owen Loan Servicing, LLC is the authorized agent loan servicer to execute a loan modification pursuant to a power of attorney or (2) Ocwen Loan Servicer, LLC is actually the creditor in this case (notwithstanding the statements made under penalty of perjury in Proof of Claim No. 12) and has the right and power to contract a loan modification in its own name.

The court will add Ocwen Loan Servicing, LLC and OneWest Bank, FSB to the hearing dates for the orders to appear for other loan servicers and creditors who, so it appears, have loan servicers appear in federal court and misrepresent that they are a party in interest who has a claim or controversy with a debtor which may be properly adjudicated in federal court. United States Constitution Article III, Section 2.

SUPPLEMENTAL DECLARATION

On March 19, 2014, Ocwen Loan Servicing, LLC, filed the Declaration of Joshua Wimbley, a contract management coordinator. Mr. Wimbley states that according to Ocwen Loan Servicing, LLC's business records, it is the holder of the promissory note and is currently in possession of the original Note, which is endorsed and payable to blank (bearer). Declaration, ¶ 6, Dckt. 73. Further, the business records reflect that an Assignment was executed on February 13, 2014 showing that the Deed of Trust was assigned to Ocwen Loan Servicing, LLC. *Id.* ¶ 8.

The court does not find this evidence credible. First, Mr. Wimbley states that he has been employed by Ocwen for a period of eight months. He has provided no explanation as to how in those eight months of experience he has become well versed in the books and records of Ocwen and can determine that notes endorsed in blank are in the possession of some (unnamed) person at some (unidentified) location for Ocwen.

Second Mr. Wimbley merely states legal conclusion that Ocwen Loan Servicing, LLC is the "holder" of the promissory note and his factual conclusion that Ocwen is "currently" in possession of the Note. He does not state what it means to be the "holder" of the note. Further, in stating that Ocwen is "currently" in possession of a note endorsed in blank (which is the equivalent of bearer paper), his testimony is pregnant with an admission that Ocwen was not formerly, and may not in the future, be in possession of the note endorsed in blank.

Third, Mr. Wimbley makes the general statement that he is "familiar" with the methods of Ocwen from the time "we acquire" the file until the present. This is curious language about Ocwen "acquiring" files, rather than taking possession of endorsed in blank notes.

Fourth, Mr. Wimbley states that when Ocwen "acquires" a loan, an electronic file is created. Mr. Wimbley does not testify how, in his eight months of experience, he has such comprehensive knowledge of the practices and policies about Ocwen "acquiring loans."

Fifth, Mr. Wimbley does not state what the Note actually says, where the note is located, who is actually in possession of the note, when it was (if at all) physically received by someone at Ocwen, . Mr. Wimbley merely concludes that Ocwen Loan Servicing, LLC is the "holder" of the note and is currently in possession.

Sixth, Mr. Wimbley testifies that he "knows" that the information in his declaration is true either because of his personal knowledge or from what he has read in the business records. Knowing something is true and repeating what is read in business records are two very different things. Something may be written in a business record may say something, but it may not be true.

While stating under penalty of perjury that he "knows" everything in the declaration is true, Mr. Wimbley qualifies that by saying, "I know its true because somebody else told me it was true."

Finally, Mr. Wimbley's "testimony" is only that Ocwen's books and records say that Ocwen is holder of the Note and in possession of the Note – not testimony that it actually is in possession of the note.

It is also curious that the purported transfer of the Claim, and presumably the underlying Note and Security, is not executed by OneWest Bank, FSB, who has filed a claim in this case, but only by Ocwen Loan Servicing, LLC, in an transfer executed only by Ocwen Loan Servicing, LLC signed by Ocwen's attorneys in this bankruptcy case.

The court cannot and will not rely on evidence, which consists of the testimony from a Contract Management Coordinator of eight months that makes findings of fact and conclusions of law for the court.

JANUARY 28, 2014 HEARING

In their Motion, Debtors stated that Ocwen Loan Servicing, LLC, whose claim the plan provides for in Class 4, had agreed to a loan modification that would reduce the Debtor's monthly mortgage payment to $955.39. A review of the Loan Modification (attached as Exhibit A) showed that Ocwen Loan Servicing, LLC was named as the "Lender" on the loan. Dckt. 57. Proof of Claim No. 12, filed by Onewest Bank, FSB, shows a secured claim on the subject real property. The court notes an Unconditional Transfer of Claim after Proof of Claim filed 11/23/2010 was filed on November 21, 2013, showing a transfer of claim to Ocwen Loan Servicing, LLC. Dckt. 48. The Assignment was signed by Ocwen Loan Servicing, LLC's attorney, Kristin A. Zilberstein. However, this is not evidence of the real creditor or lender.

The court expressed uncertainty as to how Ocwen Loan Servicing, LLC, could name themselves as "Lender" in a Loan Modification for an obligation that appears to be owed to Onewest Bank, FSB. The court stated that it will not approve an loan modification that will not be effective against the actual owner of the obligation, which here appears to be Onewest Bank, FSB. The court noted that there have been multiple instances in which different loan servicing companies have misrepresented to the court, debtors, Chapter 13 Trustee, U.S. Trustee, creditors, and other parties in interest that the loan servicing company is the "creditor" as that term is defined in 11 U.S.C. § 101(10). In each of those cases, the loan servicing company was merely an agent with very limited authority to service the loan. The servicer was not granted a power of attorney to modify the creditor's rights, was not authorized to contract in its own name to bind the creditor, or was the authorized agent for service of process for the creditor.

The court issued an order to Debtors and Ocwen Loan Servicing, LLC to file on or before February 14, 2014, any and all properly authenticated documents identifying that Ocwen Loan Servicing, LLC is the actual creditor, as defined in 11 U.S.C. § 101(10). The court continued the hearing to this date to allow the parties to file the appropriate documentation. FN.1.

FN.1. As a reference for the parties, this court has previously addressed with another servicing company, Green Tree Servicing, LLC, the requirement to

accurately identify the status of the party in a bankruptcy case – whether creditor, loan servicer for the creditor, agent of the creditor, or holder of a power of attorney authorized to act for the creditor in legal proceedings or in executing documents in the name of the creditor. In the *Edwin L. and Cynthia Crane* bankruptcy case, Bankr. E.D. Cal. 11-27005, Dckt. 124, the court entered an order requiring Green Tree Servicing, LLC to correctly identify the creditor in cases, and for Green Tree Servicing, LLC not to identify itself as the creditor,

> "unless it is the holder of all legal rights to enforce the claim in its own name, as the assignee for collection, or as the holder of a power of attorney for another and is the agent for service of process for all purposes for any other person who holds any legal rights to enforce the claim. Any proofs of claim shall have attached to them documentation of the assignment, power of attorney, and general agent for service of process for any claims for which Green Tree Servicing, LLC asserts it is a creditor."

See Civil Minutes of the November 8, 2011 hearing in the *Crane* case in which the court addressed and rejected the contention that a mere agent or loan servicer may present itself as the actual creditor with a claim. *Id.*, Dckt. 111. In addition, Specialized Loan Servicing, LLC and U.S. Bank, N.A. have also addressed this issue. The servicers and this bank have altered their practices and are not improperly listing or identifying the loan servicing company as the creditor when it is not a creditor as defined by 11 U.S.C. § 101(10).

The court acknowledged that Ocwen Loan Servicing, LLC has, and most likely will, in connection with this matter be responsive and address the court's concerns – as well as educating the court to the current practical business issues, and challenges, of maintaining a nationwide business providing these types of services. The court further noted that if Ocwen Loan Servicing, LLC has expanded its business to purchase notes, it should address how it will provide that information to the federal courts.

DECLARATION OF DEBTORS' COUNSEL

In response to the court's order continuing the motion, Debtors' Counsel, Peter Macaluso ("Counsel"), filed a declaration in support of the Motion for Order Approving Loan Modification. Dckt. No. 66. The declaration states that Debtors acknowledge the definition of creditor, as provided for by 11 U.S.C. § 101(10). Counsel notes that Proof of Claim #12 was filed on November 23, 2010 by OneWest Bank, FSB, by Marisol A Nagata, Esq. of the firm Barret, Daffin, Frappier, Treder & Weiss, LLP. A Notice of Mortgage Payment Change, was filed on January 10, 2013, by Craig A. Edelman, "Authorized Agent for OneWest Bank, FSB." Additionally, a Notice of Transfer was filed on November 22, 2013, as Dckt. No. 49.

The "Note" and "Deed of Trust" on the property list the "Lender" as Sierra Pacific Mortgage Company, Inc., and the Deed of Trust names "MERS" as "acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under the Security Instrument". The Escrow Account Disclosure Statement lists Indymac Mortgage Services, a division of OneWest

Bank, FSB as the Servicer. Debtors also point out that the loan modification offered and accepted by Debtors is from Ocwen Loan Servicing, LLC, references Ashley Hanson. Debtors state that Hanson is a

> Relationship Manager...whom claimed a paralegal, Roxanna Costello, as being responsible for the loan, whom then forwarded me to a Kresmir Dreurevic, Esq., and who did not answer the call, and upon re-dialing it went directly to Attorney, Kelly Rapherty and informed her personally of the Order of this Court.

Declaration of Peter G. Macaluso in Support of Motion for Order, Dckt. No. 66 at 2. Debtors' Attorney then forwarded the court's order to Kresmir Dreurevic.

DECLARATION OF KRISTIN A. ZILBERBERSTEIN

On February 14, 2014, Counsel of Record for Ocwen Loan Servicing ("Ocwen"), Kristin Zilberstein, filed a Declaration in Support of the Motion for Modification. Dckt. No. 68. Ms. Zilberstein stated that she learned of the court's order, requiring Ocwen to file documents in support of its authority to enter into a modification on February 11, 2014. ¶ 2. She states that since that time, her firm, McCarthy & Holthus, LLP, has been "working diligently with Ocwen to obtain the necessary documents to meet the Court's requirement." Id. at ¶ 3.

Ms. Zilberstein states that three days has not been sufficient time to obtain the responsive documents, and that Ocwen will file the documents on or before the February 25, 2014 deadline stated in that order.

A review of the docket shows that Ocwen has not yet filed the requested documents with the court. The court continued the hearing on the Motion to Approve Loan Modification to permit Ocwen to file and serve the requested documents, and allow time for the court to review the documents produced. The parties shall strive to adhere to the original deadline set for Ocwen to file and serve the requested documents, namely: properly authenticated documents by which it may assert to be the agent of or be granted a power of attorney for Onewest Bank, FSB or any other person who is the actual creditor in this case; and any other documents by which Ocwen Loan Servicing, LLC purports to be authorized or have the right to modify the loan at issue.

CONCLUSION

Based on the failure to provide credible evidence that Ocwen Loan Servicing, LLC is the creditor or that it is authorized as the named principal to modify this loan, the motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve the Loan Modification filed by Debtor having been presented to the court, and upon review of

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

IT IS ORDERED that the motion is denied without prejudice.

11. 14-22734-E-13 DPC-1 GERALD/VIRGINIA MARTINEZ Michael O'Dowd Hays

OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK 5-12-14 [22]

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 12, 2014. By the court's calculation, 29 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 fails the chapter 7 liquidation analysis. Trustee states that the Debtor's nonexempt assets total $18,000.00 and the Debtor is proposing a 20% dividend to unsecured creditors which totals $12,077.00. The non-exempt asset is listed on Schedule A as "Debtors own approximately nine tenths of

an acre near Taos, New Mexico." Trustee states that the Debtor values this property at $18,000.00, which has already taken into account costs of sale. This property is owned free and clear by the Debtor.

Trustee also argues that the debtor cannot make the plan payments. Trustee states that the Debtor lists income from "Projected Amortized Tax Refunds" in the amount of $400.00 per month on Schedule I. The Debtor's 2013 income tax return reflects that the Debtor received a refund of $5,054.00, however the Debtor admitted at the First Meeting of Creditors held on May 8, 2014 that the Debtor no longer has the funds from the 2013 tax refund, the 2013 tax, and the refund is not listed as an asset on Schedule B, the Debtor cannot make the plan payments if they have the expenses set forth on Schedule J.

Lastly, the Trustee states that the plan is not the debtor's best effort. Trustee states the Debtor is under the median income and proposes plan payments of $209.65 for 2 months; $220.00 for 3 months, then $362.00 for 55 months with a 20% dividend to unsecured creditors, which totals $12,077.00. The Debtor's 2013 tax return reflects a refund to the Debtor in the amount of $5,054.00. The Debtor has failed to propose to pay the refund into the plan each year or adjust the Debtor's tax withholdings and increase the plan payments.

DEBTOR'S RESPONSE

Debtor responds, stating that the Trustee neglected to take into account the compensation that the Chapter 7 Trustee would be entitled to in the Chapter 7 Liquidation Analysis. Counsel states that the $18,000 sale value of the property, with unsecured debts totaling $60,389.00. Counsel states that a Chapter 7 Trustee is entitled to compensation at varying rates, based on the value of recovery, here $2,550.00 of the $18,000.00, leaving $15,450.00 for unsecured creditors. Counsel states this will result in a dividend on the $60,389.00 of 25.58%.

Debtors provide testimony that they believe they will be able to afford their plan payments with their modest mortgage, older vehicles, and caring for three grandchildren. Debtors argue that they have not turned over their tax refund because they spent the refund before the case was filed on necessary expenses that are amortized on their Schedule I and J. Debtors testify they used the $5,054.00 tax refund on repairs to their home, clothing for their grandchildren, repairs and insurance for their vehicles and replacement. Debtors states the result of these expenditures being made allow for the low allotment of funds for each of these expenses in their Schedule J.

DISCUSSION

The proposed plan provides that the unsecured creditors will receive "no less than 20% dividend." Counsel for Debtor confirms that the correct percentage to unsecured creditors should be a 25.58% dividend. Therefore it does not appear that the plan complies with the Chapter 7 Liquidation Analysis.

Furthermore, while Debtor has addressed where the $5,054.00 tax refund has been spend and how that reflects on the expenses on Schedule J,

Debtors have not addressed whether they have adjusted their tax withholdings to allow for an increase in plan payments.

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.

12. 12-38436-E-13 SJS-6 NARAINAN/UMA NAIR Scott J. Sagaria — OBJECTION TO CLAIM OF BOSCO CREDIT, LLC, CLAIM NUMBER 10 5-9-14 [86]

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, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 9, 2014. By the court's calculation, 32 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). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Claim of BOSCO CREDIT, LLC is overruled without prejudice.

Narainan and Uma Nair, the Chapter 13 Debtors ("Objector") requests that the court disallow the claim of Bosco Credit, LLC ("Creditor"), Proof of Claim No. 10 ("Claim"), Official Registry of Claims in this case. The Claim in the amount of $156,312.51. Objector asserts that the Claim is a duplicate of Proof of Claim Number 15.

However, Federal Rule of Bankruptcy Procedure 3007(a) requires 30 day notice and Local Bankruptcy Rule 3007-1(b)(1) requires a 14-day opposition for a total of 35 days notice. By the court's calculation, 32 days' notice was provided.

Additionally, service appears to be defective. The Objection was mailed to Bosco Credit, LLC at a P.O. Box. Service upon a post office box is plainly deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

The Objection was also not sent to a verified address for Bosco Credit, LLC as stated in the California Secretary of State's database or for its agent for service of process, Corporation Service Company of America, dba CSC Lawyers Incorporating Service.

Furthermore, a review of the court claims registrar shows that Proof of Claim No. 10 has been amended by the filing of Proof of Claim No. 15 filed April 17, 2013. It is not duplicate of Proof of Claim No. 10, but supercedes it as an amendment. The court notes that Proof of Claim No. 15 is signed by Thomas Axon, managing member of Bosco Credit, LLC, on which service should have been to his attention.

Based on the foregoing, the Objection to the Proof of Claim is overruled 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 Objection to Claim of Bosco Credit, LLC, Creditor filed in this case by Narainan and Uma Nair, 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 is overruled without prejudice.

13. 12-20038-E-13 HECTOR/LEESHA RIVERA — MOTION TO MODIFY PLAN
NLE-2 Scott J. Sagaria — 4-24-14 [95]

Final Ruling: No appearance at the June 10, 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, 47 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. 11-20341-E-13 VICTOR/DEBI GARCIA — MOTION TO MODIFY PLAN
JLK-3 James L. Keenan — 5-5-14 [59]

Final Ruling: No appearance at the June 10, 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 May 5, 2014. By the court's calculation, 36 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 May 5, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

15. 14-21542-E-13 NATALIA RINKER
SDH-3 Scott D. Hughes

OBJECTION TO NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES
4-21-14 [35]

Final Ruling: No appearance at the June 10, 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 Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 21, 2014. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Objection to Notice of Postpetition Mortgage Fees, Expenses and Charges 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 Objection to Notice of Postpetition Mortgage Fees, Expenses and Charges is sustained.

Debtor Natalia Rinker ("Debtor") objects to the Notice of Postpetition Mortgage Fees, Expenses and Charges filed by Lakeview Loan Servicing, LLC on March 26, 2014 and supplemented on April 14, 2014, in the amount of $1,729.48. The notices alleges that Debtor owes $650.00 to M&T Bank for "Bankruptcy/proof of claim fees" and the supplement adds an additional $1,079.48 for "County Taxes."

Debtor argues that she is not in default and that the taxes for the loan are paid directly out of an escrow already set up on the mortgage. Further, Debtor states that M&T Bank did not object to the plan and has done no work in this case to justify $650.00 in additional fees.

On May 15, 2014, Lakeview Loan Servicing, LLC, through its servicing agent M&T Bank, attempted to "withdraw" its Notices of Postpetition Mortgage Fees, Expenses and Charges filed on March 26, 2014 and April 17, 2013 regarding Claim No. 2-1 and preempt the court from ruling on the Contested Matter now before it. However, having filed the notice with the court and forcing the Debtor to object is not grounds for the creditor merely "withdrawing" the demand for money when the objection is filed. Such "withdrawal" when faced with having to address with the court the demands made for a consumer debtor to pay additional amount to the creditor creates the air of improper action and an attempt to avoid "getting caught in the act" for the creditor. If the notice of post-petition changes was valid, the court expects the creditor to present the basis to the court and beat back the objection. If an error occurred, the court expects the creditor to identify that an error occurred, explained that it is not likely to happen again due to proactive corrections taken in how it handles these matters. Lakeview Loan Servicing, LLC has not availed itself of either, but merely attempts to terminate the judicial proceeding to consider the merits of the Debtor's objection.

The court rules on the merits of the Objection.

The only evidence before the court is the Declaration from the Debtor stating that she was in fact current on the loan at the time the case was filed and is still current. Debtor states that there was not work to be done to justify the $650.00 in additional fees, as they did not object to her plan. Debtor argues that since she has never been in default, she should not have to pay the alleged attorney's fees. Debtor also testifies that the supplemental notice for an additional $1,079.48 for county taxes is not proper, as she has been paying out of escrow the taxes on the property. Debtor states that the taxes are included in her regular monthly mortgage payment and paid out of escrow.

No evidence has been presented by Creditor Lakeview Loan Servicing, LLC, but simply filed a withdrawal of the Notices.

Based on the evidence presented by the Debtor, the court sustains the objection and disallows the $650.00 in fees and $1,079.48 for county taxes.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Notice of Postpetition Mortgage Fees, Expenses and Charges filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is sustained and the amounts set out in the Notices of Postpetition Mortgage Fees, Expenses and Charges filed by Creditor Lakeview Loan Servicing, LLC on March 26, 2014 and supplemented on April 14, 2014 are disallowed in their entirety.

16. 13-27044-E-13 KEVIN/BREE SEARS **MOTION TO CONFIRM PLAN**
DBJ-3 **4-28-14 [107]**
DISMISSED 5/18/14

Final Ruling: No appearance at the June 10, 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 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 Motion is dismissed as moot, the case having been dismissed.

17. 14-20045-E-13 TUBAYA/DEBORAH CARTER
TSB-1 Peter G. Macaluso

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

CONT. FROM 4-8-14

Final Ruling: No appearance at the June 10, 2014 hearing is required.

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

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

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 24, 2014.

PRIOR HEARING

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

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

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

The court continued the hearing to allow Debtor to file and serve a Motion to Value Collateral. The Debtor filed and served the motion on May 15, 2014, set for hearing on June 24, 2014. Therefore, the court continues this Objection to Plan for the same date and time.

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

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

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

IT IS ORDERED that the hearing on the Objection to confirmation the Plan is continued to 3:00 p.m. on June 24, 2014.

18. 08-36047-E-13 JOHN/CHARLENE JOHNSON MOTION TO MODIFY PLAN
PGM-5 Peter G. Macaluso 5-5-14 [114]

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, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 5, 2014. By the court's calculation, 36 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 Debtor filed a proposed modified plan on May 5, 2014 (month 66 under Debtor's confirmed plan). The Modified Plan does not require any additional payments and payments were not completed under the original plan, so the Debtor may be able to modify the plan under 11 U.S. C. § 1329(a), but as the

plan will extend beyond 60 months, the Court may not be able to confirm such a plan under 11 U.S.C. § 1322(d)(l)(C).

Furthermore, the Trustee argues that where the present plan requires no additional payments, the motion appears to be a motion for an early discharge which is governed by 11 U.S.C. §1328(b). The Debtor has not provided evidence of the hardship to authorize the discharge, although presumably it may be the failure of the Debtor to obtain a timely loan modification- but such a failure does not explain the plan delinquency under the confirmed plan.

DEBTOR'S RESPONSE

Counsel for Debtor responds, stating that the modified plan does not require any additional payments but completes the plan as confirmed. Debtor states the delinquency is the failure to complete the loan modification within the term of the plan. The Debtors request confirmation to complete the case.

DISCUSSION

The court begins its consideration of this Motion with a review of the Plans which have been confirmed to date in this case.

I. 02/10/2009 Order Confirming Chapter 13 Plan filed November 3, 2008. Dckts. 37 and 5, respectively.

A. Sixty Month Term of Plan

B. Valuation of Secured Claims

1. First Franklin Home Loan Services secured claim (second deed of trust) valued at $0.00.

2. Northwest Federal Credit Union Secured Claim valued at $17,000.00.

3. Northwest Federal Credit Union Secured Claim valued at $15,000.00.

C. Monthly Plan Payments

1. $4,800.00

D. Class 1 Claim Payments

1. First Franklin Secured Claim, First Deed of Trust

a. Monthly Installment.....$2,900.00

b. Arrearage (Beginning Month 8)...$ 280.00

E. Class 2 Claim Payments

1. Sacramento County.....$ 97.00

2. First Franklin (2nd DOT).....$ 0.00
3. Northwest Fed. CU (Chrysler).....$377.00
4. Northwest Fed. CU (Ford).....$298.00
5. Western Fed. CU (Hyundai).....$200.00

F. Class 3 Surrender

1. Chase & Wells Fargo (Moon Place)

G. Class 4 - Direct Debtor Payments

1. None

H. Class 5 - Unsecured Priority

1. None

I. Class 6 – Unsecured Special Treatment

1. None

J. Class 7 – General Unsecured

1. No Less than $10,000.00.

II. November 11, 2011 Confirmation and First Modified Chapter 13 Plan, Dckts. 73 and 66, respectively

A. Sixty Month Term of Plan

B. Valuation of Secured Claims

1. Not altered from Original Confirmed Plan

C. Monthly Plan Payments

1. $139,259.10 through July 11, 2011

2. $4,400.00 a month for 28 months, starting August 2011.

D. Class 1 Claim Payments

1. First Franklin Secured Claim, First Deed of Trust

a. Monthly Installment.....$2,893.94

b. Arrearage (Beginning Month 8)...$ 230.00

E. Class 2 Claim Payments

1. Sacramento County..(paid by Lender). No Payment
2. First Franklin (2nd DOT).....$ 0.00
3. Northwest Fed. CU (Chrysler).....$315.00
4. Northwest Fed. CU (Ford).....$275.00

5. Western Fed. CU (Hyundai).....$240.00

F. Class 3 Surrender

1. Chase & Wells Fargo (Moon Place)

G. Class 4 - Direct Debtor Payments

1. None

H. Class 5 - Unsecured Priority

1. None

I. Class 6 – Unsecured Special Treatment

1. None

J. Class 7 – General Unsecured

1. 0% Dividend.

III. June 17, 2013 Confirmation and Second Modified Chapter 13 Plan, Dckts. 98 and 88, respectively

A. Sixty Month Term of Plan

B. Valuation of Secured Claims

1. Not altered from Original Confirmed Plan

C. Monthly Plan Payments

1. $220,059.10 through March 25, 2013

2. $4,335.00 a month for 8 months, starting April 25, 2013.

D. Class 1 Claim Payments

1. First Franklin Secured Claim, First Deed of Trust

a. Monthly Installment.....$2,932.31

b. Arrearage (Pre-Petition).....$ 100.00

c. Arrearage (Post-Petition).....$ 387.00

E. Class 2 Claim Payments

1. Sacramento County..(paid by Lender). No Payment
2. First Franklin (2nd DOT).....$ 0.00
3. Northwest Fed. CU (Chrysler).....$122.00
4. Northwest Fed. CU (Ford).....$111.00

5. Western Fed. CU (Hyundai).....$ 60.00

F. Class 3 Surrender

1. Chase & Wells Fargo (Moon Place)

G. Class 4 - Direct Debtor Payments

1. None

H. Class 5 - Unsecured Priority

1. None

I. Class 6 – Unsecured Special Treatment

1. None

J. Class 7 – General Unsecured

1. 0% Dividend.

IV. Proposed Third Modified Chapter 13 Plan, Dckt. 117

A. Sixty Month Term of Plan

B. Valuation of Secured Claims

1. Not altered from Original Confirmed Plan

C. Monthly Plan Payments

1. $248,427.10 through April 25, 2014

2. $0.00 through end of Plan.

D. Class 1 Claim Payments

1. Nationstar Mortgage/First Franklin Secured Claim, First Deed of Trust

a. None

b. Ongoing $166,380.09, arrears $14,569.11, post-petition payment $1,420.55 and late fees $100.00.

E. Class 2 Claim Payments

1. Sacramento County..(paid by Lender). No Payment
2. Litton Loan Servicing/First Franklin (2nd DOT)..... .....$ 0.00
3. Northwest Fed. CU (Chrysler).....$351.00
4. Northwest Fed. CU (Ford).....$319.00
5. Western Fed. CU (Hyundai).....$173.00

F. Class 3 Surrender

1. Chase & Wells Fargo (Moon Place)

G. Class 4 - Direct Debtor Payments

1. Nationstar Mortgage

a. Pre-petition arrears and ongoing pursuant to loan modification...$2,438.65

H. Class 5 - Unsecured Priority

1. None

I. Class 6 – Unsecured Special Treatment

1. None

J. Class 7 – General Unsecured

1. 0.00% Dividend.

REVIEW OF MOTION

The grounds stated with particularity in the Motion (Fed. R. Bankr. P. 9013) are:

A. Due to the court approved loan modification, the Debtors cannot complete the Second Modified Chapter 13 Plan which has been confirmed in this case.

B. As of April 25, 2014, the Debtors have paid $248,427.10 into the Plan.

C. The Term of the Plan is 60 months.

Motion, Dckt. 114.

The Debtors provided their testimony under penalty of perjury in support of the Motion. Declaration, Dckt. 116. The Debtors offer the following testimony:

a. The proposed plan provides for a 0.00% dividend for creditors holding general unsecured claims.

b. Having obtained a loan modification, the Debtors now wish to amend the Plan to provide for Class 4 Claim treatment for the Claim based on the modified loan.

c. The Debtors have paid $248,427.10 to the Chapter 13 Trustee over 65 months.

d. The Debtors have defaulted in 5.76 monthly plan payments, which total $27,987.00.

e. By the Third Modified Plan the Debtors seek to have the $3,078.03 held by the Trustee paid to creditors with secured claims and the $27,987.00 default waived.

Lack of Financial Information

The Debtors offer no explanation as to why they are $27,987.00 in default in Plan payments, why they are unable to pay that amount, and why it would be reasonable to waive the default and deem the Debtors as having complied with their plan. As stated by the Trustee, this appears to merely be a "thinly disguised" motion for hardship discharge.

When the Debtors obtained confirmation of the Second Modified Chapter 13 Plan, they provided testimony under penalty of perjury as to their income and expenses. The Debtors gross monthly income is $15,461.54. Statement of Income, Exhibit 2, Dckt. 87. Both Debtors have well established careers with their employers (14 years for one and 28 years for the other). On the Statement of Income the Debtors list their Average Monthly Income to be $11,181.78.

On their Statement of Expenses in support of the Second Modified Chapter 13 Plan, the Debtors state under penalty of perjury that their necessary monthly expenses are $6,846.29. These include $1,000.00 for food, $1,400.00 for transportation, $694.64 charitable contribution, and $425.00 for car repairs ($5,000 a year). Exhibit 3, *Id.* From this budget, and even with the apparently large expenses, the Debtors have $4,335.49 of Monthly Net Income to fund a Chapter 13 plan.

The high expenses were explained by the Debtors in their declaration as being only temporary, due to the Debtors' daughter, fiancé, and their two children living with the Debtors at that time. Declaration, Dckt. 86. The Debtors further stated that they had defaulted under the plan due to the unique circumstance that the Debtors' father was dying of a terminal illness and it necessitated travel to the East Coast and paying for funeral expenses ("as no other family members could contribute"). *Id.*

The Debtors assured the court, stating under penalty of perjury that they could make the monthly $4,335.00 payments from the in excess of $15,000.00 a month gross income.

The Debtors have either intentionally or inadvertently failed to provide the court with any current financial information or reason for the substantial defaults. Further, the Debtors have failed to provide the court with any explanation as to where the money has gone. Rather, they merely say, "let's just call it square, we will keep the money, and shouldn't have to comply with the Plan we chose and had the court confirm."

CONCLUSION

The Debtor filed this proposed modified plan on May 5, 2014, with is month 66 under Debtor's confirmed plan. The parties agree that the proposed modified plan does not require any additional payments and that payments

were not completed under the original plan. However, the proposed modified plan will extend beyond 60 months, which exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

Even more significant, the Debtors have failed to offer the court with any credible evidence that they could not perform the Second Modified Plan confirmed by the court. Rather, they just ignore their defaults and ask the court to confirm a Third Modified Chapter 13 Plan which waives the defaults.

If the Debtors had a bona fide basis for seeking a hardship discharge pursuant to 11 U.S.C. § 1128(b), the court is confident that such a motion would have been filed, such grounds stated with particularity, and credible, competent evidence presented to the court.

While it appears that the two Debtors have paid a substantial amount through the Plan, they effectively have only made discount mortgage payments and discounted car payments. Where there are only two Debtors, they have been making monthly car payments for three cars.

The court recognizes that this case was filed in 2008 and confirmed when debtors and their attorneys were given greater leeway in what was stated under penalty of perjury on Schedules and in cases. Looking at original Schedule J, the Debtors stated under penalty of perjury that their monthly food expense was only $300.00. Dckt. 1 at 35. No explanation has been given how it ballooned to $1,000.00. In 2008 the Debtors' expenses included a $1,000.00 offset for taxes, *Id.*, which disappears when they are seeking to confirm the Second Modified Plan. In 2008 the Debtors state under penalty of perjury that their transportation expenses (for two people) were $800.00, but no explanation is provided as to how it almost doubled to $14,000.00 when seeking to confirm the Second Modified Plan.

It appears, that though these Debtors have many more advantages than the average Chapter 13 debtor (starting with more than $15,000.00 a month in gross income), on multiple occasions the Debtors have squandered their opportunities to comply with the Bankruptcy Code and their then confirmed Chapter 13 Plan. As the Debtors' income has risen, their "necessary" expenses have risen. As unusual expenses arose, the only thing the Debtors "could do" was to default under the Plan. There is no evidence of the Debtors making any efforts to reasonably adjust their expenses to take into account real life events.

The court does not think that it is a mere coincidence that as the Debtors' income increase, their expenses increase, and they defaulted in tens of thousands of dollars, each modification of the plan was to decrease plan payments so that there was just enough to pay the secured claim for the assets they wanted to keep – with the Debtors consuming everything else monthly.

The Debtors have not only shown that no good grounds exist for confirming the proposed Third Modified Plan, but that this proposed Plan, and the Chapter 13 case have not been prosecuted in good faith. In looking at the totality of the record, it appears that this case was not commenced in good faith, but with the intention to abuse the Bankruptcy Code and creditors.

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

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

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

19. 14-21349-E-13 MARK/TRISHELE SWASEY — MOTION TO CONFIRM PLAN
AJP-3 Al J. Patrick — 4-16-14 [45]

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 16, 2014. By the court's calculation, 55 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 Chapter 13 Trustee opposes the motion on the basis that the Debtors’ plan is not the Debtor's best effort pursuant to 11 U.S.C. § 1325(b). Trustee states that according to the Form B22C, the Statement of Current Monthly Income, the Debtors listed ordinary and necessary business expenses of $19,494.00. Debtor is over the median income. Debtor has failed to properly complete the CMI and has proposed a 44 month plan contrary to 11 U.S.C. § 1325(b)(1)(B).

Furthermore, the Trustee states that the Debtor amended Schedule F on April 16, 2014 but no longer lists Majestic Glover in the amount of $17,500.00. Trustee states that it is not clear why the creditor was removed, whether they were scheduled in error or have been paid post-petition or pre-petition with the period of time where such payment would be a preference.

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.

20. 14-24154-E-13 MICHAEL/SARAH CHANDLER — MOTION TO VALUE COLLATERAL OF GMAC MORTGAGE USA CORP
SDH-1 Scott D. Hughes — 5-1-14 [13]

Final Ruling: No appearance at the June 10, 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 May 1, 2014. By the court's calculation, 40 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 GMAC Mortgage USA Corp, "Creditor," is granted.

The Motion to Value filed by Michael and Sarah Chandler, "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 1413 Southwood Way, Roseville, California, "Property." Debtor seeks to value the Property at a fair market value of $265,000.00 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 $298,588.00. Creditor's second deed of trust secures a claim with a balance of approximately $74,134.33. 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 Michael and Sarah Chandler, "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 GMAC Mortgage USA Corp. secured by a second in priority deed of trust recorded against the real property commonly known as 1413 Southwood Way, Roseville, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $265,000.00 and is encumbered by senior liens securing claims in the amount of $298,588.00, which exceed the value of the Property which is subject to Creditor's lien.

21. 13-31359-E-13 GW-2 | **RANDY/KIMBERLY CRISP** | **Gary H. Gale** | **OBJECTION TO CLAIM OF CALVARY SPV 1, LLC, CLAIM NUMBER 13** | **4-21-14 [33]**

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 - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Respondent Creditor, Chapter 13 Trustee, and Office of the United States Trustee on April 21, 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). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Claim of Calvary, SPV 1, LLC is overruled without prejudice.

SERVICE OF PROCESS ISSUES

Service has not been effected as required by Fed. R. Bankr. P. 7004(b)(3). Federal Rule of Bankruptcy Procedure 7004(b)(3) and 9014 require that service upon a domestic or foreign corporation or upon a partnership or other unincorporated association, be made to the attention of an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

The respondent creditor in this matter, Calavry SPV 1, LLC, is a limited liability corporation. Thus, the service requirements of Federal Rule of Bankruptcy Procedure 7004(b)(3) applies. The certificate of service for this motion, Dckt. No. 37, does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process." The Proof of Service also shows that Beneficial California, Inc., another corporate entity, was not sent to the attention of an officer or agent designated to receive process. Thus, the Objection is overruled for defective service.

However, if the Moving Debtors can provide proof of proper service to the court, the court will issue the alternative ruling:

Randy Crisp and Kimberly Crisp, the Chapter 13 Debtors in this case ("Objector"), request that the court disallow the claim of Cavalry SPV 1, LLC ("Creditor"), Proof of Claim No. 13 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $13,674.84, and was filed by Calvary SPV I, as the assignee of HSBC Consumer Lending USA Inc./ Beneficial. 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 January 2, 2014. Notice of Bankruptcy Filing and Deadlines, Dckt. No. 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 January 2, 2014. The Creditor's Proof of Claim was filed on February 27, 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 Cavalry SPV 1, LLC, Creditor filed in this case by the Chapter 13 Debtors. Randy Crisp and Kimberly Crisp, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 13 of Cavalry SPV 1, LLC is sustained and the claim is disallowed in its entirety.

22. 13-31661-E-13 SDH-7 | **CHARLES/CANDICE WORCH** | **Scott D. Hughes** | **OBJECTION TO CLAIM OF THE LAW OFFICES OF KENOSIAN AND MIELE, CLAIM NUMBER 14** | **4-24-14 [62]**

Final Ruling: No appearance at the June 10, 2014 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 respondent creditor, Chapter 13 Trustee, and Office of the United States Trustee on April 24, 2014. By the court's calculation, 47 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 14 of The Law Offices of Knosian and Miele is sustained and the claim is disallowed in its entirety. No appearance required.

Debtors Charles and Candice Worch, the Chapter 13 Debtors ("Objector") requests that the court disallow the claim of The Law Offices of Kenosian and Miele ("Creditor"), Proof of Claim No. 14 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $18,335.17.

The Debtors object to the Proof of Claim on the basis that the statute of limitations has run on the claim pursuant to California Code of Civil Procedure § 337. The Proof of Claim was filed on December 20, 2013. The claim indicates that the date of the last payment was July 3, 2009, which was more than four years from the date of the filing of the claim.

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

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

Section 337 includes the additional proviso, however, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage. Claimant, the Law Offices of Kenosian and Miele, indicates that the basis for the claim is for "Money Owed," with no additional details on the nature of the claim. Claimant also attaches a printout from CitiBank N.A. and UniFund CCR, LLC, showing the address of Debtor Candice Worch and Worch's employer. The court cannot determine whether the debt resulted from a money judgment due upon an obligation for a payment with the power of sale upon real property as a security interest for the payment. Creditor does not appear to hold an open book account as defined in California Code of Civil Procedure § 337(a).

From the attached printout on Creditor's Proof of Claim, the date of the last payment made was July 3, 2009. Creditor is attempting to collect on the debt more than four years from the date that the last payment was made under the contract, after the statute of limitations period established by California Code of Civil Procedure § 337 has expired. Creditor was properly served and has not filed an opposition or otherwise provided an exception to the statute of limitations. Because it has been more than four years since the last payment was made on the loan contract, the claim is uncollectible as it is beyond the limitations period for the collection of contracts in California.

Based on the evidence before the court, the creditor's claim is

disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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

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

23. 13-30969-E-13 GENE TOWNSEND
NBC-2 Eamonn Foster
MOTION TO CONFIRM PLAN AND/OR MOTION TO SELL
4-29-14 [65]

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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on only on the Chapter 13 Trustee, the Attorney for Creditor Abel Family Trust, and the Office of the United States Trustee on April 29, 2014. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

It appears that Debtor failed to serve all creditors, who had, by the time the motion was served, filed proofs of claim as required by Federal Rule of Bankruptcy Procedure 2002(g). The Certificate of Service indicates that other parties were served by First Class Mail, and directs the court to "See

Attached." Dckt. No. 71. No attachment, however, was filed and none appears on the docket.

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 / Motion to Sell Property.

Multiple Types of Relief Requested

The pleading seeks two different types of relief:

1. That the court confirms Debtor's Chapter 13 plan.

2. The court enter an order approving the sale of his residence, located at 23456 Richfield Road, Corning, California, for $298,500.00.

While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014 does not incorporate Civil Procedure Rule 18 for contested matters. The Debtor has attempted to improperly join his requests for an order confirming his proposed Amended Chapter 13 Plan, and for an order approving the sale of his real property to some buyer who is undisclosed in the present Motion.

The permissive joinder of parties provisions of Federal Rule of Civil Procedure 20 and Federal Rule of Bankruptcy Procedure 7020 are not incorporated into the contested matter practice pursuant to Federal Rule of Bankruptcy Procedure 9014.

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

DEFICIENT MOTION TO SELL

Additionally, even if the Motion to Sell were to be considered as a

standalone Motion,, the Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the terms of the sale. Debtors attach their proposed purchase agreement, Dckt. No. 68, but exclude critical details in the Motion itself, including, for example:

- The name of the Buyer;
- information about overbidding procedures for potential bidders who may choose to appear at the hearing;
- what connection, if any, the Buyer has to the Debtor;
- whether the broker or real estate agent will be paid commission, and if so, what percentage of the actual purchase price Broker will be paid upon consummation of the sale.

Local Bankruptcy Rule 3015-1(b)(1) states that debtor shall not transfer, encumber, sell, or otherwise dispose of any personal or real property with a value of $1,000.00 or more other than in the ordinary course of business without prior Court authorization. To obtain Court authorization, the debtor must comply with LBR 3015-1(i).

Local Bankruptcy Rule 3015-1(i)(4) provides that:

> Sale of Property. The Court may approve an *ex parte* motion by the debtor to sell real or personal property with a value of $1,000.00 or more other than in the ordinary course of business if the trustee's written consent is filed with or as part of the motion. The debtor's motion and the trustee's approval are their certification to the Court that:
>
> (A) The sale price represents a fair value for the subject property;
>
> (B) All creditors with liens and security interests encumbering the subject property will be paid in full before or simultaneously with the transfer of title or possession to the buyer;
>
> (C) All costs of sale, such as escrow fees, title insurance, and broker's commissions, will be paid in full from the sale proceeds;
>
> (D) The sale price is all cash;
>
> (E) The debtor will not relinquish title to or possession of the subject property prior to payment in full of the purchase price; and
>
> (F) The sale is an arm's length transaction.

Debtor's Motion does not state whether the purchase price represents a fair value for the property, whether all creditors with security interests

encumbering the property will be paid in full before or concurrently with the transfer of title from the Debtor to the buyer; the costs of sale; whether the sale prices is all cash; and whether the sale is an arm's length transaction. Dckt. No. 65.

In the absence of such information, the court cannot determine whether the proposed sale is in the best interest of the Estate, and no procedures have been established to allow the court to consider any additional offers from other potential purchasers at the scheduled hearing. The court will not grant the current Motion as a Motion to Permit Debtor to Sell the Property.

Stipulation

In support of their case for confirmation, Debtor, Gene Carl Townsend, files a Stipulation entered with secured Creditors James and Kathryn Abel, Trustees of the Abel Family Trust ("Creditors"), a secured creditor who holds the note secured by a deed of trust on Debtor's real property.

The Stipulation states that the Debtor has entered into an agreement to sell the real property located at 23456 Richfield Road, Corning, California for $298,500.00. The Stipulation acknowledges that the Plan proposes to pay Creditors' secured lien in full, and that after the escrow has closed on the real property transaction, and the secured lien is paid in full, all other funds that result from the transaction are to be provided to the Trustee for distribution according to the Plan Schedule. The parties also agree that if the sale of the property is not concluded, then the Creditors will "retain their rights to seek relief from the automatic stay or dismissal of the case."

The Debtor characterizes the above-described Stipulation as a "Stipulation to Confirmation of Debtor's Chapter 13 Plan," but in actuality the stipulation merely acknowledges that the completed sale of Debtor's property will pay the secured lien of Creditors in full. The Stipulation allows Creditors to seek relief from the automatic stay on claims of the estate, or dismissal of the case, in case the sale of the property is not concluded, and for the distribution of additional proceeds from the sale to be disbursed to the Trustee for the benefit of the estate.

The concluding statement of the parties' stipulation states that the parties stipulate to the approval of the Debtor's Chapter 13 Plan. The Stipulation contains recitals concerning the terms of the sale of Debtor's property, and not the confirmation of his Chapter 13 Plan. The confusion surrounding this Motion, the Trustee's responsive pleading (discussed below), and the Stipulation executed by the Debtor and Creditors, stems from the Debtor's improper joinder of claims. The parties' Stipulation, entered into by the Debtor and one out of several creditors in the case, has little bearing on the court's review and decision to confirm or deny the confirmation of the Debtor's proposed Chapter 13 Plan.

OPPOSITION BY CHAPTER 13 TRUSTEE

Moreover, the Chapter 13 Trustee has filed opposition to the Motion. The Trustee opposes the granting of the present Motion on the following

grounds:

1. Debtor is $410.00 delinquent in plan payments to the Trustee to date, and the next scheduled payment of $410.00 is due on May 25, 2014. The case was filed on August 20, 2013, 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. Debtor has paid $2,870.00 into the Plan to date.

2. Trustee states that Debtor's Motion to Confirm the Amended Plan also includes a motion to approve sale of property with the same docket control number. The Trustee states that he does not object to the buyer or sales price, where the Debtor's attorney has incorporated the sale with the Motion to Confirm . The Trustee does, however, object to the sale as he objects to the Motion to Confirm.

   As seen in Trustee's objection, the Debtor has put himself at a disadvantage by combining two claims for relief, in which the Trustee is compelled to reject both the Motion to Sell and Motion to Confirm because the Trustee rejects one claim–-but not necessarily the other. Although the Trustee is not opposed to the terms of the proposed sale, he must reject it because his issues concerning the confirmation of Debtor's proposed Plan.

3. Debtor changed classification of the Savings Bank of Mendocino County. Debtor's Plan originally classified the payment of the 97 Ford in Class 2 of the Plan; however, the Debtor's amended Plan changed the treatment to this creditor to Class 4 to be paid outside of the Plan. The Creditor filed two claims: Claim Nos. 4 and 5, where Claim No. 5 appears to be the same as Claim No. 4 except for the inclusion of attachments. The attachments on Claim No. 4 appear to show that the maturity date of the promissory note for the claim is August 12, 2014. Claim No. 5, Page 5. The claim should be paid inside the plan in full.

4. Trustee objects to allowing Attorney Fees through the "no look" procedure. The Debtor proposes to pay attorney fees directly from the sale, which appears contrary to the goal of the Rights and Responsibilities statement, Dckt. No. 11, page 3. The Rights and Responsibilities provides:

   > "To the extent no paid by the Debtor before the filing of the petition, the fees must be paid through the plan by the chapter 13 trustee."

   The Trustee states that he does not doubt that the attorney fees can be paid directly if the court orders, but the Trustee will be unable to accurately report what fees were paid to the attorneys in the post-petition period, or object to the fees, in the event that the court is inclined to allow the attorneys to be paid directly.

5. The Plan may not comply with its own provisions as to the treatment of the Abel Trust claim. Debtor has provided for this claim as

Class 4, so that as of the entry of the order confirming, the Automatic Stay is modified in the event of a default under the applicable law and contract. § 2.11, Debtor's Plan.

The Debtor provides for this creditor in the Additional Provisions, §§ 6.02, 6.03, and 6.04, which appear to allow Debtor to sell the real property up to 18 months after filing with no ongoing payments. The Creditor has stipulated that, if the sale of property is not concluded, then the Creditor retains their rights to seek relief. Dckt. No. 70, so that the Creditor may have stipulated away any right to a Motion for Relief for 180 months. The Debtor does not disclose in the Plan that the claim was in default.

The amended Plan does not comply with 11 U.S.C. §§ 1322, 1323 and 1325(a). Further, the Debtor has attempted to improperly join multiple types of relief in the instant Motion. Service of the Motion to Creditors may also be deficient. Thus, the Motion 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 / Motion to Sell Property is denied and the proposed Chapter 13 Plan is not confirmed.

24. 13-35369-E-13 MAC-1 VASILIOS TSIGARIS Marc A. Caraska MOTION TO CONFIRM PLAN 4-26-14 [60]

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 Chapter 13 Trustee, all creditors, and Office of the United States Trustee on April 26, 2014. By the court's calculation, 45 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.

SERVICE OF PROCESS ISSUES

Service of Debtor's Motion to Confirm has not been effected as required by Federal Rules of Bankruptcy Procedure 7004(b)(3) and 7004(h).

Federal Rule of Bankruptcy Procedure 7004(h) and 9014 require that service be made on federally insured financial institutions by certified mail. Even if certified mail is not required, corporations, partnerships, and other fictitious entities need to be served on officers, partners, managing members, and other designated agents for service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

Even if a party is not federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(b)(3) requires that service upon a domestic or foreign corporation or upon a partnership or other unincorporated association, be made to the attention of an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

The Certificate of Service filed with this Motion, Dckt. No. 65, reflects that the corporate creditors like Pacific Bell Telephone Co. And Select Portfolio Servicing, Inc. were not sent to the attention of an officer or agent designated to receive service of process pursuant to the requirements of Federal Rule of Bankruptcy Procedure 7004(b)(3).

Select Portfolio Servicing, Inc. is served at a post office box. Service upon a post office box is plainly deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.").

Additionally, Creditor "U.S. Bank, N.A." (which the Debtor lists as "U.S. Bank, N.A. et al--the court does not understand what other parties the Debtor is referring to) is an entity insured by the Federal Deposit Insurance Corporation. The service requirements of Federal Rule of Bankruptcy Procedure 7004(h) regarding federally insured financial institutions therefore apply. The Proof of Service does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process." U.S. Bank, N.A. was not served by certified mail under Federal Rule of Bankruptcy Procedure 7004(h).

The address listed for U.S. Bank (which may be the address for Select Portfolio Servicing, Inc. But not U.S. Bank, because Proof of Service indicates that the intermediary responsible for transferring mailings between the addressee and "U.S. Bank, N.A. et al" is Select Portfolio Servicing, for some unknown reason), is not the address listed on the Federal Deposit Insurance Corporation Institution Directory (Institution Directory, Information Gateway, U.S. Bank National Association (June 4, 2014, 5:39 PM), http://kepler.sos.ca.gov/.)

REVIEW OF MOTION AND OPPOSITION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, the Chapter 13 Trustee and Creditor U.S. Bank, N.A., have filed opposition to the present Motion to Confirm.

Opposition by Chapter 13 Trustee

The Trustee opposes the Motion to Confirm the First Amended Plan on two grounds. Dckt. No. 69. First, the Trustee states that the Debtor is $135.28 delinquent in plan payments to the Trustee to date and the next scheduled payment of $2,432.68 is due on May 25, 2014. The case was filed on December 4, 2013, 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. The Debtor has paid $9,595.44 into the Plan to date.

Second, it appears that the Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtor's prior case, Case No. 13-30202 filed on August 1, 2013 listed a 2006 Nissan. Debtor failed to list this vehicle, however, on Schedule B and exempt any equity on Schedule C.

Objection by Creditor

U.S. Bank N.A., successor trustee to Wachovia Bank, N.A. (formerly known as First Union National Bank), as Trustee for Long Beach Mortgage Loan Trust 2001-4, its assignees and/or successors in interest ("Creditor"), states that it is a secured creditor in this case. The Creditor holds a senior lien on the real property described as 1940 Wesley Drive, Folsom, California.

Creditor argues that Debtor's Chapter 13 Plan fails to provide maintenance of the correct ongoing post-petition monthly payments as required by 11 U.S.C. §1322(b)(5) and the Bankruptcy Appellate Panel for the

Ninth Circuit. *In Re Gavia*, 24 B.R. 573 (9th Cir. BAP 1982). Debtor's Plan states that the current monthly payment is $1,753.29, while the correct monthly payment amount on the Creditor's note is $1,762.54 not $1,753.00.

Creditor also objects to the proposed Plan on the basis that the Plan attempts to modify (in stating the payment is $1,753.29) the Creditor's original Note and Trust Deed, which is in direct violation of § 1322(b)(2). 11 U.S.C. § 1322(b)(2) states that a Debtor may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the Debtor's principal residence. The subject Property is Debtor's principal residence.

Based on the points of opposition raised by the Chapter 13 Trustee, and Creditor U.S. Bank N.A. to the Motion to Confirm, in addition to the issue of defective service of the Motion discussed by the court above, the Motion to Confirm the Amended Plan is denied. 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.

25. 14-23669-E-13 DPR-1 — DAVID/JESSICA CERVANTES — David P. Ritzinger — MOTION TO VALUE COLLATERAL OF PNC BANK, NATIONAL ASSOCIATION — 5-12-14 [14]

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 the respondent Creditor, the Chapter 13 Trustee, and the Office of the United States Trustee on May 12, 2014. By the court's calculation, 29 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 PNC Bank, National Association, "Creditor," is granted and Creditor's secured claim is determined to be $0.00.

The Motion to Value filed by David Gudino Cervantes and Jessica Mae Cervantes, "Debtors" to value the secured claim of PNC Bank, National Association, "Creditor" is accompanied by the Debtors's joint declaration. Debtors are the owner of the subject real property commonly known as 180 Chimney Rock Drive, Vacaville, California, "Property." Debtors seek to value the Property at a fair market value of $350,000.00 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 first deed of trust secures a claim with a balance of approximately $402,406.00. Creditor's second deed of trust secures a claim with a balance of approximately $30,696.09. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized.

OPPOSITION BY CREDITOR

PNC Bank, N.A., successor by merger to National City Bank, its successors an/ or assigns ("Creditor") files an objection to the Debtors' Motion to Value its Secured Claim. Dckt. No. 23.

The Creditor is the owner and holder of the following Fixed Rate Consumer Note and Security Agreement secured by Deed of Trust executed on or about August 3, 2006 and recorded on August 11, 2006, as Instrument No. 20060101506, in the office of the County Recorder of Solano County, California, covering certain real property located at 180 Chimney Rock Drive, Vacaville, California.

Creditor argues that Debtors have failed to "prove" the balance of the first position loan with Green Tree Servicing. Creditor states that a recent creditor report shows that the balance owed to Green Tree Servicing is $287,872.00. Creditor does not attach or file as evidence a copy of said credit report to its Opposition.

Creditor therefore requests a hearing to establish the fair market value of the property, and asserts that its claim is fully secured.

REPLY BY DEBTORS

Debtors argue that the Creditor's Objection was not timely filed. The Creditor was served pursuant to the requirements of Local Bankruptcy Rule 9014-1(f)(1). Under Local Bankruptcy Rule 9014-1(f)(1), opposition must be submitted no later than fourteen calendar days prior to the hearing date. In this case, the deadline to submit opposition was May 27, 2014, but the Creditor filed its opposition on June 2, 2014. Debtors further argue that Creditor failed to provide any evidence regarding the disputed value of the secured portion of Creditor's claim.

Debtors state that the first deed of trust claim held by Green Tree Servicing, LLC, does have a principal balance of approximately $402,406.00. In support of this figure, Debtors file a copy of the first page of their credit report dated April 4, 2014, listing the debt held by Green Tree Servicing, LLC, as in the amount of $402,406.00, as well as a mortgage statement from Green Tree Servicing, LLC, dated March 6, 2014. Dckt. No. 28.

Debtors' Exhibit B, which Debtors authenticate by describing as a true and correct copy of the first page of their online credit report in their Joint Declaration, Dckt. No. 27, lists the amount of Green Tree Servicing, LLC's claim as $402,406.00. Exhibit B, Dckt. No. 28.

While "authenticating" the first page of the credit report as a document obtained from a third-party about the claim of "Green Tree Servicing, LLC," the Debtors offer no personal knowledge testimony or evidence. Fed. R. Evid. 601, 602, 801, 802, 901. The court has no idea who "Suite Solutions" is, how they have knowledge of the creditor's claim, and how they can testify as to that information.

The Debtors have also provided a copy of a monthly billing statement from "green tree" (the statement does not state it is from "Green Tree Servicing, LLC," a well known third-party loan servicer. The "green tree" letter presented as Exhibit 1 states that it is being sent from a "debt collector." A loan servicer may well be a "debt collector" as defined by the Federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692a et seq.) and required to give this notice, without diminishing its standing and rights to assert the claim.

Whenever the court sees a loan servicer, such as "Green Tree Servicing, LLC" being listed as the creditor and served with pleadings intending to effect the creditor's rights, a concern arises as to whether the actual creditor is being ignored and the court's order of little or no legal force and effect as to the actual creditor. FN.1.

FN.1. This may well be a more significant issue for the Debtors with respect to confirmation of a plan and any order entered for which the motion was not served on the actual creditor. The court notes that no proof of claim has been filed by the creditor (as defined in 11 U.S.C. § 101(10) and (5)) for the claim secured by the senior deed of trust on the Debtors' property.

In the opposition Creditor PNC Bank, N.A. states that the Debtors have failed to "prove" the balance of the loan with "green tree." Between the declaration provided by the Debtors and the "green tree" statement, there is

sufficient evidence of the senior lien and the debt is secures. The court is surprised that a junior lien creditor, such as PNC Bank, N.A., would not have in its files such information in the ordinary course of business. If so, such information would have been of assistance in giving credibility to the opposition.

Further, while saying that the Debtors "failed to prove the balance of the loan" with "green tree," the Creditor concludes that it wants a hearing to establish the fair market value of the Property. However, the Creditor does not allege that the value of the property is greater than the $350,000.00 testified to by the Debtors. Creditor does not offer any evidence, or argument, to the contrary.

The court sees no need in extending the parties additional time to determine the identity of the creditor holding the claim secured by the first deed of trust, beyond that provided by the Debtors, in connection with the present motion. The fair market value of Debtors' property is valued by Debtors at $350,000.00, which has not been contested by the Creditor. Debtors' have provided what they have received as the current statement for this obligation, with a balance of approximately $402,406.00. Creditor's second deed of trust secures a claim with a balance of approximately $30,696.09. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized.

The secured claim of Creditor PNC Bank, N.A., 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 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 Gudino Cervantes and Jessica Mae Cervantes, "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 PNC Bank, National Association secured by a second in priority deed of trust recorded against the real property commonly known as 180 Chimney Rock Drive, Vacaville, 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 $350,000.00 and is encumbered by a senior lien securing claims in the amount of $402,406.00, which exceeds the value of the Property which is subject to Creditor's lien.

26. 14-23271-E-13 HLG-1 ROBERT/CINDY LANDINGHAM Kristy A. Hernandez — MOTION TO AVOID LIEN OF CACH, LLC 5-23-14 [21]

Final Ruling: The Debtors, Robert Ben Landingham and Cindy Ann Landingham, having filed a Withdrawal of the Motion to Avoid the Lien of CACH, LLC, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the** Motion to Avoid the Lien of CACH, LLC **was dismissed without prejudice, and the matter is removed from the calendar.**

27. 14-23271-E-13 HLG-2 ROBERT/CINDY LANDINGHAM Kristy A. Hernandez — MOTION TO AVOID LIEN OF DISCOVER BANK 5-23-14 [26]

Final Ruling: The Debtors, Robert Ben Landingham and Cindy Ann Landingham, having filed a Withdrawal of the Motion to Avoid the Lien of Discover Bank, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the** Motion to Avoid the Lien of Discover Bank **was dismissed without prejudice, and the matter is removed from the calendar.**

28. 14-23271-E-13 HLG-3 ROBERT/CINDY LANDINGHAM Kristy A. Hernandez — MOTION TO AVOID LIEN OF SECURITY CREDIT SERVICES, LLC 5-23-14 [31]

Final Ruling: The Debtors, Robert Ben Landingham and Cindy Ann Landingham, having filed a Withdrawal of the Motion to Avoid the Lien of Security Credit Services, LLC, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the** Motion to Avoid the Lien of Security Credit Services, LLC **was dismissed without prejudice, and the matter is removed from the calendar.**

29. 14-23271-E-13 HLG-4 ROBERT/CINDY LANDINGHAM Kristy A. Hernandez — MOTION TO VALUE COLLATERAL OF HSBC MORTGAGE SERVICES INC 5-23-14 [36]

Tentative Ruling: The Motion to Value 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 Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2014. By the court's calculation, 18 days' notice was provided. 14 days' notice is required.

The Motion to Value 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 Value secured claim of HSBC Mortgage Services, Inc., "Creditor," is granted and Creditor's secured claim is determined to be $0.00.

The Motion to Value filed by Robert Ben Landingham and Cindy Ann Landingham, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtors are the owner of the subject real property commonly known as 8242 Streng Avenue, Citrus Heights, California, "Property." Debtors seeks to value the Property at a fair market value of $280,000.00 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 first deed of trust secures a claim with a balance of approximately $301,407.92. Creditor's second deed of trust secures a claim with a balance of approximately $66,246,00. 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 Robert Ben Landingham and Cindy Ann Landingham, "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 HSBC Mortgage Services, Inc. secured by a second in priority deed of trust recorded against the real property commonly known as 8242 Streng Avenue, Citrus Heights, 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 $280,000.00 and is encumbered by a senior lien securing a claim in the amount of $301,407.92, which exceed the value of the Property which is subject to Creditor's lien.

30. 14-23271-E-13 TSB-1 — ROBERT/CINDY LANDINGHAM — Kristy A. Hernandez — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK — 5-8-14 [17]

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 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 grant the Objection to Confirmation.

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 granting the motion to value, the Trustee's objection is overruled and the plan is confirmed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on March 31, 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.

31. 13-32277-E-13 BROOKE O'ROURKE MOTION TO SELL
LC-2 Lorraine W. Crozier 5-9-14 [33]

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 - Hearing Required.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, all creditors, and Office of the United States Trustee on May 9, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Chapter 13 Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to sell the "Property" commonly known as 735 Buchanan Street, #105, Benicia, California. The property secures the first deed of trust claim held by the Bank of New Rok, as Trustee for CWALT 2004-08CB c/o Shell Point Mortgage Servicing, and a second deed of trust claim held by GMAC Mortgage c/o Ocwen Loan Servicing, LLC in the property as a Class 3 claim.

The Debtor, Brooke O'Rourke, states that she has negotiated and completed a short sale of the proeprty, acceptable to the Bank of New York as Trustee for CWALT 2004-08CB c/0 Shell Point Mortgage Servicing and GMAC Mortgage c/o Ocwen Loan Servicing, LLC, and seeks the court's approval of the sale. No net proceeds are being realized by the Debtor or will be available to the Trustee.

Debtor asserts that the sales price of $185,000.00 represents a fair value for the property, and all creditor with liens and security interests encumbering the subject property were voluntarily released, simultaneous with the transfer of the titles to the buyer. Debtor further states that the costs of sale were paid in full from the proceeds; that the sales price was all cash; and that Debtor did not relinquish title to, or possession of, the subject property prior to the payment in full of the purchase price. Debtor sates taht the sale was an "arms length" transaction, and that the sale resulted in the payment of post-petition home owners association dues which were continuing to accrue, which Debtor states that she could not pay and were not part of her Chapter 133 Plan.

The Debtor submits a Purchase Agreement and Final Settlement Statement as exhibits to this Motion.

RETROACTIVE COURT APPROVAL OF SALE

The Motion states that "[t]he debtor is aware that an order of this type is required prior to the completion of the sale and believed that her escrow company had appropriately communicated with debtor's counsel. That had not occurred. This motion was drafted and filed upon learning of the close of the escrow. The debtor respectfully requests that the court approve the sale which has taken place."

The court is uncertain about what this means. The Motion seems to represent that Debtor was cognizant about the requirement under 11 U.S.C. § 363(b)(1) to obtain court approval for a sale outside of the ordinary course of business, of the property of the estate, but did not communicate with her attorney. Though 11 U.S.C. § 363(b)(1) expressly refers to trustees, the terms of the statute apply equally to debtors in possession," who "'generally ha[ve] the authority to exercise the same powers as a trustee." *In re Nashville Sr. Living,* LLC, 620 F.3d 584, 592, n. 1, 53 Bankr. Ct. Dec. (CRR) 166, 64 Collier Bankr. Cas. 2d (MB) 515, Bankr. L. Rep. (CCH) P 81843 (6th Cir. 2010), quoting *Weingarten Nostat, Inc. v. Service Merchandise Co., Inc.*, 396 F.3d 737, 742, n. 4, 44 Bankr. Ct. Dec. (CRR) 45, Bankr. L. Rep. (CCH) P 80227, 2005 Fed. App. 0038P (6th Cir. 2005) (citing 11 U.S.C. §§ 1107(a), 1108). This includes a Debtor in a Chapter 13 case exercising the powers of a Trustee pursuant to 11 U.S.C. § 1303, 1304.

The Debtor appears to acknowledge that the short sale of her property constitutes the type of transaction for which Debtor must seek and secure court approval of the sale first; however, Debtor attempts to excuse compliance by stating that Debtor's escrow company had not appropriately communicated with Debtor's counsel. The court is not sure whether this means that the Debtor did not appropriately communicate with her counsel, to notify her that she had negotiated a short sale with her lender, and/or that Debtor expected the escrow company to inform Debtor that a short sale had closed.

OPPOSITION BY TRUSTEE

The Chapter 13 Trustee states that he has no objection to the proposed Motion to Sell real property located at 735 Buchanan Street, #105, Benicia, California. Dckt. No. 40. According to the Final Closing Statement, attached by Debtor as Exhibit B, Dckt. No. 36, Clocktower Grove Owners Association was paid $2,200 for delinquent homeowners association dues.

Clocktower filed an unsecured proof of claim in the amount of $1,999.94. Although the Plan confirmed February 16, 2014, proposes no less than 0% to the holders of unsecured claims, the Trustee seeks clarification as to whether the Debtor is seeking to modify the plan pursuant to this motion under 11 U.S.C. § 1329(a)(3) to avoid disbursements to this creditor. The Plan does not call for a minimum dividend, but the Trustee currently projects that the unsecured claims will receive a dividend.

REPLY BY DEBTOR

Debtor's Counsel of Record, Lorraine W. Crozier, files a response to

the Chapter 13 Trustee's Opposition to the Motion. Dckt. 42. No declaration or other evidence is presented to support the allegations of fact stated in the Response. The Response asserts facts concerning the time line of when the payments made to Debtor's Homeowners Association fees were paid during the course of the short sale. While Counsel and her client are governed by Federal Rule of Bankruptcy Procedure 9011, that does not replace the need for proper, admissible, properly authenticated evidence to support factual contentions.

The Reply states that it is the Debtor's "understanding" (irrespective of whether it is true or not) that the payments were made to the Clocktower Grove Owners Association through escrow were made for the post-petition charges incurred. The Debtor states that she has requested information confirming this assumption; and intends to object to the claim if any pre-petition arrearage was paid.

The Debtor asserts that she does not intend a modification of the plan. The Reply states that obligations to the Clocktower Grove Owners Association were incurred in the pre and post petition period, and that clarification of the amounts paid will dictate the Debtor's proper course of action. Thus, the Debtor requests the hearing to be continued until July 1, 2014, at 3:00 pm to allow her to obtain the necessary information.

DISCUSSION

The present Motion arises out of an unfortunate set of facts and circumstances. It is not the usual course for a debtor to sell property and then come to the court after the fact to obtain an (what the Debtor believes should be perfunctory) order. Unfortunately, the Debtor has sold the property to someone, without notice, without the opportunity for possible overbids, and without the judicial process to insure that there are no insider, "friends of the Debtor" deals being cut in the backroom.

The Motion is not supported by any points and authorities for the court to consider in determining whether the Motion should be granted or denied. The Debtor appears to have drafted the court and judicial law to research the law and effect of the Debtor having purported to have sold property of the estate. Given the significant legal issues which arise from a purported sale which may well be ineffective, a non-debtor, non-fiduciary in possession of this property.

On February 16, 2014, the court filed its order (Dckt. 30) confirming the Debtor's Chapter 13 Plan (Dckt. 5). The Plan requires monthly payments of $975.00 for a term of 60 months. The Plan provides to abandon the property being sold to the creditors having liens thereon. Chapter 13 Plan, Class 3. The Chapter 13 Plan payments are consumed by paying significant unpaid state and federal taxes. Chapter 13 Plan, Class 5.

The Trustee did not oppose confirmation, and the Chapter 13 Plan was confirmed without a hearing. From reviewing Schedule J and the surrender provisions in the Chapter 13 Plan, the short-sale of the property is consistent with the Plan.

While short on authority and explanation, the court finds that granting the motion and approving the sale is consistent with the confirmed Plan in this case. The court will leave it to the Chapter 13 Trustee, U.S.

Trustee, and creditors to determine if there is anything amiss with respect to the sale, whether any issues exist as to whether it was an arms-length transaction, and if the Debtor has more to worry about than completing the sale prior to obtaining an order from the court.

The court sees no reason to continue the sale for the Debtor to obtain information about what Clocktower Grove Owners Association was paid. The court shall require the Debtor to provide an accounting of what was paid to all creditors from the sale, the disbursement of all proceeds to anyone other than a creditor, and a statement of any improper payments which the Debtor will move expeditiously to recover for the estate. If the accounting is not provided, the Debtor fails to reasonably act to recover improper payment, or the Chapter 13 Trustee, U.S. Trustee, and parties in interest may seek appropriate relief from this court – which may include dismissal of the case with prejudice.

The Bankruptcy Code permits the Debtor ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here Movant proposes to sell the real property described as 735 Buchanan St #104, Benicia, California (the "Property").

The proposed purchaser of the Property is Jae Phoenix and the terms of the sale are for $185,000.00, and the authorization to so sell the property is retroactively approved to and including April 15, 2014.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Brooke Marie O'Rourke 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 Brooks Marie O'Rourke, the Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Jae Phoenix ("Buyer"), the Property commonly known as 735 Buchanan St #104, Benicia, California ("Property"), on the following terms:
>
> 1. The Property shall be sold to Buyer for $185,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 36, 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 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.

IT IS FURTHER ORDERED that this authorization to sell the Property is effective retroactively from and including April 15, 2014, with the Debtor authorized to have sold the Property prior to the issuance of this Order.

IT IS FURTHER ORDERED that on or before July 15, 2014, the Debtor shall file an accounting of all monies paid from escrow (which shall include legible copies of the Title Company escrow statements). The accounting shall identify the claims paid and whether they are for pre-petition or post-petition obligations or amounts owed. The accounting shall also identify all other amounts paid from sales proceeds (or any other monies related to the sale which may or may not have been paid through escrow or denominates as “sales proceeds”) to any person, including fees, costs, expenses, or accommodation charges.

IT IS FURTHER ORDERED that the accounting shall also include a report of any monies paid creditors or any other person which are not proper secured claims to be paid or were such amounts not otherwise permitted by this order. The Debtor shall state those amounts and what process will be made for demanding payment of such improper amount to the Chapter 13 Trustee, and if not paid, what litigation will be commenced to recover such monies.

IT IS FURTHER ORDERED that if the Debtor fails to timely provide the accounting or the report, the court shall issue an order to show cause why this bankruptcy case should not be dismissed with prejudice for the Debtor’s failure to obtain court approval for the sale of property of the estate prior to selling the property and for the failure to comply with the accounting and reporting requirements of this order.

32. 10-23278-E-13 JOSEPH/LOURDES IBARRA
PLC-2 Peter L. Cianchetta

MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON
4-16-14 [28]

Final Ruling: No appearance at the June 10, 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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 16, 2014. By the court's calculation, 55' 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 the Bank of New York Mellon fka the Bank of New York, as Trustee for the Certificateholders CWHEQ, Inc., Home Equity Loan Asset Backed Certificates Series 2006-S4, "Creditor," is denied without prejudice.

On May 9, 2010, the court issued an order confirming Debtors Joseph M. Ibarra and Lourdes V. Ibarra's ("Debtors") Chapter 13 Plan. Dckt. No. 19. Debtors are the owner of the subject real property commonly known as 8249 Redford Way, Sacramento, California, "Property," Debtors valued the Property at a fair market value of $158,000.00 as of the petition filing date.

The order confirming Debtors' Chapter 13 Plan further ordered that Debtors' Motion to Value the Secured Claim of Countrywide Home Lending/ Bank of America granted, and that the secured claim of the EMC Mortgage creditor be valued at $0.00 under the Chapter 13 Plan. Dckt. No 19.

Debtors state that, as the case is getting close to completion, a due diligence review that Debtors conducted has now revealed that the Proof of Claim filed in the case by Bank of America, which Debtors had previously identified as a junior lienholder on the Property, lists the Bank of New York Mellon, fka the BAnk of New York, as Trustee for the Certificatehodlers CQHEZ, Inc. Home Equity Loan Asset Backed Certificates Series 2006-S4 as the creditor who holds this claim instead. Debtors bring this Motion to Value to include

the Bank of New York Mellon, fka the Bank of New York, as Trustee for the Certificatehodlers CQHEZ, Inc. Home Equity Loan Asset Backed Certificates Series 2006-S4 and Nationstar Mortgage, LLC, the current servicer on this claim, as part of the order that Debtors obtained on May 9, 2010.

While such a corrective motion, whether to amend the prior order or have a completely new order issued (as in this Contested Matter) is appropriate and necessary, the presentation of the current Motion is not sufficient. The Motion, which must state with particularity the grounds upon which the relief is based and the relief it self (Fed. R. Bankr. P. 9013) states,

> A. Debtor seeks to have the secured claim of Bank of New York Mellon, as Trustee valued.
>
> B. Debtor filed a motion to have the collateral of "Bank of America" valued at $0.00. The court granted the motion and entered an order thereon.
>
> C. The Debtors realize that the Proof of Claim was filed by "Bank of America" as the loan servicer, with Bank of New York Mellon, as Trustee, being the actual creditor.
>
> D. The Debtors seek to include Bank of New York Mellon, as Trustee, as part of the May 9, 2010, order of this court "valuing the collateral" at $0.00.
>
> E. Wherefore, the Debtors request that the court value the secured claim of Bank of New York Mellon, as Trustee at $0.00.

Motion, Dckt. 28.

The Motion also instructs the court to read other pleadings and documents to assemble the grounds which have to be stated by Movant with particularity in the Motion. These include: (1) the property which secures the claim, (2) evidence of value, (3) the senior liens on the property, (4) the amount of the claims secured by the senior liens, and (5) the computation of the value of the Bank of New York Mellon, as Trustee secured claim. Quite possibly all of the necessary grounds are buried in these other documents, but that is for the Movant to present, not work assigned to the court and judicial law clerks.

Further, from reading the Motion the court cannot tell if the Debtor wants to amend the prior order or seeks an entirely new order. While it appears to request a new order, the Motion can be read to request that the court just make the prior order effective against Bank of New York Mellon, as Trustee, in place of "Bank of America." FN.1.

FN.1. While the court "knows" what the Debtors want to accomplish, the Motion does not get them there, and to grant such relief may render the court's order subject to subsequent attack by the creditor or assignee of the creditor.

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 Joseph M. Ibarra and Lourdes V. Ibarra, "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 value the secured claim of Bank of New York Mellon fka The bank of New York, as Trustee for Certificateholders CWHEQ, Inc., Home Equity Loan Asset Backed Certificates Series 2006-S4 secured by a second in priority deed of trust recorded against the real property commonly known as 1413 Southwood Way, Roseville, California, is denied without prejudice.

33. 09-39783-E-13 SDB-3 LAWRENCE/GIGI RAMEY W. Scott de Bie MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A. 5-7-14 [79]

Final Ruling: No appearance at the June 10, 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 Chapter 13 Trustee, all creditors, and Office of the United States Trustee on May 7, 2014. By the court's calculation, 34 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 Bank of America, N.A., "Creditor," is granted.

Debtors seek to value the secured claim of Bank of America, N.A. The Motion to Value filed by Lawrence A. Ramey and Gigi M. Ramey, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtors are the owner of the subject real property commonly known as 28 Springs Road, Vallejo, California, "Property." Debtors seek to

value the Property at a fair market value of $93,000.00 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 $195,291.00. Creditor's second deed of trust secures a claim with a balance of approximately $149,997.56. 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).

Upon a review of the court docket, however, it appears that the value of the secured claim of Creditor Bank of America, N.A., has already been determined to be $0.00, as a result of the Debtors' Motion to Value the Secured Claim of the same creditor which was filed previously on October 9, 2009. Civil Minutes, Dckt. No. 22, and Order, Dckt. No. 24.

Debtors address this by stating that a Motion to Value the Secured Claim of Bank of America, N.A. had been filed as Dckt. Control No. SdB-1, and was heard by the court on November 10, 2009. Debtors indicate that service of the pervious Motion may not have been sufficient, however, to satisfy due process requirements. At that time, the court and parties did not as closely look at compliance with Federal Rule of Bankruptcy Procedure 7004 for service of motions.

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 Lawrence A. Ramey and Gigi M. Ramey, "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 Bank of America, N.A. ("Creditor") secured by a second in priority deed of trust recorded against the real property commonly known as 28 Springs Road, Vallejo, 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 $149,997.56 and is encumbered by senior liens securing claims in the amount of $195,291.00, which exceed the value of the Property which is subject to Creditor's lien.

34. 14-23685-E-13 PAUL LUDOVINA
LBG-1 Lucas B. Garcia

MOTION TO VALUE COLLATERAL OF ADVANCED RESTAURANT FINANCE, LLC., A CALIFORNIA LIMITED LIABILITY COMPANY
5-5-14 [14]

Final Ruling: No appearance at the June 10, 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 the Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on May 5, 2014. By the court's calculation, 38 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 Advanced Restaurant Finance, LLC., a California Limited Liability Company, assignee of COMMUNITY BANK OF THE BAY, "Creditor," is denied.

The Motion to Value filed by Paul Ludovina, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtor has an interest in money borrowed. Debtor seeks to value the Property at a fair market value of $8,000/00 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 Motion does not describe what actually is an asset fo "money borrowed." No such asset is listed on Schedule B. Dckt. 1 at 10-12. No collateral is described on Schedule D for this Creditor. *Id.* at 14. The Debtor directs the court to read the Declaration filed by the Debtor to figure out what asset is subject to the lien, the value of that asset, and the value of the Creditor's secured claim.

In his declaration the Debtor provides the following testimony:

A. "The Schedules filed on my case disclose my interest in money borrowed (hereinafter the 'ASSET')."

B. "I believe and assert that the reasonable, replacement value of the ASSET is $8,000.00."

C. "I believe and assert that [Advance Restaurant Finance, LLC] holds a valid security interest in the ASSET in the nature of a Purchase Money Security Interest."

Declaration, Dckt. 16.

The wording of the Motion and the Declaration are quite curious and cause the court concern. The very generic "money borrowed" does not describe a specific assert of the estate. If money were actually borrowed and held by the Debtor, then it would appear on Schedule B.

The Debtor appears to carefully try and qualify his declaration testimony under penalty of perjury by stating "I believe and assert" the existence of the "ASSET" and the creditor's lien. The Debtor doesn't clearly say, "It is.....," but rather uses the weasel words "I believe and assert...." Notwithstanding the weasel words, the Debtor has provided the testimony under penalty of perjury.

Next, the Debtor provides his expert opinion that Advance Restaurant Finance, LLC has a security interest "in the nature of" a purchase money security interest. The Debtor demonstrates no special or expert knowledge concerning purchase money financing or the term purchase money security interest under the California Commercial Code.

Third, the court notes that there is one claim near in amount to the $8,000.00 value attributed to the "monies borrowed." A general unsecured claim in the amount of $8,500.00 is listed for an individual named Frank Ludovina. Due to the same last names, one would initially infer that there is a familial relationship between this Frank Ludovina and the Debtor.

The Debtor having stated under penalty of perjury that there is no $8,000.00 of monies in the estate which could be the "monies borrowed," the Debtor has not shown that there is such an asset for the court to value in determining the amount of the Creditor's secured claim.

The court is not going to blindly value a secured claim based on an alleged asset which is not listed on Schedule B or described with any more specificity than "monies borrowed."

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 Paul Ludovina, "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) to value the secured claim Advanced Restaurant Finance, LLC., a California Limited Liability Company, assignee of COMMUNITY BANK OF THE BAY, is denied.

35. 14-23087-E-13 MOLLY MILLIKIN — **OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK**
DPC-1 Diana J. Cavanaugh — **5-12-14 [18]**

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 12, 2014. By the court's calculation, 29 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 three grounds.

First, the Trustee states that Debtor is delinquent $940.00 in plan payments to the Trustee to date, and the next scheduled payment of $940.00 is due on May 25, 2014. The case was filed on March 26, 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.

Second, Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341 on May 8, 2014. 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 is continued to June 12, 2014 at 10:30 am.

Third, Trustee states that the Debtor cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6) because the Plan relies on a pending motion. Debtor's plan relies on the Motion to Value Collateral of Air Force Federal Credit Union, DJC-1 which is set for hearing on May 20, 2014. The court granted that motion, which resolves this portion of the Trustee's Objection to Confirmation.

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 13 Chapter 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. 14-22297-E-13 ANTHONY FURR **MOTION TO CONFIRM PLAN**
AF-4 Pro Se **4-30-14 [30]**

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 Chapter 13 Trustee, all creditors, and Office of the United States Trustee on April 29, 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). 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 and a creditor have filed opposition to the proposed Plan.

OPPOSITION BY CHAPTER 13 TRUSTEE

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

1. All sums required by the plan have not been paid. 11 U.S.C. § 1325(a)(2). The Debtor is $463.00 delinquent in plan payments to the Trustee to date and the next scheduled payment of $517.00 is due on June 25, 2014. The Debtor has paid $571.00 into the plan to date.

2. Debtor's Plan fails to provide for the claim of the City Water

Utility District, listed twice on Schedule D for $12,018.00 and $1618.00 (Schedule D, Dckt. No. 21, Page 13), and while treatment of all secured claims may not be required under 11 U.S.C. § 1325(a)(5), failure to provide the treatment could indicate that the Debtor either cannot afford the payments called for under the Plan because they additional debts, or that the Debtor wants to conceal the proposed treatment of a creditor.

3. It appears that Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6). Debtor lists on Schedule A multiple properties for which he claims ownership. On Schedule A, Debtor also shows liens held on property at 1473 Wentworth Avenue, Sacramento, California in the amount of $50,000.00 and property at 2148 Irvin Way, Sacramento, California in the amount of $50,00. These debts and others that the Debtor may have are not disclosed on his schedules and matrix.

4. Debtor's Plan may not be the Debtor's best effort under 11 U.S.C. § 1325(b). Debtor's projected disposable monthly income listed on Schedule J totals $9,408.00, while Debtor is proposing a plan payment of only $517.00. The Trustee is also uncertain as to whether Debtor receives rental income for the multiple properties listed on Schedule A. None has been reported on Schedule I. Debtor filed a Proof of Service along with his motion to confirm and proposed amended plan. Dckt. No. 33.

5. The proof of service is signed by Debtor himself; the proof of service language requires that documents be served by a party who is over 18 years old and not a party in the court case. Individuals who are a party in the case cannot serve documents in their own case under California Civil Code of Procedure § 1013a(3).

OPPOSITION BY CREDITOR

Creditor PennyMac Holdings, LLC fka PennyMac Mortgage Investment Trust Holdings I, LLC its successors and/or assigns by its duly authorized agent PennyMac Loan Services (“Creditor”), holds a first deed of trust claim encumbering real property located at 2822 H Street, Sacramento, California.

On Jule 1, 2009, the Debtor’s wife defaulted under the terms of the Creditor's Note. As of March 6, 2014, pre-petition arrearage existed in the approximate amount of $240,068.57, representing the July 1, 2009 through March 1, 2014 mortgage payments, accrued late charges and other fees and costs. Creditor states that it will file its Proof of Claim prior to the Claims Bar date of July 23, 2014.

Creditor believes that on or about May 27, 2004, prior to executing the Note and Deed of Trust, Debtor's wife executed a grant deed transferring the real property to herself and her husband, the Debtor Anthony I. Furr. Creditor believes that this is actually one of 3 cases filed by Debtor affecting its interest in real property. Debtor filed his first case in pro se, Case No. 12-22048, on February 1, 2012. The court dismissed this case based upon unreasonable delays by the Debtor that were deemed prejudicial to creditors. On April 27, 2012, Debtor filed his second case in Pro Se, Case No. 12-28240, which was dismissed on November 9, 2012.

On March 6, 2014, the Debtor filed the present Chapter 13 case. As of May 22, the Debtor remains due for his April 1, 2014 through May 1, 2014 post-petition payments of $3,635.82, for a total post-petition default of $7,271.64.

Creditor objects to the confirmation of Debtor's Amended Plan on the basis that Debtor has failed to provide for the repayment of $240,068.57 in pre-petition arrears through the proposed Chapter 13 Plan, and that it does not consent to a time period to cure for more than 60 months. Creditor also states that it is uncertain as to the Debtor's financial ability to make all payments called for under the plan, while Debtor continues to make regular post-petition payments to the Creditor. However, Creditor does not point specifically to any of Debtor's schedules, and listed income and expenses, to justify its concern that Debtor may not be able to afford payments under the plan. Creditor merely makes the general assertion that it is concerned that the Debtor will not be able to make plan payments.

Based on the foregoing, 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.

37. 14-23997-E-13 DAVID JARMAN
DJL-1 Daryl J. Lander

MOTION TO VALUE COLLATERAL OF BEST BUY CO., INC.
4-28-14 [14]

Final Ruling: No appearance at the June 10, 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 Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on April 28, 2014. By the court's calculation, 42 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 Best Buy Co., Inc., "Creditor," is granted and that creditor's secured claim is determined to be $1,150.00.

The Motion to Value filed by David Jarman, "Debtor" to value the secured claim of "Creditor" is accompanied by Debtor's declaration. Debtor is the owner of two assets described as: (1.) A 2010 Sony Bravia 48" LCD flat screen television; and (2.) A 2010 Toshiba 17" laptop computer (the "Property").

Debtor seeks to value the Property at a value of $1,150.00 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).

Debtor listed the Property as "electronics" on Schedule B of his bankruptcy petition and valued them at $1,150.00. The $1,650.00 amount that is listed for electronics listed on Debtor's Schedule B includes the television and laptop computer value of $1,150.00 plus an additional $500.00 value for two (2) Samsung Galaxy Note 2's. Debtor states that the Samsung Galaxy Note 2's are not included in this motion and not subject to reduction based on the value of collateral because they were purchased within one (1) year of the filing date of the Petition. *See* Debtor's Confirmed Chapter 13 Plan, Dckt. No. 5.

The Debtor entered into a purchase money security agreement with creditor Best Buy, Co., Inc. for the financing of the the Sony television and Toshiba laptop computer on or about September, 2010, more than one year prior to the filing of the Debtor's bankruptcy case. At the time of filing date, the Sony television and Toshiba laptop computer were encumbered in the amount of approximately $5,182.91 under the terms of the Creditor's purchase money security agreement.

Therefore, the respondent creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of $1,150.00. *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 David Jarman, "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 Best Buy Co., Inc., secured by an assets described as (1.) A 2010 Sony Bravia 48" LCD flat screen television; and (2.) A 2010 Toshiba 17" laptop computer is determined to be a secured claim in the amount of $1,150.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the asset is $1,150.00 and is encumbered by liens securing claims which exceed the value of the asset.

38. 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

No Tentative Ruling: The Motion to Avoid 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).

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 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 xxxxxxxxxxxx the Motion to Avoid a Judicial Lien.

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.

At the hearing...

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).
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> 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.
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> 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 Motion to Avoid Judicial Lien is xxxx.