UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

July 1, 2014 at 3:00 p.m.

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1. 11-43701-E-13 LEAH MEJIA — **MOTION TO APPROVE LOAN MODIFICATION**
JE-3 Julius Engel — **6-17-14 [53]**

APPEARANCE OF JULIUS ENGEL, COUNSEL FOR DEBTOR REQUIRED FOR JULY 1, 2014 HEARING TO CONFIRM ON THE RECORD THAT THE ACTUAL RELIEF ORDERED IS THAT WHICH WAS INTENDED TO BE REQUESTED IN THE MOTION

NO TELEPHONIC APPEARANCE FOR COUNSEL PERMITTED

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 NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 17, 2014. By the court's calculation, 14 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 is granted and the court authorizes Debtor to Enter into the Proposed Loan Modification.

The Motion to Approve Loan Modification filed by Leah Mejia ("Debtor") seeks court approval for Debtor to negotiate a loan modification. The Motion states with particularity the following grounds and relief requested (Fed. R. Bank. P. 9013):

A. This Chapter 13 case was commenced on September 30, 2011.

B. Schedule A discloses the Debtor's interest in property commonly known as 100 Lofas Pl. in Vallejo, California.

C. As disclosed in Schedule D Wells Fargo Bank, N.A. holds a security interest in the Property.

D. The Debtor now desires to enter into negotiations with Wells Fargo Bank, N.A. to modify the terms of the Note and Deed of Trust.

E. Wells Fargo Bank, N.A. has requested that the court issue an order "authorizing" the Debtor to "negotiate" a loan modification prior to Wells Fargo Bank, N.A. commencing any such "negotiations."

F. Debtor's counsel has advised the Debtor on the ramifications of such "negotiations."

Motion, Dckt. 53.

The Motion also states with particularity (Fed. R. Bankr. P. 9013) the following specific relief sought by Debtor [emphasis added]:

> "Debtor moves this court for an Order **Authorizing the Debtor to Negotiate** a Loan Modification."

The Motion does not present the court with the terms of any loan modification or any post-petition credit transaction for which Debtor seeks court approval.

SERVICE

However, the Notice states that opposition must be filed within fourteen days before the hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Debtor only provided 14 days notice before the hearing. This is not sufficient notice to the parties to file written opposition

TRUSTEE'S OPPOSITION

Trustee states that Debtor has not provided 28 days notice prior to the hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1).

Trustee also argues that Debtor's motion is defective because it seeks an order authorizing Debtor to negotiate a loan modification, but does not provide the specifics of the loan modification. Further, attached as an exhibit is a permanent loan modification effective January 1, 2014. Trustee is uncertain why the motion is not approval of a permanent loan modification rather than just for authorization to negotiate one, since it appears negotiations have already taken place and a permanent loan modification offered.

Lastly, the Trustee is unclear regarding the connection between World Savings Bank, FSB and Wachovia Mortgage. Debtor's Schedule D does not identify Wells Fargo Bank, N.A. as the creditor but Wachovia Mortgage. Wells Fargo Bank, N.A. filed a proof of claim. However, the Mortgage Note and Deed of Trust attached to the claim identify the creditor as World Savings Bank, FSB.

DISCUSSION

Though the Motion only seeks "authority" to "negotiate," as opposed to entering into a post-petition credit transaction, Exhibit A filed in support of the Motion is titled "**HOME AFFORDABLE MODIFICATION AGREEMENT.**" (All capital letters and bold font in original.) Dckt. 56. This Exhibit A is not referenced in the Motion and, from the face of the Motion, would not appear to be the subject of any relief requested in the Motion.

Though not stated in the Motion, the Debtor's declaration sheds some light on the true transaction in which she is engaged, not merely the "please allow me to negotiate" relief stated with particularity in the Motion. Declaration, Dckt. 55. In the Declaration Debtor testifies under penalty of perjury,

A. She desires to enter into negotiations with Wells Fargo Bank, N.A.

B. She is "anxious" to commence these negotiations, but Wells Fargo Bank, N.A. has requested that prior to any negotiations that the Debtor obtain authorization to so negotiate.

C. Exhibit A filed in support of the Motion is the proposed contract for the Modification of the loan, with the Debtor testifying as to her personal knowledge of the terms of the Modification.

D. The Debtor has already commenced making mortgage payments pursuant to the terms of the Loan Modification Agreement filed as Exhibit A.

This testimony not only is internally inconsistent, but stands in start contrast to the "authorize me to commence negotiations" stated in the Motion. The Debtor has already "commenced," and appears to have completed all of the negotiations for a post-petition loan modification. Additionally, the Debtor has already begun making reduced mortgage payments [in an unstated amount] since October 2013.

Exhibit A is a formal Loan Modification Agreement with all of the specific terms, conditions, and modifications one would expect for a post-petition credit transaction by the Debtor in this Chapter 13 case. Beginning with January 1, 2014, the Debtor's monthly payment has been reduced to $942.71. (Under the confirmed Chapter 13 Plan, the Debtor listed her monthly mortgage payment, being paid directly by her as a Class 4 Claim, to be $1,120.38. Plan, Dckt. 5.)

Wells Fargo Bank, N.A. has provided the Debtor and the court with a Loan Modification Agreement form which states all of the terms and conditions to modify this loan. This Loan Modification Agreement clearly identifies Wells Fargo Bank, N.A. as the creditor who is entering into the contract with Debtor and is to be signed by a representative of Wells Fargo Bank, N.A. (not merely a loan servicing company not disclosing the identity of the actual creditor, an ambiguous entity name, or MERS as the "nominee" of a loan servicer). In many respects, having provided a complete Loan Modification Agreement form to be presented to the court, Wells Fargo Bank, N.A. may well be viewed as having "saved the day" for Debtor.

It appears that the Debtor has already negotiated the loan modification – exercising her rights and powers as a Chapter 13 Debtor pursuant to 11 U.S.C. § 1303 relating to property of the estate and claims, and 11 U.S.C. §§ 1322, 1325, and 1329 to provide for treatment of claims through a confirmed Chapter 13 Plan. No "authorization" is required from the court for the Chapter 13 Debtor to "negotiate" with creditors, Debtor and her counsel to address claims and determine how to properly provide for them, or to then seek orders from the court authorizing post-petition credit transactions, confirming or modifying Chapter 13 plans, or disallowing claims.

If the court were to grant the relief as stated in the Motion, the order would merely state, "IT IS ORDERED that the Debtor is authorized to negotiate with Wells Fargo Bank, N.A. the terms of a possible loan modification, and then after the negotiations are completed, the Debtor must file a motion for the court to authorize the Debtor to enter into a specific proposed post-petition credit transaction to modify the loan."

It appears evident that the Debtor does not need, or want, "authorization to negotiate" a possible loan modification, for which none of the terms are currently know, but seeks this court to authorize the Debtor to enter into the Loan Modification which is embodied in the Loan Modification Agreement which is presented as Exhibit A.

The court construes the Motion to actually request that the court authorize the Debtor, pursuant to 11 U.S.C. § 364(c), to use the property of the estate to secure the Loan as modified.

Though there are defects in the Motion, Notice, and Notice Period provided by Debtor, the court waives the defects and rules on the merits of the Motion. The Debtor has been assisted by counsel since the Fall of 2013 in obtaining a loan modification that significantly reduces the current mortgage payments. FN.1.

FN.1. The Loan Modification Agreement makes reference to "unpaid amounts" in the amount of $72,700.00 being forgiven and the principal balance being reduced. The court cannot tell from its review of the agreement whether this is merely a reduction of the principal or a waiving of pre-petition defaults. Proof of Claim No. 2 filed by Wells Fargo Bank, N.A. on November 29, 2011 states that there was no arrearage as of the commencement of this case. The confirmed Chapter 13 Plan provides for the payment of this claim under Class 4, which was Debtor's certification that no pre-petition arrearage existed.

To not authorize the Debtor to enter into the Loan Modification and permanently lock in these terms would cause not only the court otherwise unnecessary cost and expense in having to "re-chew this cud," it would subject the Debtor to unnecessary angst over whether the Modification will be lost due to the way the Motion was prepared and presented to the court. While it is not the court's responsibility to "represent" any of the parties, it is the proper exercise of judicial discretion to interpret the substance of the pleadings instead of the headings and strictly reading the choice of words used by counsel.

The court grant the motion and authorizes the Debtor to enter into the Loan Modification Agreement which has been presented to the court as Exhibit A, Dckt. 56.

SUPPLEMENTAL PROCEEDINGS – CORRECTIVE SANCTIONS

Upon review of the pleadings, it is clear to the court that an Order to Show Cause why counsel should not pay $393.00 in corrective sanctions to the Clerk of the Bankruptcy Court, for deposit into the United States Treasury, for the Motion, Notice, and prosecution of this Motion. Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposes under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemptor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058.

Here, the Motion clearly misstates not only the relief sought, but the underlying facts which have transpired. Counsel appears to have either intentionally, or through the use of stock forms and para-professionals who do not understand the (1) the rights and obligations of Chapter 13 debtors, (2) the rights and powers of Chapter 13 debtors and their attorneys to address claims, communicate with creditors, and negotiate terms of proposed credit transactions, (3) the obligations of Chapter 13 debtors to obtain authorization to use property of the estate other than in the ordinary course of business and enter into post-petition credit transactions, to misrepresent to the court this Loan Modification Transaction.

If it was intentional, while Wells Fargo Bank, N.A. has provided a copy of the actual Loan Modification Agreement which clearly states, the terms, counsel may have been "testing the waters" to determine if the court would just blindly sign orders for whatever relief he would request for some "poor less sophisticated consumer debtor." It is only slightly better if this gross misstatement of the facts and relief requested arose because through the use of forms and inadequately trained para-professionals inaccurate pleadings were presented to the court.

The court shall conduct a Supplemental Hearing pursuant to an Order to Show Cause why counsel should not pay $393.00 in corrective sanctions to preclude the filing of such other inaccurate motions. The court computes that the $393.00 is substantially less than what it would cost counsel in time and uncompensated billings if the court made him properly prepare a motion, declaration (which was not making inconsistent statements under penalty of perjury), properly notice the hearing, and then attend the hearing (no telephonic appearance permitted).

The Order to Show Cause will provide for counsel to provide a written response at least two weeks prior to the hearing providing the court with a basis for discharging the Order to Show Cause, waiving any corrective sanctions, or reducing the corrective sanctions. Counsel shall be required to appear at the hearing on the Order to Show Cause.

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 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and Leah Mejia, the Chapter 13 Debtor, is authorized to enter into the Loan Modification Agreement which has been presented to the court as Exhibit A, Dckt. 56.

IT IS FURTHER ORDERED that Julius M. Engel, attorney for Debtor, shall appear in person (no telephonic appearance permitted) at 3:00 p.m. on August 5, 2014, and Show Cause why the court should not impose $393.00 in corrective sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 and the inherent power of the court for the Motion and supporting pleadings filed in this contested matter (DCN: JE-3). The court addresses in detail the defect in the pleadings, the inaccuracies stated in the motion, the inconsistencies under penalty of perjury in the Debtor's declaration, and the incorrect statement of the relief requested in the Motion. The court's Civil Minutes from the July 1, 2014 hearing on the Motion (DCN: JE-3) are incorporated herein by this reference and made a part hereof.

IT IS FURTHER ORDERED that any Response to this Order to Show Cause shall be filed and served on the Chapter 13 Trustee, U.S. Trustee, and Counsel (if filed any other party in interest) on or before July 22, 2014.

2. 14-24402-E-13 SHAD/KARALEE HUNTLEY — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
DPC-1 Mark Wolff — 6-5-14 [20]

Final Ruling: No appearance at the July 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on June 5, 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 court's decision is to continue the hearing on the Objection to 3:00 p.m. on July 22, 2014.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan relies on a pending Motion to Value, which is set to be heard

on July 22, 2014. The court continues the Objection to be heard in conjunction with the Motion to Value.

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 continued to 3:00 p.m. on July 22, 2014.

3. 12-38907-E-13 PAUL/CYNTHIA BRICK — MOTION TO MODIFY PLAN
CFH-1 Curt Hennecke — 5-14-14 [24]

Final Ruling: No appearance at the July 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 14, 2014. By the court's calculation, 48 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)(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 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 14, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

4. 13-34907-E-13 VICTORIA VALENTE — MOTION TO CONFIRM PLAN
LBG-2 Lucas Garcia — 5-9-14 [42]

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 May 9, 2014. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 confirmation offering evidence that the Debtor is $3,963.00 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).

Trustee also states that the Debtor cannot make the payments under the plan or comply with the plan pursuant to 11 U.S.C.§ 1325(a)(6). On March 4, 2014, the State Board of Equalization filed Proof of Claim No. 1, indicating that debtor has a priority debt in the amount of $117.33. This claim is not provided for in the plan.

Trustee also argues that the Debtor cannot make the payments under the plan or comply with the plan pursuant to 11 U.S.C.§ 1325(a)(6). On March 21,2014, Nationstar Mortgage filed Proof of Claim No. 2, claiming security in real property at 2828 Snyder Lane, Stockton, Califronia. Debtor has not listed having interest in any real property located in Stockton nor did the Debtor list any debts owing to Nationstar Mortgage.

Additionally, Trustee is unable to determine whether the Debtor can make the payments under the plan or comply with the plan, 11 U.S.C. § 1325(a)(6). In section 6-1.01 Debtor proposes to pay $3,973.00 per month for 30 months, $5,050.00 per month for 30 months and a lump sum of $5,000.00 in months 18 and 30. Debtor fails to indicate both how she will increase the plan in the 30th month to pay $5,050.00 per month for the duration of the plan and also the source of the two lump sum payments of $5,000.00 in months 18 and 30. In the Declaration in support of the proposed plan, debtor states that she is willing to turn over all future tax refunds during the life of the plan. Although the plan does not propose such a provision, the Trustee questions if this is in addition to the proposed steps and lump sum payments or the source.

Lastly, the Trustee states that in Section 6.01 of the plan, the debtor appears to be proposing to pay her counsel outside the plan. The provision indicates that debtor has paid $500 to counsel which has been put into an attorney trust account. The provision further states that upon filing the petition the attorney will bill for all pre-petition services and court filing fees. The Trustee is concerned that the attorney is attempting to bill debtor outside of the court. Ordinarily, funds are held in trust until a fee motion is filed with the court approved.

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.

5. 11-49511-E-13 RANDALL DREES
FF-5 Gary Fraley

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FRALEY & FRALEY FOR GARY RAY FRALEY, DEBTOR'S ATTORNEY
6-4-14 [80]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 4, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Motion for Compensation 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 for Compensation is granted.

FEES REQUESTED

Law Offices of Fraley and Fraley, the Attorney ("Applicant") for Randall Edward Drees, the Chapter 13 Debtor ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period September 6, 2011 through June 3, 2014.

Applicant provides a task billing analysis and supporting evidence

for the services provided, which are described in the following main categories.

Pre-Filing: Applicant spent 8.75 hours in this category. Applicant met with client to determine eligibility and assess overall financial situation, information regarding tax liability, trustee sale details, information of the character and amount of debts; outlined the requirements of Chapter 13 plan and explained details of the process. Advised client of estimated payments under plan; reviewed and revised chapter 13 filing documents, including plan and schedules.

Post-Filing: Applicant spent 21 hours in this category. Applicant attended meeting of creditors with client; Drafted and filed motion to confirm plan; drafted and filed opposition to motion to dismiss case; attended court hearing on motion to dismiss; consulted with attorney for trustee; obtained withdrawal of motion; reviewed notice of filed claims; drafted new motion to confirm Chapter 13 Plan; attended court hearing on motion to confirm; reviewed notice of default and strategized regarding same; attended court hearing on motion dismiss; consulted with client regarding sale of home; follow-up consultation with client regarding sale of home; review notice of default and strategized regarding same; reviewed sale contract and client's Chapter 13 status; drafted and filed motion to sell; and finalized and filed fee application.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled

practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or
(ii) services that were not--
(I) reasonably likely to benefit the debtor's estate;
(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

(a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including confirmation of a Chapter 13 plan.

While a Chapter 13 case, this was not a “simple” consumer Chapter 13 case. To preserve equity in assets, Debtor and counsel need to craft a plan to provide for secured and priority claims, and the liquidation of an asset to provide for paying 100% dividend to creditor for creditors holding general unsecured claims. Debtor’s income being generated by a sole proprietorship, Debtor and counsel had the added challenge of documenting the reasonable expenses from the business and that monthly net income number was true and accurate (and there not being phantom expenses or hidden income

left in the business).

FEES ALLOWED

The fees request are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Gary Fraley (Partner)	3.50	$360.00	$1,260.00
Andrew Grossman (Associate)	12.75	$300.00	$3,825.00
Lisa White (Paralegal)	4.0	$90.00	$360.00
Brian Turner (Associate)	9.5	$300.00	$2,850.00
Total Fees For Period of Application			$8,295.00

Applicant has applied a $1,325.00 discount for a total requested amount of fees of $6,970.00, $970.00 was paid prior to the bankruptcy and an additional $6,000.00 is currently being sought.

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $6,970.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Debtor from the available funds of the estate in a manner consistent with the order of distribution in a Chapter 13 case.

Applicant is allowed, and the Chapter 13 Debtor is authorized to pay, the following amounts as compensation to this professional in this case:

Fees $6,970.00

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Law Offices of Fraley and Fraley ("Applicant"), Attorney for the Chapter 13 Debtor having been presented to the

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

IT IS ORDERED that Law Offices of Fraley and Fraley is allowed the following fees and expenses as a professional of the Estate:

Law Offices of Fraley and Fraley, Professional Employed by Chapter 13 Debtor

Fees in the amount of $ 6,970.00

The Fees and Costs pursuant to this Applicant are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Chapter 13 Debtor is authorized to pay the fees allowed by this Order, after credit for any retainer or pre-petition payments, from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 13 case.

6. 14-22811-E-13 DPC-1 ADELAIDA VASQUEZ Pro Se OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS 5-27-14 [24]

Final Ruling: No appearance at the July 1, 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 (*pro se*) on May 27, 2014. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The objection to claimed exemptions is sustained and the exemptions are disallowed in their entirety.

The Trustee objects to the Debtor's use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure §703.140. California Code of Civil Procedure §703.140, subd. (a)(2), provides:

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

(Emphasis added). The court's review of the docket reveals that the spousal wavier has not been filed. The Trustee's objection is sustained and the claimed exemptions are disallowed. FN.1.

FN.1. The Debtor is not unfamiliar with the bankruptcy process, having filed a prior bankruptcy case in 2013 (13-26750, Chapter 13 case dismissed August 6, 2013), two cases in 2012 (12-36514, Chapter 7, discharge granted January 7, 2012; 12-30708, Chapter 7, dismissed June 18, 2012), and one case in 2011 (11-46999, Chapter 13, dismissed January 27, 2012).

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 Exemptions 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 is sustained and the claimed exemptions are disallowed in their entirety.

7. 14-23317-E-13 MARIA OCHOA **MOTION TO CONFIRM PLAN**
HDR-2 Harry Roth **5-19-14 [24]**

Final Ruling: No appearance at the July 1, 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 19, 2014. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 May 19, 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. 13-30919-E-13 BUN AUYEUNG AND SOO TSE — MOTION TO CONFIRM PLAN
PGM-5 Pete Macaluso — 5-19-14 [144]

Final Ruling: No appearance at the July 1, 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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 19, 2014. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

The court's decision is to continue the hearing on the Motion to Confirm the Amended Plan to July 22, 2014 at 3:00 p.m. to be heard in conjunction with the Motion to Avoid Lien.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. As the plan relies on the pending Motion to Avoid Lien, which was continued to July 22, 2014, the court continues the hearing on the Motion to Confirm to 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 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 July 22, 2014.

9. 14-22527-E-13 MARK/PATRICIA HARLAND — MOTION TO VALUE COLLATERAL OF REAL TIME RESOLUTIONS, INC.
JMC-1 Joseph Canning — 5-28-14 [30]

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

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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 28, 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Value secured claim of Real Time Resolutions, Inc., "Creditor," is denied without prejudice.

The Motion to Value filed by Mark A. And Patricia T. Harland, "Debtor" to value the secured claim of "Creditor" Real time Resolutions, Inc. is accompanied by Debtor's declaration.

However, a review of Proof of Claim No. 2, which has been filed in this case and to which Movant references in the motion and Exhibit B, identifies the Creditor as "Real Time Resolutions, Inc. as agent for RTR Capital II LP." Based on these filings, it appears that RTR Capital II, LP is the Creditor. Debtor has not shown how Real Time Resolution, Inc. is the agent for service of process.

As the motion names the improper creditor and that RTR Capital II, LP has not been noticed or served with this motion and supporting pleadings, the court denies the motion without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral filed by Mark A. And Patricia T. Harland, "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.

10. 09-36429-E-13 DBJ-5 — ARTHUR/WEEDONETTE HANNIBAL — Douglas Jacobs — MOTION TO APPROVE LOAN MODIFICATION — 5-23-14 [77]

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 Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 23, 2014. By the court's calculation, 39 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 Weedonette P. and Arthur A. Hannibal ("Debtor") seeks court approval for Debtor to incur post-petition credit.

However, the Motion and Declaration fail to identify the Creditor in which the Debtor seeks a loan modification with. A review of the Loan Modification Agreement provided as Exhibit B, shows that the servicer is Ocwen Loan Servicing, LLC. A review of the proof of claim registrar reveals that no claim has been filed by Ocwen Loan Servicng, LLC. The court will not enter an order effectuating a loan modification with an entity that may not be the creditor.

Additionally, the loan modification agreement is not to be signed by the creditor or even Ocwen Loan Servicing, LLC as the servicer exercising a power of attorney or as the agent for a disclosed principal, but merely by Mortgage Electronic Registration System, Inc. ("MERS") as the "Nominee for Servicer." There in nothing in the record to show what rights and powers that such a "Nominee" may exercise for a loan servicer, or that such a "Nominee" may exercise a power of attorney or serve as an agent for an undisclosed principal who may be the creditor.

The Modification Agreement form makes reference to the Note being dated April 11, 2007. Proof of Claim No. 1 has been filed by "American Home Mortgage Servicing, Inc., to which is attached a Note dated April 11, 2007, and a Deed of Trust to secure that Note. The Note is not made payable to American Home Mortgage Servicing, Inc., but does appear to be endorsed in blank. No evidence or documentation is provided that the Note is, and continues to be in the physical possession of American Home Mortgage Servicing, Inc. and that such entity satisfies the definition of creditor as provided by Congress in 11 U.S.C. § 101(10). FN.1.

FN.1. In reviewing the Deed of Trust attached to Proof of Claim No. 2, MERS is identified as the beneficiary under the Deed of Trust, as the "Nominee" for "Lender [American Home Mortgage] and Lender's successors and assigns." The powers granted MERS under the Deed of Trust are stated to be,

> "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary ot comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests [in the Security Instrument], including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Deed of Trust Attached to Proof of Claim No. 2, page 3 of 15 of Deed of Trust. This is consistent with language in deeds of trust for which MERS is the nominee, which is carefully circumscribed to be limited only to interests under the deed of trust and not that MERS is granted a power of attorney, an interest in the note secured by the deed of trust, or the ability to alter or defease the "Lender, successors, or assigns" of its rights and interests in the note secured by the deed of trust.

As this court has stated on many occasions, the fundamental requirement for any federal court to exercise federal court judicial power is that there must be a case or controversy between the parties for whom relief is sought. U.S. Constitution Article III, Sec. 2. Here, there is nothing to indicate that there are two real parties in interest whose rights are being impacted. While the Debtors are before the court, it appears that at best a servicing company, for an unidentified creditor in this case, is being inserted into the Loan Modification Agreement as a "placeholder," who may or may not be authorized to modify the creditor's rights and claim.

This court will not issue "maybe effective, maybe not effective" orders. The residential mortgage market has already suffered serious black eyes from incorrectly identified lenders, transferees, nominees, robo-signing of declarations and providing false testimony under penalty of perjury, and documents which do not truthfully and accurately identify the parties to the transaction. It is not too much for least sophisticated consumer debtors to have the true party with whom they are purportedly contracting identified in the written contract. It is not too much, and is Constitutionally mandated, that the true parties appear in federal court to have their rights and interests determined, and the relief they seek issued.

Based on the foregoing, the motion is denied without prejudice.

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

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

11. 13-35033-E-13 SAMUEL TAPIA — **MOTION TO CONFIRM PLAN**
JGD-2 John Downing — **5-13-14 [44]**

CASE DISMISSED 5/28/14

Final Ruling: No appearance at the July 1, 2014 hearing is required.

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

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

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

The Motion to Confirm having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed as moot, the case having been dismissed.

12. 13-31834-E-13 GARY/AMY CORNELLIER
PGM-2 Peter Macaluso

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTORS' ATTORNEY
6-2-14 [39]

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

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, parties requesting special notice, and Office of the United States Trustee on June 2, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Compensation is granted and Counsel is awarded interim fees pursuant to 11 U.S.C. § 331.

Law Offices of Peter G. Macaluso, Counsel for Debtor, ("Applicant") seeks attorney fees in the amount of $4,095.00. Applicant states that his billing rate when contracting with the Debtors was $300.00 and hour and he has spent 13.65 hours of actual, reasonable and necessary post-confirmation work.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee states that while the motion request $4,095.00 in fees, Debtors plan states that Debtor's attorney will seek the courts approval by filing and serving a motion in accordance with 11 U.S.C. § 329, Debtor's Rights and Responsibilities states that the initial fee should be sufficient to fully and fairly compensate counsel for all pre-confirmation services and most post-confirmation services rendered in the case. Trustee states that Counsel filed a Disclosure of Compensation of Attorney for Debtor stating that Counsel has agreed to accept $4,000 for legal fees, which $0.00 was received prior to filing the petition.

The order confirming the plan states that the balance of the $4,000.00 shall be paid by the Trustee from plan payments. Trustee states he has paid counsel $1,200.00 in attorneys fees to date, with $2,895.00 remaining to be paid.

The Trustee is not certain if Debtor needs to file an Amended Order Confirming the plan or if Debtor should file a noticed motion to amend the plan.

DEBTOR'S RESPONSE

Counsel responds, stating that this is one of the very few cases Counsel has opted out of no look fees, but Counsel also filed a Rights and Responsibilities which created confusion. Counsel states he has been paid $1,200 to date and only $2,895.00 remains to be paid.

DISCUSSION

In seeking the approval of fees, the court requires that applicant provide a task billing analysis in which the various activities, time charged, and fees by task area is provided. These can include Administrative Work (such as applications to employ, communicating with the Clerk's office for procedure, and the organizational activities of counsel); motions for relief from the stay; motions for sale, use or lease of property, for obtaining credit, or abandoning property; preference and avoiding adversary proceedings, other adversary proceedings; plans and confirmation; and the like. Within each of the task areas a brief description is provided and the time and fees relating to those items. For the present Motion, applicant provides no tasks at all for the 13.65 hours of work requested.

Exhibit A filed in support of the Motion is applicant's raw time records, in which all of the activities are mixed together, leaving it for the court to mine the document to construct a task billing analysis. The court declines the opportunity, leaving it to applicant who intimately knows the work done and his billing system to correctly assemble the information.

FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young association (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the times entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different task areas.

On November 22, 2013, the court filed its order confirming the Chapter 13 Plan. Dckt. 34. This order was prepared by Counsel who is currently requesting approval fo the $4,095.00 in fees. That order states,

> "**IT IS FURTHER ORDERED** that the attorney's fees for the debtor's attorney in the full amount $4.000.00 are approved, $0.00 of which was paid prior to the filing of the petition.
>
> The balance of $4,000.00, provided that the attorney and debtor have complied with Local Bankruptcy Rule 2016-1(c), shall be paid by the trustee from plan payments at the rate specified in the confirmed plan."

Local Bankruptcy Rule 2016-1(c) provides that in Chapter 13 cases debtor's counsel elects to accept a fixed fee, not to excess $4,000.00 in non-business cases and $6,000.00 in business cases. fees may be allowed for additional "substantial" and "unanticipated" legal services reasonable and necessary provided by counsel to the debtor.

The Order confirming the Chapter 13 Plan grants counsel the maximum $4,000.00 fixed fee pursuant to Local Bankruptcy Rule 2016-1(c). Counsel may not seek to have fees allowed under an alternative theory without vacate that portion of the prior order.

However, the Chapter 13 Plan provides that Counsel is to seek and be awarded fees and costs in accordance with 11 U.S.C. §§ 329 and 330, and Federal Rules of Bankruptcy Procedure 2002, 2016, and 2017. Chapter 13 Plan ¶ 2.06, Dckt. 5. It appears that the Confirmation Order prepared by Counsel and lodged with the court by the Chapter 13 Trustee contains a typographical error which incorrectly provides for an award of attorneys' fees where none was requested.

Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9024 provides,

> "Rule 60. Relief from a Judgment or Order

> (a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave."

As provided in the plain language of the Rule, clerical errors may be corrected either by the court on its own or when such correction is sought by a party in interest. As addressed by the Ninth Circuit Court of Appeals,

> "A judge may use Rule 60(a) "to make an order reflect the actual intentions of the court, plus necessary implications." *Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d 1072, 1074 (9th Cir. 1981). Errors correctable under Rule 60(a) include those where what is spoken, written or recorded is not what the court intended to speak, write or record. *Waggoner v. R. McGray, Inc*, 743 F.2d 643, 644 (9th Cir. 1984). A court may correct errors of this type even when not committed by the clerk; "it matters not whether the magistrate committed it -- as by mistakenly drafting his own judgment -- or whether his clerk did so. . . ." *Dura-Wood Treating Co. v. Century Forest Industries*, 694 F.2d 112, 114 (5th Cir. 1982); see also *Jones & Guerrero*, 650 F.2d at 1074 (rule allows correction of clerical mistakes not made by clerk). Thus, under Rule 60(a), a court has "very wide latitude in correcting clerical mistakes in a judgment." *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 676 (9th Cir. 1951)."

Korea Exchange Bank v. Hanil Bank Ltd (In re Jee), 799 F.2d 532, 535 (9th Cir. 1986), *cert. den.* 481 U.S. 1015 (1987). The "quintessential 'clerical' errors are those where the court errs in transcribing the judgment or makes a computational mistake." *Tattersalls, Ltd. V. Dehaven*, 745 F.3d 1294, 1297 (9th Cir. 2014), citing 12-60 Moore's Federal Practice § 60.11[1][b], and *Garamendi v. Henin*, 683 F.3d 1069 (9th Cir. 2012).

On the face of the pleadings, the Plan itself, there has been a clerical error in the preparation and lodging of the order confirming the Chapter 13 Plan. Debtor's Counsel did not provide for, and cannot be awarded, the fixed fees as provided in Local Bankruptcy Rule 2016-1(c). To the extent that the order signed by the court appears to so allow, it is a clerical error.

The court shall issue an order vacating that portion of the Order Confirming Plan filed on November 22, 2013, Dckt. 34, which incorrectly so provides.

AWARD OF FEES

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or
> (ii) services that were not--
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

The Motion requests an interim award pursuant to 11 U.S.C. § 331 of attorneys' fees for Chapter 13 Debtor's Counsel in the amount of $4,095.00. The Motion states "The application reflects that [Counsel] has spent 13.65 hours of actual, reasonable, and necessary post confirmation work for which [Counsel] seeks $4,095.00." Motion, pg. 2:3-6, Dckt. 39. The Motion does not include a summary or outline of what was undertaken by counsel or the work to which this 13.65 hours relates.

The Declaration in Support of the Motion has been provided by Counsel. Dckt. 41. In that Declaration Counsel states that h is seeking the award of "Additional Attorney Fees in the amount of $4,095.00 pursuant

to Bankruptcy Code Section 330 and Bankruptcy Rule 2016(a)." Counsel does not provide an explanation of the services provided or how they benefit the estate. Rather, Counsel merely directs the court an attached itemized billing statement.

The Itemized Billing Statement is Exhibit A in support of the Motion. Dckt. 42. This is a statement of raw billing data with entries from June 26, 2013 through May 23, 2014. No effort has been made to provide any task billing analysis or organizing the information into task groups for review and consideration by the Chapter 13 Trustee, U.S. Trustee, Creditors, and the court.

In seeking the approval of fees, the court requires that applicant provide a task billing analysis in which the various activities, time charged, and fees by task area is provided. These can include Administrative Work (such as applications to employ, communicating with the Clerk's office for procedure, and the organizational activities of counsel); motions for relief from the stay; motions for sale, use or lease of property, for obtaining credit, or abandoning property; preference and avoiding adversary proceedings, other adversary proceedings; plans and confirmation; and the like. Within each of the task areas a brief description is provided and the time and fees relating to those items. FN.2.

FN.2. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young association (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the times entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different task areas.

The Itemized Billing Statement is inconsistent with the Declaration and the Motion which seek additional post-confirmation fees for Counsel. The order confirming the Plan was filed on November 22, 2013. The Itemized Billing Statement is divided into two categories. The first contains the heading "**PRE-CONFIRMATION** (Hourly billing)." [Emphasis in original.] The billing entries for this time period are from June 26, 2013 through November 20, 2013. These correspond to the period prior to entry of the order confirming the Plan. The total hours billed are 11.45 for which Counsel computes $3,435.00 for the pre-confirmation legal services.

The second part of the Itemized Billing Statement is titled "**POST CONFIRMATION**." [Emphasis in original.] Counsel lists billing entries from December 4, 2013 through May 23, 2014. The total hours for this period are 2.20, for which Counsel computes $660.00 in fees.

Thus, the fees requested are $3,435.00 for legal services in prosecuting this case through entry of the confirmation order. Reviewing the billing entries does not disclose anything unusual or complex with respect to the prosecution of this case through confirmation. A motion to value a secured claim was uncontested and the Trustee's objection to confirmation (based on the motion to value the secured claim not having been determined) were granted and overruled, respectively, without hearing. Civil Minutes Dckt. 30 (Motion to Value) and Dckt. 32 (Objection to Confirmation).

For the post-confirmation period, Counsel lists activities relating to mortgage payment change and other correspondence regarding NTFC for which no information is provided to the court as to what such matters relate.

Benefit to the Estate

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged as services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must exercise good billing judgment with regard to the services undertaken as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the professional is obligated to consider:

> (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

Here Counsel does not provide an statement, even a short, simple statement of what has been accomplished or how there has been value and benefit provided to the estate and Debtors. Rather, that consideration has been left to the court staff to divine.

Notwithstanding all of the deficiencies in the Motion and supporting pleadings, on the totality of the circumstances, the court has reviewed the file and determined that $4,095.00 are reasonable interim fees which may be granted pursuant to 11 U.S.C. § 331. Such an award is subject to final review and allowance pursuant to 11 U.S.C. § 330. Upon such final review the court may reduce any interim award, which may be upon a determination that excessive time was spent, the perceived value does not exist, or the

hourly rate requested by Counsel exceeds the value of the services provided.

Counsel is requesting that the court approve fees based on a $300.00 an hour rate. Based on the Motion presented and the supporting pleadings, such an hourly rate would not be warranted. Based on these pleadings, the court would be more likely to reduce the rate to $200.00 an hour, treating counsel as a new attorney who is "learning on the job."

The court grants the interim fees using an hourly rate of $300.00, confident that in any future fee application and the final fee application in this case (or other cases), Counsel will have considered the above and reviewed fee applications and supporting pleadings of other attorneys who regularly request fees other than on a fixed fee basis pursuant to Local Bankruptcy Rule 2016-1(c).

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 Compensation filed by Counsel for Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and counsel is allowed First Interim Professional Fees in the amount of $4,095.00 pursuant to 11 U.S.C. § 331. Such fees are subject to final review and approval pursuant to 11 U.S.C. § 330.
>
> The Chapter 13 Trustee is authorized to pay the above fees as provided in the Chapter 13 Plan, with the prior payments made by the Chapter 13 Trustee pursuant to the clerical error in the Order Confirming the Chapter 13 Plan being authorized pursuant to this order.

SEPARATE ORDER CORRECTING CLERICAL ERROR

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.
>
> **ORDER VACATING AWARD OF LOCAL BANKRUPTCY RULE 2016-1(c) FIXED FEES IN CONFIRMATION ORDER (DCKT. 34)**
>
> The Counsel for the Chapter 13 Debtor and the Chapter 13 Trustee having identified a clerical error in the Order Confirming the Chapter 13 Plan in this case (filed November 22, 2013, Dkct. 34), the court determining sua sponte that

said clerical error should be corrected pursuant to Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9014, and good cause appearing,

IT IS ORDERED that the following portion of the November 22, 2013 Confirmation Order, Dckt. 34, in this case is vacated,

> "**IT IS FURTHER ORDERED** that the attorney's fees for the debtor's attorney in the full amount $4.000.00 are approved, $0.00 of which was paid prior to the filing of the petition.
>
> The balance of $4,000.00, provided that the attorney and debtor have complied with Local Bankruptcy Rule 2016-1(c), shall be paid by the trustee from plan payments at the rate specified in the confirmed plan."

All other terms and provisions of said Order Confirming the Chapter 13 Plan remain in full force and effect. Counsel for the Chapter 13 Debtor shall seek the allowance of fees pursuant to 11 U.S.C. §§ 330 and 331.

13. 12-38436-E-13 NARAINAN/UMA NAIR — MOTION TO INCUR DEBT
SJS-7 Scott Sagaria — 5-29-14 [89]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 29, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Incur Debt 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 Incur Debt is granted.

The Motion seeks to Approve a Loan Modification with Wells Fargo Bank, N.A. ("Creditor"), whose claim the plan provides for in Class 4. The loan modification which will reduce Debtor's mortgage payment to $1,606.90 a month. The modification will provide for an interest rate of 2.00%.

TRUSTEE'S OPPOSITION

Trustee states that the exhibits may not have been served, as the Declaration that referenced them were filed May 29, 2014 (with the rest of the pleadings) while the Exhibits were not served until June 2, 2014. The Proof of Service indicates the exhibits were included with the Motion, Notice and Declaration, but the Trustee did not receive them.

The Trustee also notes that the proof of service does not provide service to all creditors, as is required by Federal Rule of Bankruptcy Procedure 2002(a)(3).

Lastly, the Trustee states that the "loan modification" included in the exhibits is a copy of a letter and a modification proposal dated May 13, 2014, which indicates that Debtor is eligible for a loan modification, and includes the terms of the modification, but the actual loan modification contract has not been provided.

REVIEW OF MOTION

Debtors have filed a Motion for authorization to enter into an agreement for post-petition creditor in the form of a modification of the loan which is secured by their home. The Creditor in this case with whom the modification is requested is Wells Fargo Bank, N.A. The Motion states the following particular terms of the existing loan which will be modified.

a. Modified Principal Balance.....$391,832.74
b. Modified Maturity Date.....June 1, 2054
c. Modified Interest Rate.....2.000%
d. Modified Monthly Payment.....$ 1,606.90
e. Deferred Principal Balance.....$60,764.17

Motion, Dckt. 89. The Motion requests that the Debtors be authorized to enter into an Agreement with Wells Fargo Bank, N.A. providing for the above modifications to their existing loan.

The Motion is supported by the Debtors' declaration. Dckt. 91. Debtors testify that they have negotiated the Loan Modification with Wells Fargo Bank, N.A., achieving the terms as stated in the Motion. They further

testify that Exhibit B filed in support of the Motion is a letter notifying the Debtors that the Bank has agreed to these terms for modification of their loan.

Exhibit B is a letter on ASC letterhead to which is attached a chart showing the loan modification terms. ASC is identified as the loan servicing division of Wells Fargo Bank, N.A., the creditor. (Footer on the letter disclosing this common identity.)

Included with the letter is a chart of the loan modification terms, which differ from those stated in the motion and testified to by the Debtors in their declaration. The 2.000% interest rate is only for the first five years of the loan, with increases in years 6, 7, and 8 with increase the interest rate to 4.250 and the monthly payment to $1,632.83.

Missing from the documents presented to the court is the actual Loan Modification Agreement. Fed. R. Bankr. P. 4001(c)(1). The absence of the agreement has been the subject of an Order to Appear, with Wells Fargo Bank, N.A., through a senior officer and member of the Bank's general counsel, appearing on June 26, 2014 to address the practices and procedures of the Bank. At this juncture, the Bank has manifested an intention to comply with the requirements of Rule 4001(c)(1).

The Trustee has raised significant and bona fide opposition to the Motion. The court would normally summarily deny the Motion without prejudice, sending the Debtors and Wells Fargo Bank, N.A. to file a new motion with all of the attached documents. However, in light of the activities of the Bank and the representations as to how it is modifying its process, the court waives the defects for this Motion.

Exhibit B includes a chart of the terms of the existing loan which are being modified. The court grants the motion and authorizes the Debtors to enter into a loan modification providing for those terms, and only those terms.

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 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Narainan and Uma Nair, the Debtors, are authorized to enter into a Loan Modification Agreement with Wells Fargo Bank, N.A. which modify the terms of the Loan identified in the May 18, 2014 letter filed as Exhibit A, Dckt. 93, which Modification shall provide for the following modified terms (and only these terms):

A.	Modified Unpaid Principal Balance	$391,832.74
B.	Modified Maturity Date	June 1, 2054
C.	Modified Term of Loan	480 Months
D.	Modified Payment Due Date	July 1, 2014
E.	Modified Current Principal and Interest Pmt	$ 1,186.57
F.	Modified Estimated Payment (Including Escrow)	$ 1,606.90
G.	Initial Escrow (adjusts annually)	$ 420.00
H.	Interest Rate, Years 1-5	2.000%
I.	Interest Rate, Year 6	3.000%
J.	Interest Rate, Year 7	4.000%
K.	Interest Rate, Years 8-40	4.250%

14. 08-37840-E-13 CARMEN AMBRIZ **MOTION TO REOPEN CHAPTER 13 BANKRUPTCY CASE**
CGA-1 Pro Se **5-21-14 [56]**

CASE CLOSED 5/21/12

Final Ruling: No appearance at the July 1, 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, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 15, 2014. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

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

The Motion to Reopen Chapter 13 Bankruptcy Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Reopen Chapter 13 Bankruptcy Case is granted.

Debtor seeks to reopen her Chapter 13 Bankruptcy filed December 2, 2008. Debtor states her case was closed without discharge on May 12, 2012 because she did not file her Motion requesting entry of discharge as ordered by the "Scheduling Order Regarding procedure for Entry of Discharge in Post-BAPCPA Case." Debtor missed the required date to file her Motion because she was unaware that such motion was required. Debtor seeks to reopen the case so that she can file a Motion requesting entry of discharge and her case can be officially discharged.

Based on the foregoing, the court grants the Debtor's Motion to Reopen Chapter 13 Bankruptcy Case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Reopen Chapter 13 Bankruptcy Case filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and E.D. Cal. Case No. 08-37840 is reopened.

15. 13-20541-E-13 NEIL FREEMAN — **MOTION TO APPROVE LOAN MODIFICATION**
DEF-7 Davis Foyil — **6-5-14 [86]**

Tentative Ruling: The Motion to Approve Loan Modification 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 Creditor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 5, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Motion to Approve Loan Modification 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 Approve Loan Modification is granted.

REVIEW OF MOTION

Debtor states with particularity the following grounds and relief (Fed. R. Bankr. P. 9013) in the Motion (Dckt. 86):

a. On July 15, 2011, a Corporate Assignment of Deed of Trust was recorded, which transferred to Bank of America, N.A. all interests in a Deed of Trust.

b. On January 16, 2013, Debtor commenced the present bankruptcy case, with Debtor's Chapter 13 Plan being confirmed on June 24, 2013.

c. On January 18, 2013, Bank of America, N.A. filed an Assignment of Deed of Trust conveying to Green Tree Servicing, LLC all beneficial interests in the Deed of Trust.

d. The Note is in "first position."

e. On June 19, 2013, the court issued an order valuing Bank of America, N.A.'s secured claim, for which a "second" Deed of Trust provided the security, at $0.00.

f. Debtor will be filing a modified Chapter 13 Plan.

g. Debtor requests an order authorizing him to enter into an agreement with Green Tree Servicing, LLC modifying the "first mortgage."

h. The Modification is to provide,

i. Monthly payment, principal and interest,....$740.85
ii. Interest rate.....4.000%
iii. Term of loan.....479 months
iv. One final payment.....$737.64
v. Escrow payment.....$287.18

i. Upon authorization to enter into the Loan Modification, the Debtor will filed a modified plan to provide for this claim in Class 4 of such plan. FN.1.

FN.1. The Motion includes additional allegations as to the Debtor being entitled to shorten the term of the Plan and reduce the monthly payment once this loan is modified. Such issues are properly the subject of a motion to modify plan, if any, and the confirmation hearing thereon. The court does not address, and will not provide any advisory opinions concerning, such confirmation issues.

The Debtor provides his Declaration under penalty of perjury. Dckt. 88. In it he states when assignments of deed of trust were recorded, first to Bank of America, N.A. and then to Green Tree Servicing, LLC. No testimony is provided as to how he has personal knowledge concerning these documents or the recording thereof. F.R.E. 601, 602. (Upon review of Exhibits A and B, the Assignment, they appear to be certified by the County Recorder. Such documents are self authenticating as provided in Federal Rule of Evidence 902(4).) He further testifies that he has negotiated the terms for the Loan Modification stated in the Motion. Finally, he testifies that the "loan modification" is filed as Exhibit C.

While Titled "Assignment of Deed of Trust," Exhibit B states that the assignment is of "all beneficial interest under that certain Deed of Trust described below together with the note(s) and obligations therein described and all money due and to become due with interest and all rights accrued or to accrue under said Deed of Trust." Dckt. 89 at 7. On its face, this document assigns the Note which is secured by the Deed of Trust. FN.2.

FN.2. Exhibit A is a similar assignment of the Deed of Trust and Note to Bank of America, N.A. Though Debtor did not present this to the court, in this contested matter, the court has ferreted out the information. It is well established that the mere assignment of a deed of trust does not in and of itself transfer the obligation it secures. It is also well established law that an assignment of a deed of trust (or other security) is of no force and effect if would work to transfer the security to anyone other than the person who is the creditor on the obligation secured. *Cervantes v. Countrywide Home Loans, Inc. et. al.*, 656 F.3d 1034 (9th Cir. 2011); *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); *accord Henley v. Hotaling*, 41 Cal. 22, 28 (1871); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); and Cal. Civ. Code §2936.

Exhibit C, *Id.* at 12-15, is a Loan Modification Agreement to be executed between Debtor and Green Tree Servicing, LLC. The signature block on the Loan Modification Agreement is for Green Tree Servicing, LLC.

Debtor has provided the court with evidence that Green Tree Servicing, LLC is the creditor, as that term is defined by 11 U.S.C. § 101(10), with which to enter into the Loan Modification. Consistent with the assignment of the Note secured by the Deed of Trust, on April 9, 2013, Green Tree Servicing, LLC filed Proof of Claim No. 8, asserting a claim secured by the Debtor's residence, 4561 Parkhill Drive, Placerville, California. Green Tree Servicing, LLC filed a copy of the Note, endorsed in blank, to Proof of Claim No. 8, but not the assignment of the Note and Deed

of Trust (Exhibit B).

The Debtor having provided the court with evidence of the assignment of the Note, Exhibit B, the court proceeds in the belief that the real parties in interest, the creditor and the Debtor, to the Loan Modification Agreement are before the court.

The Motion is granted and the Debtor is authorized to enter into the Loan Modification Agreement filed as Exhibit C, Dckt. 89.

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 Neil Freeman, the Debtor, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Neil Jacob Freeman, the Chapter 13 Debtor, is authorized to enter into the Loan Modification Agreement with Green Tree Servicing, LLC which is filed as Exhibit C, Dckt. 89.

16. 13-31441-E-13 DOREEN GASTELUM
PGM-3 Peter Macaluso

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTOR'S ATTORNEY
6-2-14 [33]

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

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, parties requesting special notice, and Office of the United States Trustee on June 2, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Compensation is denied without prejudice.

Law Offices of Peter G. Macaluso, Counsel for Debtor, ("Applicant") seeks attorney fees in the amount of $3,510.00. Applicant states that his billing rate when contracting with the Debtors was $300.00 and hour and he has spent 11.70 hours of actual, reasonable and necessary post-confirmation work.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee states that while the motion request $3,510.00 in fees, Debtors plan states that Debtor's attorney will seek the courts approval by filing and serving a motion in accordance with 11 U.S.C. § 329. Trustee states that Counsel filed a Disclosure of Compensation of Attorney for Debtor stating that Counsel has agreed to accept $4,000 for legal fees, which $0.00 was received prior to filing the petition. No Rights

and Responsibilities has been filed in this case.

The order confirming the plan states that the balance of the $4,000.00 shall be paid by the Trustee from plan payments. Trustee states he has paid counsel $900.00 in attorneys fees to date.

The Trustee disputes the $2,325.00 pre-confirmation fees claimed as the plan and order confirming provides for pre-confirmation fees to be paid. The Trustee states the entirely of the post-confirmation fees of $1,155.00 should not be allowed as they would be covered in the no-look fee.

Trustee also notes that Counsel made an error in calculation, as the numbers actually total 8.25 of pre-confirmation work, or $2,475.00 and a total of 12.10 hours or $3,630.00. With the error taken into consideration, Trustee states that the fees allowed should be $2,730.00.

DEBTOR'S RESPONSE

Counsel responds, stating that this is one of the very few cases Counsel has opted out of no look fees, but Counsel also filed a Rights and Responsibilities which created confusion. Counsel states he has been paid $1,200 to date and only $2,895.00 remains to be paid.

DISCUSSION

In seeking the approval of fees, the court requires that applicant provide a task billing analysis in which the various activities, time charged, and fees by task area is provided. These can include Administrative Work (such as applications to employ, communicating with the Clerk's office for procedure, and the organizational activities of counsel); motions for relief from the stay; motions for sale, use or lease of property, for obtaining credit, or abandoning property; preference and avoiding adversary proceedings, other adversary proceedings; plans and confirmation; and the like. Within each of the task areas a brief description is provided and the time and fees relating to those items. For the present Motion, applicant provides no tasks at all for the 12.10 hours of work requested.

Exhibit A filed in support of the Motion is applicant's raw time records, in which all of the activities are mixed together, leaving it for the court to mine the document to construct a task billing analysis. The court declines the opportunity, leaving it to applicant who intimately knows the work done and his billing system to correctly assemble the information. FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young association (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate

billing number so that it would generate a separate billing. Within the bankruptcy case billing number the times entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different task areas.

On November 22, 2013, the court filed its order confirming the Chapter 13 Plan. Dckt. 15. This order was prepared by Counsel who is currently requesting approval of the $3,630.00 in fees. That order states,

> "**IT IS FURTHER ORDERED** that the attorney's fees for the debtor's attorney in the full amount $4.000.00 are approved, $0.00 of which was paid prior to the filing of the petition.
>
> The balance of $4,000.00, provided that the attorney and debtor have complied with Local Bankruptcy Rule 2016-1(c), shall be paid by the trustee from plan payments at the rate specified in the confirmed plan."

Local Bankruptcy Rule 2016-1(c) provides that in Chapter 13 cases debtor's counsel elects to accept a fixed fee, not to excess $4,000.00 in non-business cases and $6,000.00 in business cases. Additional fees may be allowed for additional "substantial" and "unanticipated" legal services reasonable and necessary provided by counsel to the debtor.

The Order confirming the Chapter 13 Plan grants counsel the maximum $4,000.00 fixed fee pursuant to Local Bankruptcy Rule 2016-1(c). This is consistent with the Chapter 13 Plan. Dckt. 5, ¶ 2.06 electing fees pursuant to L.B.R. 2014-1(c). Counsel may not seek to have fees allowed under an alternative theory without vacate that portion of the prior order. Though the court would not be "offended" even if presented with an *ex parte* motion by the Debtor and Chapter 13 Trustee to vacate that portion of the order to correct a "clerical error" (Fed. R. Civ. P. 60(a), Fed. R. Bankr. P. 9024), the prior order cannot be ignored.

The court reviewed the pleadings to determine if the $95.00 could be constructed as "substantial" and reasonably "unanticipated" legal services in this case. Even wading through the raw billing data does not provide a clear basis for approving the additional fees under Rule 2016-1(c).

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 Compensation filed by Counsel for Debtors having been presented to the court, the Confirmation Order allowing Counsel fees of $4,000.00 pursuant to Local Bankruptcy Rule 2016-1(c) [Dckt. 15], and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without

prejudice.

17. 09-29145-E-13 ERIC/MISTE BRIDGE MOTION FOR ENTRY OF DISCHARGE
WW-3 Mark Wolff 6-11-14 [64]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee onJune 11, 2014. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion for Entry of Discharge 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 for Entry of Discharge is granted.

Debtors Eric and Miste Bridge ("Debtor") request that the court enter their discharge pursuant to 11 U.S.C. § 1328(a) as they have completed all payments and complied with the bankruptcy code. Debtor states that the Trustee has not filed a Final Report with the court.

Debtors testify that they are currently in divorce proceedings and will be attempting to sell the residence and dividing up their other assets.

Debtors state they wish to complete this case, receive their discharge and then finalize the divorce proceedings to move on with their separate lives. Dckt. 67.

The Trustee filed a response, stating that he does not oppose the motion, and that the Final Report has not been generated as the final disbursement checks remain outstanding. The Trustee reconciles the bank records once and month and does not anticipate a delay in the negotiation of the outstanding checks. The Trustee filed the Notice of Completed Plan Payments on June 12, 2014. Debtors have filed their 1328 Certificates on June 11, 2014.

Local Bankruptcy Rule 5009-1 addresses the granting of discharges and closing of Chapter 13 cases. Upon the completion of all payments, the Trustee shall file and serve on Debtors the Notice of Completed Plan payments. This was filed on June 12, 2014. Notice, Dckt. 69; Certificate of Service on Debtor and Debtor's attorney, Dckt. 71.

The Debtor is then obligated to file with the Court and serve the Trustee Debtor's 11 U.S.C. § 1328 Certificate and Statement of Chapter 132 Debtor regarding 11 U.S.C. § 522(q) Exemptions. L.B.R. 5009-1. These forms were filed by Debtor on June 11, 2014. Dckt. 68.

Upon verifying the Debtor having satisfied specific conditions and court approval of the Chapter 13 Trustee's final accounting, the Clerk shall serve Notice of Intent to Enter Chapter 13 Discharge. L.B.R. 5009-1(c). Creditor are notified by the Clerk of the Court that they have fourteen days from the date of the Notice to object to the Debtor's discharge. L.B.R. 5009-1(d). If an objection is not filed the Court (generally acting through the Clerk of the Court) may enter the Debtor's discharge without further hearing.

The Clerk of the Court has not sent the above notice to creditors and they have not yet been given that opportunity to object to the discharge being entered. However, Debtors have filed the present motion and served it on all creditors. Certificate of Service, Dckt. 70. All creditors were given notice that the Debtors assert they have completed the plan, qualify for the entry of their discharge, and that creditors must respond if they believe that the discharge should not be entered.

Normally the court will not deviate from the established procedure for the processing of the final payment, accounting, and discharge in a Chapter 13 case. The Local Bankruptcy Rule establish that procedure. In this case, the Debtor are addressing personal issues (a dissolution) which is being delayed by the normal process for the Trustee's final accounting and Clerk's notice. The Chapter 13 Trustee does not oppose the granting of the discharge through this process under these very unique circumstances.

The Motion is granted and the Clerk of the Court shall enter a discharge for each of the Debtors.

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

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

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

IT IS ORDERED that the Motion is granted and the Clerk of the Court enter the discharge for each debtor in this case.

18. 11-30546-E-13 WILLIAM/DENISE NISSEN — MOTION TO APPROVE LOAN MODIFICATION
LC-2 Lorraine Crozier — 5-30-14 [46]

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, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 30, 2014. By the court's calculation, 32 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 with prejudice.

The Motion to Approve Loan Modification filed by William and Denise Nissen ("Debtor") seeks court approval for Debtor to incur post-petition credit from Ocwen Loan Servicing, LLC.

The Debtors identify Ocwen Loan Servicing, LLC, as the current servicer of their primary home loan. The Debtors have not, however, provided credible evidence that Ocwen Loan Servicing, LLC is the creditor or that it is authorized as the named principal to modify this loan. The court will not approve an loan modification that will not be effective against the actual owner of the obligation.

The Motion makes summary reference to the claim of Owen Loan Servicing, LLC being provided for in Class 4 of the proposed plan. Dckt. 46. The Declaration of William Nissen, one of the Debtors, (Dckt. 48) authenticates the Loan Modification Agreement which is filed as Exhibit A (Dckt. 49) in support of the Motion. The Declaration does not provide evidence that Ocwen Loan Servicing, LLC is a creditor of the Debtors.

The Loan Modification Agreement identifies Ocwen Loan Servicing, LLC as the entity offering the loan modification and does not indicate that it is the actual creditor to enter into a contract to modify the Loan. The Loan Modification Agreement does not state that it is a contract or agreement between Ocwen Loan Servicing, LLC and the Debtors, but only uses the non-specific language, "Ocwen Loan Servicing, LLC ('Ocwen') is offering you this Loan Modification Agreement...."

Interestingly, Ocwen Loan Servicing, LLC is not a party to sign this Loan Modification Agreement. The signature block for the other party to the Loan Modification Agreement provides that it is signed by "Mortgage Electronic Registration Systems, Inc. ["MERS"] – Nominee for Service." This is problematic for several reasons.

First, there is no defined term in the Loan Modification Agreement for "Servicer" or "Service." From the four corners of this Loan Modification Agreement there is no way to tell for whom MERS is the "Nominee." Second, there is not way to tell what rights and powers a "Nominee" would have to alter the terms of the promissory Note for which the Debtors are obligors.

Second, MERS involvement in the consumer residential loan market transactions has been that of a "placeholder" as the "nominee" of the lender who is the actual creditor. In 2011, the Ninth Circuit Court of Appeals addressed this note-deed of trust issue in *Cervantes v. Countrywide Home Loans, Inc. et. al.*, 656 F.3d 1034, (9th Cir. 2011). The creation of MERS by lenders was to facilitate multiple transfers of promissory notes as part of securitized loan portfolio trading is at the root of many of these timing and document of transfer issues. The purpose of creating MERS was to avoid the recording of assignments of deeds of trust while promissory notes were transferred from investment portfolio to investment portfolio. Only when the ultimate buyer would have to foreclose would MERS then stop acting as the "nominee" for the original lender and its assigns. FN.1.

FN.1. For a discussion of MERS, *see Cervantes v. Countrywide Home Loans*, 656 F.3d at 1038-1040.

In this case, Proof of Claim No. 10 was filed for OneWest Bank, FSB.

The claim is for $252,871.45 and is asserted to be secured by the Debtors' property at 8609 El Sobrante Way, Orangevale, California. The person filing the proof of claim for OneWest Bank, FSB, is identified as "Ryan M. Davies, Claimant's Counsel." Payemntns on the claim are to be sent to "OneWest Bank, FSB 00 Cashiering Dept., 6900 Beatrice Drive, Kalamazoo, MI."

The Loan Modification Agreement does not specifically identify the Note that is being modified, but does state that the principal balance is $246,092.03. It appears that this the same debt as the one upon which Proof of Claim No. 10 is based.

The Deed of Trust attached to Proof of Claim No. 10 identifies MERS as the beneficiary under the Deed of Trust, as the "Nominee" for "Lender [Quicken Loans, Inc.] and Lender's successors and assigns." The powers granted MERS under the Deed of Trust are stated to be,

> "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary ot comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests [in the Security Instrument], including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Deed of Trust Attached to Proof of Claim No. 10, page 3 of 15 of Deed of Trust. This is consistent with language in other deeds of trust for which MERS is the nominee, which is carefully circumscribed to be limited only to interests under the deed of trust and not that MERS is granted a power of attorney, an interest in the note secured by the deed of trust, or the ability to alter or defease the "Lender, successors, or assigns" of its rights and interests in the note secured by the deed of trust.

A second modification document is proved as part of Exhibit A (pg. 4 of 9) which is titled "Modification Due on Transfer Rider." This document is to be signed by the Debtors and Ocwen Loan Servicing, LLC. This document is "deemed to amend and supplement the Loan Modification Agreement...." This additional modification is to add a due on sale clause to the Deed of Trust. For this document, Ocwen Loan Servicing, LLC is given the defined term "Lender" to identify it in the document.

A third modification document is included as part of Exhibit A (pgs. 5-6 of 9). This document is titled "1-4 Family Modification Agreement Rider Assignment of Rents and is to be executed by Owen Loan Servicing, LLC and the Debtors. The document does not include Ocwen Loan Servicing, LLC as a party or have it agree to any terms of the modification. It is to be incorporated into the Loan Modification Agreement (which is executed by MERS as "Nominee."

On October 15, 2013, a Transfer of Claim was filed for Proof of Claim No. 10. Dckt. 37. The Transferee is identified as Ocwen Loan Servicing, LLC and the Transferor is identified as OneWest Bank, FSB. The

person signing the Transfer document is "Nancy Lee, Esq.," who is identified as the Transferee's Agent. This document directs that payments on the claim are to be sent to Attn: Payment Processing, 3451 Hammond Avenue, Waterloo, IA 50702. No documents, such as an assignment of the Note, assignment of the claim, copy of note endorsed in blank and certification that it is in the possession of the Transferee is attached to the this document.

As this court has stated on many occasions, the fundamental requirement for any federal court to exercise federal court judicial power is that there must be a case or controversy between the parties for whom relief is sought. U.S. Constitution Article III, Sec. 2. Here, there is nothing to indicate that there are two real parties in interest whose rights are being impacted. While the Debtors are before the court, it appears that at best a servicing company, for an unidentified creditor in this case, is being inserted into the Loan Modification Agreement as a "placeholder," who may or may not be authorized to modify the creditor's rights and claim.

This court will not issue "maybe effective, maybe not effective" orders. The residential mortgage market has already suffered serious black eyes from incorrectly identified lenders, transferees, nominees, robo-signing of declarations and providing false testimony under penalty of perjury, and documents which do not truthfully and accurately identify the parties to the transaction. It is not too much for least sophisticated consumer debtors to have the true party with whom they are purportedly contracting identified in the written contract. It is not too much, and is Constitutionally mandated, that the true parties appear in federal court to have their rights and interests determined, and the relief they seek issued.

If Ocwen Loan Servicing, LLC is the loan servicer for the actual creditor and is the authorized agent for the creditor, then it can properly exercise that power. In doing so, it can properly disclose the identity of the true creditor, disclose that it is exercising its agent authority, and execute the documents (rather than MERS) as the agent for the true creditor.

While not accepting it as evidence, the court notes with interest how Ocwen Loan Servicing, LLC describes itself on its website, www.ocwen.com. The "About Us" link at the Ocwen Loan Servicing, LLC home page provides the following statement about Ocwen Loan Servicing, LLC:

Why Choose Ocwen?

Our Focus on Products and Service

Ocwen is a highly rated Special Servicer and prides itself on setting the standard for customer service, turn around times and speed of resolution. Our seasoned, commercial servicing team is supported by the combination of globalization and leading technology allowing Ocwen to provide the highest levels of service and cost competitiveness combined with lower loss severity rates on non-performing loans and REO.

> Why Ocwen Commercial Loan Servicing?

> Ocwen is a leader in loss mitigation for commercial servicing.

> Our seasoned professionals, proven processes and leading-edge technology provide worry-free servicing and results-driven special servicing.

> Obtain the benefits of leading commercial servicing software developed and refined based on our own experience servicing commercial loans.

> Receive personal attention by dealing with a single point of contact with the expertise to resolve your most complex servicing challenges.

> Ocwen has expertise in servicing complex CMBS loans, whole loans, and large and small balance loans.

> Whatever your loan portfolio, we can handle it!

> Our nationwide scope of attorneys and service providers for any type of commercial loan adds benefit to your portfolio."

http://www.ocwen.com/about.

Another link under the About Us tab provides a description of Ocwen Loan Servicing, LLC, titled "Our Company."

"Our Company

Ocwen is the industry leader in servicing high-risk loans. Ocwen works with customers in a variety of ways to make their loans worth more, including purchasing of mortgage servicing rights, sub-servicing, special servicing and stand-by servicing. We can also support companies that wish to utilize our best-in-class technology and know-how to support improvements in their own operations.

Independent third-party studies consistently show that Ocwen cures more loans and keeps more borrowers current than anyone in the industry. As an indication, Ocwen has achieved pre-foreclosure resolution rates of 70% or more and consistent best-in-class HAMP performance. While Ocwen modifies loans at rates far above industry norms, our re-default rates are among the lowest. Ocwen is widely recognized in the national media and by consumer advocacy groups as the industry leader in responsible home retention through foreclosure prevention. For example, Ocwen's shared-appreciation modification is just the latest example of the kind of innovations that have drawn strong support and interest from community groups, the federal governments and large servicers.

Ocwen's exceptional performance is a result of its state-of-the-art proprietary servicing systems built with

> over 20-years of experience and $150 million of research and development. For example, Ocwen utilizes behavioral science principles and advanced optimization analytics to drive its borrower dialogues and Net Present Value maximizing loan resolutions. By improving both what is offered and how it is offered, Ocwen increases borrower acceptance of and compliance with loan resolutions. Moreover, Ocwen's technology is easily customized to rapidly support experimentation or alternative investor-driven mitigation strategies."

http://www.ocwen.com/our-company.

The above statements are consistent with that of a "loan servicer," which provides services to a creditor. Just as a collection agency, billing service, or collection attorney will work for a creditor to manage accounts receivable, a loan servicer provides a very valuable service. However, providing a "valuable service" is not a bona fide reason for hiding the identity of, and exclude from a written contract, the actual creditor.

The Ninth Circuit Court of Appeals recently addressed the requirement for third-parties to correctly identify the creditor, or original creditor, when obtaining payment of consumer debt. *Tourgeman v. Collins Financial Services, Inc.*, et al., 12-56783 (9th Cir. 2014), filed June 25, 2014. In that case the Ninth Circuit panel concluded that the misidentification of the original creditor (notwithstanding correctly identifying the current creditor) stated a cause of action under the Federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 et seq.). As this court has addressed in Landry v. Bank of America, N.A., 493 B.R. 541 (Bankr. E.D. Cal. 2013) and Luchini v. JPMorgan Chase Bank, N.A., 2014 Bankr. LEXIS 2510 (Bankr,. E.D. Cal. 2014), in California all creditors (original, assignees, collectors, third-party servicers) are covered by Rosenthal Fair Debt Collection Practices Act, which incorporates may provisions of the Fair Debt Collection Practices Act. This just highlights the need for creditors, and their servicers, to deal honestly and truthfully with consumer debtors. This include correctly identifying the other party with whom the consumer debtor is contracting (and other party who is actually bound by the contract).

The court has now been presented with multiple instances of different loan servicing companies misrepresenting 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 case the loan servicing company was merely that, 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.

This court has made it clear on many occasions that it can and will only issue orders against parties properly named in motions and for which there is a colorable basis for the court issuing an order effecting the rights of such party. The Debtors provide no evidence for the court to determine that this loan servicing company is a creditor in this case. The

Debtors do not testify that they have borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred to Ocwen Loan Servicing, LLC.

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

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

19. 11-30546-E-13 WILLIAM/DENISE NISSEN MOTION TO INCUR DEBT
LC-3 Lorraine Crozier 5-30-14 [41]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on May 30, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Incur Debt 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 hearing on the Motion to Incur Debt is continued to 3:00 p.m. on August 5, 2014.

The motion seeks permission for approval of debt, which they have already incurred, to purchase a 2013 Honda Fit for $20,049.89. Debtors mistakenly believed that they could finance the purchase of the new vehicle by borrowing money from their 401K plans without first obtaining permission from the court to do so. Debtors state they searched to secure vehicle financing after her employer no longer provided a vehicle, but could not obtain any financing. Debtors state they restructured their 401K loans, Denise incurring a second 401K loan in the amount of $11,740.00, and Greg incurring a $23,493.33 loan, used to purchase the vehicle, a refrigerator and tires for Greg's vehicle. Debtors state at the inception of the case, Debtors 401K loan repayments totaled $610.19 and after above referenced financing the loan payments are now $440.87 for Denise and $467.50 for Greg for a total of $908.37 per month (a difference of $298.18 per month). The interest rate on the 401K loans is 4.25%.

DISCUSSION

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).

The Debtor does not address the reasonableness of incurring debt to purchase a brand new vehicle while seeking the extraordinary relief under Chapter 13 to discharge debts. The Debtor also proceeded to borrow from their 401K loans, after already owing a substantial amount.

Most troubling, however, is the fact that Debtor completed the purchase of the vehicle without court approval and in direct violation of the bankruptcy code and confirmed plan. Debtor was not authorized to make such a purchase, and electing to do so calls into question whether confirmation of the Plan in this case was properly confirmed, the statement made under penalty of perjury in the Schedules and to confirm the plan were truthful, and if the Debtor filed and is prosecuting this case and Plan in good faith.

STATUS OF CHAPTER 13 PLAN

An issue of the Debtors' good faith may exist in this case. Under the existing confirmed Plan Debtors are obligated to make $297.00 a month payment for 60 months. Chapter 13 Plan, Dkct. 5. That monthly plan payment was premised on the Debtors' Monthly Net Income as computed on Schedule J. Dckt. 1 at 29. Though the Debtors have gross monthly income of $9,555.83, their income was reduced by $392.00 a month for 401K contributions and $610.19 for 401K loan payments.

The expenses listed on Schedule J include $1,980.00 for monthly mortgage payment (including property taxes and insurance), $800.00 for food, $425.00 for medical expenses, $140.00 for Health Savings Account, $825.00 for transportation. It was disclosed that Mrs. Nissen has a medical condition which limits her ability to work and causes them to incur higher than average monthly out of pocket medical expenses.

Schedule J also explained that the transportation expenses were high because the Debtors needed to have a 100,000 mile service on a vehicle and purchase new tires.

Under the confirmed Plan, the $297.00 a month payment were used to make a 10% dividend to creditors holding general unsecured claims. This was projected on $141,072.00 of general unsecured claims – which equals $14,107.00 to be paid creditors holding general unsecured claims.

Proposed Modified Plan

The Debtors have filed a proposed Modified Chapter 13 Plan. Dckt. 60.

Under the Modified Plan the monthly payments will be $297.00 for the first 37 months and then double to $600.00 a month for the last 23 months. The change to the Plan, in addition to increasing the payments, is that creditors holding shall receive a 25% dividend based on there being $81,665.00 in general unsecured claims – which equals $20,416.25 to be disbursed for these general unsecured claims. The Debtors explain that they have had some modest increases in income.

While such could appear positive on its face, when looking at the Debtors' current expenses have ballooned. These include: (1) increasing the food expense to $950.00 a month, (2) clothing to $120.00, and (3) transportation to $1,216.00 (notwithstanding the Debtors having purchased a 2013 vehicle). On top of this, Debtors increase their 401K contributions to $522.00 a month and their 401K loan payments to $908.37 (to pay for purchase of the 2013 car and other personal purchases).

Though the Debtors decided to purchase a 2013 vehicle, their declaration in support of confirmation states that even more repair expenses will be required to the Debtors' 2004 Dodge Truck. FN.1.

FN.1. On the current statement of income Mr. Nissen states that he continues to be employed as a Store Manager for Kelly Moore Paint Co. No explanation is provided as to why he has to retain, repair, and maintain a 2004 Dodge Truck which requires significant repairs as a store manager. Ms. Nissen identifies her employment as a training manager for Kelly Moore Paint Co. No explanation is provided why the Debtors had to purchase a brand new car for Ms. Nissen rather than a newer car that was 2-4 years old and had already suffered from the rapid depreciation which occurs during the first three model years after purchase of a new car.

One way of looking at the proposed Modified Plan is that Debtors' counsel anticipate a need for the Debtors to rehabilitate themselves for having incurred credit without authorization to buy new consumer goods and a new car. Alternatively, it could well be that the Debtors thought that the Trustee may have caught wind of their increased income, and getting a $1,000.00 tax refund for 2013, and preemptively filed a "look good" plan to divert the court's and creditors' attention from the diversion of current income to pay for the consumer purchases that the Debtors wanted to make – with or without court authorization.

The hearing on the Motion to confirm the Plan will be held on August 5, 2014. The court continues the hearing on this Motion to 3:00 p.m. on August 5, 2014, to be considered in light of whether the Debtors can confirm a modified plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> 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 hearing on the Motion is continued to 3:00 p.m. on August 5, 2014. The Debtors shall file and serve on the Chapter 13 Trustee and U.S. Trustee any supplemental pleadings they deem appropriate and necessary to address any concerns of the court, Chapter 13 Trustee, and Creditors concerning the conduct of the Debtors in obtaining credit without court authorization to purchase consumer goods.

20. 14-20849-E-13 JERRY JORS **MOTION TO CONFIRM PLAN**
WW-2 Mark Wolff **5-13-14 [44]**

Final Ruling: No appearance at the July 1, 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 13, 2014. By the court's calculation, 49 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 May 13, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

21. 14-23652-E-13 SDB-1 PHILIP/YVETTE HOLDEN Scott deBie MOTION TO VALUE COLLATERAL OF SOLANO FIRST FEDERAL CREDIT UNION 5-15-14 [20]

Final Ruling: No appearance at the July 1, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on May 15, 2014. By the court's calculation, 47 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 Solano First Federal Credit Union, "Creditor," is granted.

The Motion to Value filed by Phillip S. and Yvette V. Holden, "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 158 Bret Harte Way, Vallejo, California, "Property." Debtor seeks to value the Property at a fair market value of $231,349 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 $313,542. Creditor's second deed of trust secures a claim with a balance of approximately $43,192.92. 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 Phillip S. and Yvette V. Holden, "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 Solano First Federal Credit Union secured by a second in priority deed of trust recorded against the real property commonly known as 158 Bret Harte Way, 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 $231,349 and is encumbered by senior liens securing claims in the amount of $313,542, which exceed the value of the Property which is subject to Creditor's lien.

22. 14-23652-E-13 SDB-2 PHILIP/YVETTE HOLDEN Scott deBie

MOTION TO VALUE COLLATERAL OF BANK OF THE WEST 5-15-14 [25]

Final Ruling: No appearance at the July 1, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on May 15, 2014. By the court's calculation, 47 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 Bank of the West, "Creditor" is granted.

The Motion filed by Phillip S. and Yvette V. Holden, "Debtor", to value the secured claim of Bank of the West, "Creditor," motion is accompanied by Debtor's declaration. Debtor is the owner of a 2011 Chevy Silverado, "Vehicle." The Debtor seeks to value the Vehicle at a replacement value of $28,510 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in July 16, 2011, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $33,176. 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 $28,510. *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 Phillip S. and Yvette V. Holden, "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 Bank of the West, "Creditor," secured by an asset described as 2011 Chevy Silverado, "Vehicle," is determined to be a secured claim in the amount of $28,510, 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 $28,510 and is encumbered by liens securing claims which exceed the value of the asset.

23. 14-21955-E-13 STEVEN/DEBRA RAZWICK — AMENDED OBJECTION TO CLAIM OF INTERNAL REVENUE SERVICE, CLAIM NUMBER 3
AEB-1 Andrew Bakos — 5-23-14 [49]

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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2014. By the court's calculation, 39 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 moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

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 the Internal Revenue Service is overruled without prejudice.

SERVICE ISSUES

Federal Rule of Bankruptcy Procedure 3007(a) requires a 30 day notice, while Local Bankruptcy Rule 3007-1(b)(1) requires a 14-day opposition filing period. This requires a total of 44 days' notice to the parties. By the

court's calculation, 39 days' notice was provided.

REVIEW OF MOTION

Steven and Debra Razwick, the Chapter 13 Debtor ("Objector") requests that the court disallow the claim of the Internal Revenue Service ("Creditor"), Proof of Claim No. 3 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be in the amount of $192,576.76, with a priority claim in the amount of $92,039.32, a secured claim in the amount of $52,200.54, and an unsecured portion of $48,286.90.

Objector asserts that the overall claim should be $142,284.49, with a priority claim of $41,797.05, a secured claim in the amount of $52,200.54 and an unsecured portion of $48,286.90. Objector essentially agrees with the secured and unsecured portions, but objects to the priority amount, as the IRS asserts a debt for tax year 2013 based on their own estimates of the Debtor's income, but has not yet received or reviewed the Debtors' 2013 income tax return, which was filed no later than May 31, 2014 (this motion was filed May 23, 2014).

Debtors state that the IRS has been diligent in amending their claim based on new and developing data, but Debtors wish to preserve their rights in this matter and provide new information to the court. Debtors state sufficient questions have been raised to challenge the validity of the claim.

DISCUSSION

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

A review of Proof of Claim No. 3 indicates that it was amended as of June 26, 2014, after this motion and the alleged filing of the Debtor's 2013 tax returns. The amended claim shows a total amount of $136,598.25, which consists for the following:

Secured Claims	$52,200.54
Unsecured Claim	
Priority Unsecured	$37,493.04
General Unsecured	$46,904.67

For the Priority Unsecured Claim, the Internal Revenue Service breaks it down to the following taxes:

2010 Income Tax (per return)	$ 3,089.18
2011 Income Tax (Assessed)	$ 5,979.54

2012 Income Tax (Assessed).....$28,424.32

Even if the court waived the service issue, the objection does not state what, if any, the Debtors assert is their tax obligation for 2012. Rather, they merely state that the 2013 tax return has not been filed, and they anticipate filing it by May 31, 2014. The Amended Proof of Claim does not include any amounts for 2013 taxes – quite possibly because the Internal Revenue Service has received a 2013 tax return and, based on the return, does not believe that it has a priority claim to assert for that year.

It appears from the Objection that Debtors assert the claim should be in the amount of $157,414.10 and that all of it should be a priority claim. The Objection to Claim does not allege how such $157,414.10 priority claim should be computed. The Debtors repeat this in their Declaration. Dckt. 39.

The Objection does not present the court with an evidentiary basis for disallowing the claim. It appears that the Internal Revenue Service has recently amended its Claim, with not only reduces the amount of the total claim, but seeks a priority claim more than $100,000.00 less than asserted by Debtors in the Objection.

The court overrules the Objection 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 Internal Revenue Service, Creditor filed in this case by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 3 of Internal Revenue Service is overruled without prejudice.

24. 11-23658-E-13 WESLEY/JULIE KAWAGISHI MOTION TO MODIFY PLAN
MOH-4 Michael O Hays 5-15-14 [90]

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(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 15, 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 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 modified plan proposes a plan payment of $37,775.00 total paid in through May 25, 2014, then $1,140.00 beginning June 25, 2014 for the remainder of the plan. Trustee states that through May the Debtor has actually paid $38,686.00 with the last payment posted on May 28, 2014 in the amount of $911.00.

The Trustee is also uncertain of the treatment of Butte County Tax Collector. Under Debtor's confirmed plan, Butte County is scheduled as a Class 3 creditor regarding the Concow lots with an estimated deficiency of $1,150.00. Debtor lists Butte County Tax Collector twice on Schedule D: first for property taxes regarding Lots 12 and 13 in Concow Yankee Hill with a parcel number of 066-270-050-000; secondly for property taxes regarding Lots 14 and 15 in Concow Yankee Hill with parcel numbers of 058-420-040-00

and 058-420-039-00. Each description states Debtor is relinquishing the property. Butte County Tax Collector filed a secured proof of claim no. 16 on July 29, 2011 in the amount of $2,369.82. The attachment to the claim indicates the claim encompasses four parcels numbered 056-420-039-000, 058-420-036-000, 058-420-040-000 and 058-420-038-000.

Debtor's modified plan provides for Butte County Tax Collector in Class 3 regarding Lots 12 and 13 with an estimated deficiency of $2,369.82. Debtor's modified plan also provides for Butte County Tax Collector in Class 5 with a claim amount of $2,369.82, but identifies no Lots or parcel numbers. It is unclear to the Trustee what Debtor is proposing regarding this creditor. Butte County has filed a secured claim regarding four parcels. Debtor's modified plan provides for Butte County Tax Collector in Class 3 and Class 5. The creditors claim does not indicate any amount of the claim is entitled to priority.

The Trustee is also uncertain of the treatment of Milton and Valerie Hull relating to Lots 12 and 13 in Concow Yankee Hill, and Vickie Dault relating to Lots 14 and 15 in Concow Yankee Hill. Debtor's confirmed plan provided for these creditors in Class 3. Debtor's modified plan no longer includes these creditors.

Additionally, Debtors have not filed a declaration in support of their proposed plan. The only declaration filed is that of Debtor's Counsel. Debtors have failed to meet their burden of proving the requirements of confirmation. *See Amfac Distribution Corp. v. Wolff (In re Wolff)*, 22 B.R. 510, 512 (9th Cir. B.A.P. 1982) (holding that the proponent of a Chapter 13 plan has the burden of proof as to confirmation). Such evidence, typically in the form of a Debtors' Declaration proving the elements of 11 U.S.C. §1325(a), is required. *See* Local Bankr. R. 9014-1(d)(6). FN.1.

FN.1. It is always troubling when an attorney wants to turn himself into a "personal knowledge witness" for his clients. When becoming a witness, the attorney becomes subject to cross-examination and puts into jeopardy the attorney-client privilege. Even more significantly, the areas in which an attorney for a debtor has the requisite personal knowledge (Fed. R. Evid. 601, 602) of the debtor's finances that such testimony is usually worthless.

Here, Counsel testifies under penalty of perjury that determining whether the Debtors are current or in default is difficult because they have an adjustable rate loan mortgage. The payments have changed three times in the thirty-eights months the case has been pending. Counsel attaches to the declaration a handwritten "analysis" of what should have been paid by Debtors. Based on that he concludes that they are "short" $1,932.50.

Without significant work by court staff, the handwritten attachment is not clear, with amounts added and multiplied without explanation. It is not for the court to construct for one of the parties evidence, whether testimony, exhibits, or demonstrative, to help in the prosecution of the case. The creditor receiving the Class 1 payments (arrearage and current mortgage) is GMAC Mortgage, LLC. The court cannot understand why GMAC Mortgage, LLC has not or will not produce an annual statement of payments

made, the payment amount for each payment change, or a statement of payments made against payments owed.

In seeking to confirm a modified Chapter 13 Plan, debtors must comply with 11 U.S.C. §§ 1329, 1325(a), and 1322. No evidence has been presented for the court to make the necessary factual findings which support a conclusion of law that the requirements of §§ 1329, 1325, and 1322 have been satisfied.

Lastly, Trustee states that Debtor has not provided current income and expense statements. Debtor's most recent Schedules I and J were filed February 28, 2011 and support a plan payment of $931.00. At that time Wesley Kawagishi was a grocery clerk with a net income of $1,750.00 and Julie Kawagishi was unemployed. Debtor is currently proposing a plan payment of $1,140.00.

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.

25. 14-24258-E-13 BARNEY GAXIOLA — MOTION TO VALUE COLLATERAL OF OCWEN
AEB-1 Andrew Bakos — 5-23-14 [26]

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).

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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on May 23, 2014. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion to Value secured claim of Ocwen is denied without prejudice.

The Motion to Value filed by Barney D. Gaxiola, "Debtor" is to value the secured claim of "Ocwen" as to the real property commonly known as 7422 Mar Vista Way, Citrus Heights, California.

However, the court cannot determine from the evidence presented which legal entity the Debtors wish the court to include in the order. The court will not issue orders on incorrect or partial parties that are ineffective. Debtor may always use Federal Rule of Bankruptcy 2004 to aid themselves in finding the true creditor.

This court has made it clear on many occasions that it can and will only issue orders against parties properly named in motions and for which there is a colorable basis for the court issuing an order effecting the rights of such party. The Debtor provides no evidence for the court to determine that "Ocwen" loan servicing company is a creditor in this case. The Debtor does not testify that he borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred to Ocwen Loan Servicing, LLC. The Debtor does not provide the court with any

discovery conducted to identify the creditor holding the claim secured by the second deed of trust. FN.1.

FN.1. The misidentification of creditors for purposes of § 506(a) motions continues to mystify the court. Obtaining an order valuing the "claim" of a loan servicing company does not value the claim of the creditor. No motion has been filed seeking to value the claim of the actual creditor, no service has been attempted on the actual creditor, and no effort made to afford the actual creditor any due process rights. Any order issued by the court would be void as to the actual creditor. After performing under a plan for 3 to 5 years, the debtor would then have a rude awakening that their still remains a creditor, having a debt secured by a third deed of trust (in this case) which has never been valued and for no lien-strip may be possible.

As this court has stated on many occasions, the fundamental requirement for any federal court to exercise federal court judicial power is that there must be a case or controversy between the parties for whom relief is sought. U.S. Constitution Article III, Sec. 2. Here, there is nothing to indicate that there are two real parties in interest whose rights are being impacted. While the Debtors are before the court, it appears that at best a servicing company, for an unidentified creditor in this case, is being inserted into the Loan Modification Agreement as a "placeholder," who may or may not be authorized to modify the creditor's rights and claim.

This court will not issue "maybe effective, maybe not effective" orders. The residential mortgage market has already suffered serious black eyes from incorrectly identified lenders, transferees, nominees, robo-signing of declarations and providing false testimony under penalty of perjury, and documents which do not truthfully and accurately identify the parties to the transaction. It is not too much for least sophisticated consumer debtors to have the true party with whom they are purportedly contracting identified in the written contract. It is not too much, and is Constitutionally mandated, that the true parties appear in federal court to have their rights and interests determined, and the relief they seek issued.

The court has now been presented with multiple instances of different loan servicing companies misrepresenting 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 case the loan servicing company was merely that, 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 will not speculate and hope that it has named a real creditor and that it's order will have any legal effect. The Motion is denied without prejudice.

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

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

The Motion for Valuation of Collateral filed by Barney D. Gaxiola, "Debtor," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

26. 13-32861-E-13 JAMES/BETH FRY — MOTION TO CONFIRM PLAN
PGM-2 Peter Macaluso — 5-15-14 [66]

Final Ruling: No appearance at the July 1, 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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 15, 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). 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 Amended Plan to 3:00 p.m. on August 5, 2014.

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 Class 4 of Debtors' plan indicates that Debtors are in a trial loan modification effective May 2014. Debtors have filed a Motion to Approve Loan Modification, but the plan does not contain any provisions for the mortgage in the event the trial modification does not become permanent. The motion does not indicate any alternative provision for the mortgage or indicate what the terms of the permanent modification would be.

The court notes that the loan modification was approve as a Trial Loan Modification at the June 24, 2014 hearing.

Additionally, the Trustee argues that the Debtors' plan may not be the Debtors best effort. Trustee states the Debtors are below median income. The amended plan calls for payments of a total of $7,500 through April 2014 and then $850.00 per month for the remainder of the plan. The most recently filed Schedule J, Dckt. 77, indicates combined monthly income from Schedule I of $4,660.26 per month. Expenses on Schedule J total

$3,809.75, leaving net income of $850.51 per month. Item #24 indicates that "Debtor wife has new single job ... ". Debtors Declaration in Support of the Motion to Confirm indicates that Debtors are employed by Sacramento City Unified School District and Hallmark Rehab Group but the Declaration does not indicate any changes to the Debtors income. The most recently filed Schedule I, Dckt. 29, filed on December 2, 2013 indicates Beth Fry is employed by HCR Manor Care, her gross income is $4,742.05 and the net income on the Schedule is $5,627.48 (not $4,660.26 as indicated on the most recent Schedule J). The Trustee is not aware of any other amended Schedule I to date. Debtors may have more than the net income of $850.51 which may be paid into the plan for the benefit of unsecured creditors.

DEBTOR'S RESPONSE

Debtor responds, stating that additional time is needed to address the Trustee's concerns, to provide the Trustee with statements and the financial effect on the disposable income funding the plan.

Based on the foregoing, the court continues the hearing to 3:00 p.m. on August 5, 2014 to allow the Debtor to provide the Trustee with the requested documentation and for the Trustee to file additional opposition, if any.

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 hearing on the Motion to Confirm the Plan is continued to 3:00 p.m. on August 5, 2014.

27. 10-39062-E-13 RODNEY/JENNY DECKER MOTION TO REFINANCE
MWB-2 Mark Briden 6-2-14 [58]

Tentative Ruling: The Motion to Refinance 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 Dentor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 2, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Refinance 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 Refinance is granted.

Rodney and Jenny Decker ("Debtor") are the owners of the property commonly known as 32223 Battle View Drive, Manton, California, which Debtors obtained a mortgage from US Bank Home Mortgage prior to filing the bankruptcy. Debtor states on May 7, 2014, they were approved for an FHA loan with Sun West Mortgage Company, Inc. ISAOA. The principal amount of the loan is $238,960.00 payable over 30 years at a 4.75% interest rate. Debtor states the monthly payments would be $1,270.42, which is less than the $1,820.00 which they are paying to US Bank Home Mortgage, saving approximately $550.00 per month. Debtors state they would receive cash from escrow of approximately $640.56, with loan proceeds being used to pay off the first mortgage in full satisfaction.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee does not oppose the motion, but states the Debtor indicates a $650.58 will be received from escrow but with no

explanation why. Trustee notes that U.S. Bank no longer being paid through the plan, Debtor should modify the plan.

DEBTOR'S RESPONSE

Debtor responds, stating that the good faith estimate from Sun West Mortgage Company, Inc. shows a slight margin of $640.56 to insure escrow can be closed without the Debtor having to pay additional funds to complete the escrow. Debtor states this is the most they would receive if the estimate figures provided are correct. Debtor states they are aware that they must file a Motion to Modify their Chapter 13 Plan, but have waited to get this motion approved before doing so.

DISCUSSION

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).

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. There being no opposition from any party in interest and the terms being reasonable, the motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Refinance filed by Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Rodney and Jenny Decker are authorized to enter into a refinance with Sun West Mortgage Company, Inc., which is secured by the real property commonly known as 32223 Battle View Drive, Manton, California, on such terms as stated in the Preliminary Settlement Statement filed as Exhibit A-1 in support of the Motion, Dckt. 60.

28. 14-21964-E-13 JVP-5 | **DAVE/MICHELLE SMITH** | **James Phelps** | **MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.** | **6-3-14 [74]**

Final Ruling: No appearance at the July 1, 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 Creditor, Chapter 13 Trustee, and Office of the United States Trustee on June 3, 2014. By the court's calculation, 28 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 Bank of America, N.A., "Creditor" is granted.

The Motion filed by David H. and Michelle A. Smith, "Debtor", to value the secured claim of Bank of America, N.A., "Creditor," motion is accompanied by Debtor's declaration. Debtor is the owner of a 2004 Ford Monaco Monarch Motorhome, "Vehicle." The Debtor seeks to value the Vehicle at a replacement value of $24,478 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 April, 2004, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $49,468.88. 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 $24,478. *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 H. And Michelle A. Smith, "Debtor" having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of [name of creditor], "Creditor," secured by an asset described as 2004 Ford Monaco Monarch Motorhome, "Vehicle," is determined to be a secured claim in the amount of $24,478, 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 $24,478 and is encumbered by liens securing claims which exceed the value of the asset.

29. 14-21964-E-13 JVP-6 DAVE/MICHELLE SMITH James Phelps MOTION TO VALUE COLLATERAL OF TRI COUNTIES BANK 6-3-14 [80]

Final Ruling: No appearance at the July 1, 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 Creditor Chapter 13 Trustee, and Office of the United States Trustee on June 3, 2014. By the court's calculation, 28 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 Tri Counties Bank, "Creditor," is granted.

The Motion to Value filed by David H. And Michelle A. Smith, "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 4530 Lake Shastina Drive, Weed, California, "Property." Debtor seeks to value the Property at a fair market value of $235,000 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 Creditor's senior in priority first deed of trust secures a claim with a balance of approximately $218,281.66. Creditor's second deed of trust secures a claim with a balance of approximately $52,619.01. Creditor's third deed of trust secures a claim with a balance of approximately $69,931.50. Therefore, third deed of trust is completely under-collateralized. Creditor's secured claim for the third deed of trust is determined to be $0.00 and therefore no payments on the third deed of trust shall be made 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 David H. And Michelle A. Smith, "Debtor," having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Tri Counties Bank secured by a third in priority deed of trust recorded against the real property commonly known as 4530 Lake Shastina Drive, Weed, 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 $235,000 and is encumbered by senior liens securing claims in the amount of $218,281.66 and 52,619.01, which exceed the value of the Property which is subject to Creditor's lien.

30. 09-38970-E-13 RUEL/JEAN GATDULA
SDB-4

MOTION TO VALUE COLLATERAL OF J.P. MORGAN CHASE BANK, N.A.
5-13-14 [102]

Final Ruling: No appearance at the July 1, 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, parties requesting special notice, and Office of the United States Trustee on May 13, 2014. By the court's calculation, 49 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 JPMorgan Chase Bank, N.A., "Creditor," is granted.

The Motion to Value filed by Ruel G. Gatdula and Jean C. Gatdula, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtors' declaration. Debtors are the owner of the subject real property commonly known as 126 Oakstone Way, American Canyon, California, "Property." Debtors seek to value the Property at a fair market value of $390,000.00 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 $467,394.18. Creditor's second deed of trust secures a claim with a balance of approximately $99,978.07. 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 Ruel G. Gatdula and Jean C. Gatdula, "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 JPMorgan Chase Bank, N.A., secured by a second in priority deed of trust recorded against the real property commonly known as 126 Oakstone Way, American Canyon, 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 $390,000.00 and is encumbered by a senior liens securing a claim in the amount of $467,394.18, which exceed the value of the Property which is subject to Creditor's lien.

31. 12-31671-E-13 CHRISTIAN NEWMAN
PGM-6 Peter G. Macaluso

CONTINUED MOTION TO CONFIRM PLAN
2-13-14 [149]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 46 days' notice was provided. 42 days' notice is required. That requirement was met.

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

The court's tentative decision is to set an evidentiary hearing on the Motion at ------ , on -------, 2014. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

APRIL 1, 2014 HEARING

At the April 1, 2014 hearing on this matter, the Debtors and Trustee requested that they be allowed time to conduct discovery prior to the court setting an evidentiary hearing. The parties also represented that the discovery could facilitate their resolution of the Trustee's Objection to Confirmation. Civil Minutes, Dckt. No. 163.

REVIEW OF MOTION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. In this instance, the Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's Plan does not represent his best efforts under 11 U.S.C. § 1325(2)(3), and that the Plan may not be proposed in good faith under 11 U.S.C. § 1325(a)(3).

This case was filed on June 21, 2012. From the commencement of the case until February 13, 2014, Debtor's sole source of income were contributions from his girlfriend, Georgia Blackmer. ¶ 11, Declaration of Christian L. Newman in Support of the Chapter 13 Plan, Dckt. No. 120. Trustee has objected to each of Debtor's previous plans, and has inquired as to why Debtor is not reporting all of his income.

Trustee believes that the Debtor has been working as a handyman throughout the life of the plan. Trustee has objected to Debtor's reporting

of his income because on July 11, 2012, the Trustee was provided Debtor's profit and loss statements, Dckt. No. 18, for the time period prior to the filing. The statements reflect that Debtor received earnings of $2,300 each month, from December 2011 to May 2012. Declaration of Corey Crom, Dckt. No. 17. Until Debtor filed his supplemental declaration on October 28, 2013, Dckt. No 138, in response to Trustee's Opposition, the Debtor had not addressed the Trustee's Objection concerning Debtor not accurately reporting his income.

In the supplemental declaration in support of the Debtor's Fourth Amended Plan, filed on August 8, 2013, that Debtor states that he is self-employed, but was not making any money when the case was filed. Debtor also states that he relied on the income of his girlfriend, which was represented as $2,200 per month in net income. Debtor also declared that his girlfriend only incurs $250 to $300 per month in personal expenses, and that their combined income would allow for plan payments. Dckt. No. 138.

In the Debtor's Declaration in support of the latest Fifth Amended Plan, Debtor shifts his representation of the source of his income as derived from his girlfriend's contributions, to his income from self-employment as a handyman. ¶ 11, Declaration of Debtor in Support of Fifth Amended Plan, Dckt. No. 151. Debtor attests that he can make all payments called for by the Plan, stating that,

> The primary source of my income for my household is from self employment handyman service and I anticipate this income source for the remainder of the plan. I had previously required the assistance of friends and family to make plan payments, but my business has increased and I am not able to make my plans without assistance.

Id. Trustee argues that Debtor's inconsistent testimony lacks credibility, and that Debtor has not supplied documents to support his reported household income, or the expenses listed on his Schedule J. Debtor has not explained what happened to the income Debtor received from his previous work, if Debtor had received any income at all. Trustee states that he believes that Debtor's household has additional income, and that he is still not reporting his income accurately.

Debtor's girlfriend has declared on two separate occasions that she is willing and able to contribute toward the Debtor's Plan. Dckt. No. 12 and Dckt. No. 131. Debtor has not addressed why his girlfriend is now unable or unwilling to contribute. In his most recent declaration in support of the Plan, filed on March 7, 2014, Debtor lists his current household expenses and indicates that his girlfriend pays his auto insurance of $200.00 per month. If the Debtor is receiving the income, it should be contributed. *In re Short*, 232 F.3d 1018, 9th Cir 2000. Trustee argues that Debtor's Plan is not being proposed in good faith, and that the court should consider factors #4 and #10 as set forth by In Re Warren, which are included in the list below:

Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren*, 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389-1390 (9th

Cir. 1982)). Factors to consider include:

1) The amount of the proposed payments and the amounts of the debtor's surplus;

2) The debtor's employment history, ability to earn, and likelihood of future increases in income;

3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

5) The extent of preferential treatment between classes of creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

11) The burden which the plan's administration would place upon the trustee.

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))).

Here, the court is asked to consider factors: (1) The amount of the proposed payments and the amounts of the debtor's surplus; and (4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court.

Trustee cites to multiple instances where Debtor has filed multiple versions of his Schedule I and J, over what appears to be a relatively short span of time:

1. Filed 6/21/, Dckt. No. 1, pages 29-30. Income: $2,200; Expenses: $740.

2. Filed 9/9/12, Dckt. No. 27. Expenses: $715.

3. Filed 2/13/13, Dckt. No. 57. Income: $2,300; Expenses: $710.

4. Filed 5/3/13, Dckt. No. 101. Income: $2750.

5. Filed 8/9/13, Dckt. No. 122. Income: $2750.

6. Filed 2/13/14, Dckt. No. 154. Income: $3000; Expenses: $625.

7. Filed 3/7/13, Dckt. No. 156. Expenses: $953.34-$200=$753.34.

Trustee requests that the court deny confirmation of the plan, and grant Trustee's Motion to Dismiss, TSB-4, which was heard on February 19, 2014, and continued to April 1, 2014, to be heard in conjunction with Debtor's Motion to Confirm. This case has been pending for 21 months, and has not yet been confirmed. Trustee has filed four separate motions to dismiss, for Debtor's delay of the case in failing to amend the plan and to make plan payments. Trustee has filed the following motions to dismiss thusfar:

1. Motion to Dismiss Based on Failure to File Plan, TSB-1, Dckt. No. 44

2. Motion to Dismiss Based on Failure to File Plan, TSB-2, Dckt. No. 88

3. Motion to Dismiss Based on Failure to File Plan and Delinquency, TSB-3, Dckt. No. 111

4. Motion to Dismiss Based on Failure to File Plan, TSB-4, Dckt. No. 143, Failure to File Plan

REPLY OF DEBTOR TO TRUSTEE'S OBJECTION TO DEBTOR'S MOTION TO CONFIRM

Debtor responds by stating that he is proposing the plan in good faith. While it is admittedly unstable, Debtor states that the Plan is still feasible. Dckt. No. 161. Debtor wishes to testify as to the material disputed issues raised by the Trustee, which includes:

1. Whether the Debtor has reported all of his "income," or whether Debtor was failing to disclose his income; and

2. Debtor's good faith, pursuant to the factors set out by *In re Warren*.

Debtor states that he has established a factual record, and thereby requests an evidentiary hearing based on the record before the court. Federal Rule of Bankruptcy Procedure 9014(d) provides that evidence relating to disputed material facts in a contested matter shall be taken in the same manner as testimony in an adversary proceeding. Thus, under this rule, to the extent that there are disputed material facts, if the parties request, the court shall conduct an evidentiary hearing. Evidentiary hearings are conducted in this District with the use of direct testimony statements, L.B.R. 9017-1, as part of the live testimony.

TRIAL BRIEF BY CHAPTER 13 TRUSTEE

The Chapter 13 Trustee has filed a "trial brief" detailing further concerns with confirmation of the proposed Plan. In this brief, the Trustee

provides a short history of the present case.

History of the Case

Debtor filed the case on June 21, 2012. On August 28, 2014, the Trustee filed the first of many objections to the confirmation of Debtor's proposed plans, stating that not all income had been provided; not all assets had been reported; Debtor would be unable to make payments; that the plan fails liquidation; and Debtor failed to file tax returns. Dckt. No. 15.

One of the Trustee's biggest concerns that has continued throughout the life of the case, is that pre-petition, the Debtor provided the Trustee with business documents, including profit and loss statements for the 6 month period prior to filing. These statements showed that Debtor did own and operate his own business, working as a handyman, and that his statements showed that Debtor was working and earning money each month prior to filing. Exhibit A, Dckt. No. 18.

Current Motion

Trustee states that it is now 2 years into the 5 year plan, without a confirmed plan. The current hearing is a continued hearing on a Fifth Amended Plan. Trustee has not been able to get accurate information from the Debtor; Trustee argues that the Debtor's budget has been "created" to suit his needs, and nothing more. The Debtor's original budget and following budgets showed that his only source of income has been his live-in girlfriend Georgia Blackmer's financial support and contribution toward the plan. Initially, Ms. Blackmer's contribution on Schedule I was listed as $2,200.00 per month. Schedule I. Her contribution has been listed as high as $2,750.00. Dckt. No. 122 at 4.

Recently, the Debtor has made changes to his budget to show that he is now working as a handyman, a position that the Trustee has held since the beginning of the case. Debtor admits to earning approximately $3,000 per month. Debtor now fails to report any household contribution from his household companion and girlfriend, Georgia Blackmer, whom he has reported as his sole source of support until recently. On this basis, Trustee objected to confirmation of the Fifth Amended Plan.

On his most recent Schedule J, Dckt. No. 154, debtor reports $625 in household expenses. The Debtor has still not supplied a full and complete household budget. The Schedule J filed, fails to allow for Debtor's auto insurance expense of $200.00 per month, and for Ms. Blackmer's $300 per month in personal expenses. In addition, many of the expenses had to be trimmed so low to allow Debtor to show the ability to make payments, that Trustee states that it is difficult to believe that the budget was realistic. Debtor has not supplied evidence of any of the expenses reported on any of the budgets filed.

Trustee crafts a table of expenses, representing what he believes to be a reasonable budget based on pieces of information that the Debtor has provided by means of budgets or declarations. The Trustee has also slightly increased a couple of expenses fo allow for more realistic household allowances. This budget is shown below:

EXPENSES	
Electricity/heating	$125.00*
Water/sewer	$90.00*
Telephone	$30.00*
HOA	$75.00*
Food	$400.00*
Home maintenance	$50.00
Clothing/ laundry	$60.00*
Medical/dental	$25.00
Transportation	$120.00
Recreation	$75.00
Charity	$15.00
Life Insurance	$20.00
Auto Insurance	$200.00
Gym	$80.00
Girlfriend's personal expenses	$300.00
Total Household Expenses Outside of Plan	$1,665.00 - $300 g/f personal expenses $1,365.00 Debtors' Household expenses
Debtor/Girlfriend shared costs (*)	$770.00/2 = $385.00

Trustee asserts that the above budget allows the debtor to project reasonable living expense and share the living costs with his girlfriend, who Trustee believes should not be expected to contribute all her income toward the Plan and expect the Debtor to pay all household living expenses without a contribution from her. The household budget of shared expenses totals $770.00, or a share of $385.00 per household member. This includes the food, utilities, telephone, home owners association dues (each expense included is marked with a * on the budget). In addition, both parties should share the mortgage expense in the plan of $1,021.41. Trustee asserts that a fair share of the cost would be half for $510.71 each. It would seem reasonable that Ms. Blackmer contribute for rent, utilities, and food at $895.71 per month.

This would make Debtor's household income $3,000 from operation of

his business, and $895.71 from his girlfriend's contribution, for a total of $3,895.71. Debtor's share of the household expenses and his personal expenses are: $385 (share) + $560 personal expenses=$945.00. Net disposable income: $3,895.71-$$945.00=$2,950.71.

Trustee states that $2,950.71 should be the plan payment moving forward. There have been multiple previous hearings on whether to confirm a plan to which the Trustee has opposed, objecting to the Debtor's lack of credibility and food faith:

8/28/12- Trustee's objection to confirmation NLE-1, Dckt. No. 5

11/6/12- Trustee's opposition to debtor's motion to confirm, PGM-1, Dckt. No. 34

3/19/13- Trustee's opposition to debtor's motion to confirm, PGM-3, Dckt. No. 63

9/24/13- Trustee's opposition to debtor's motion to confirm, PGM-5, Dckt. No. 123

11/19/13-Supplemental opposition to motion to confirm, PGM-5, Dckt. No 34

4/1/14-Trustee's opposition to debtor's motion to confirm PGM-6, Dckt. No. 159–and there have been 4 separate motions to dismiss

1/11/13, TSB-1, Failure to file plan

4/23/13, TSB-2, Failure to file plan

7/17/13, TSB-3, Failure to file plan and delinquency

1/22/14, TSB-4, Failure to file plan

Trustee argues that "[i]t is time to end the delay." Trustee recommends that the court either confirm the plan as proposed, with a plan payment of $2,950.71 considering the household income is $3,895.71, with debtor's girlfriend contributing $895.71 toward the combined household costs and debtors separate living expenses of $560 per month, or dismiss this case due to the Debtor's inability to put together an honest and forthcoming schedule of income and expenses, and to timely confirm a plan.

REPLY BY DEBTOR TO TRUSTEE'S TRIAL BRIEF

The Debtor asserts that he continues to supply complete household budgets. The Debtor states that he and "his significant other," presumably Georgia Blackmer, request permission to testify to the disputed facts in this case as to: (1) whether the Debtor has provided a complete household budget to the Trustee, and (2) whether the Debtor's disposable income can support the proposed plan of $2,375 per month until the completion of the plan, or can make a payment of $2,950.71.

Debtor states that both he and the Trustee have established a

factual record, and thereby requests an evidentiary hearing based on the record before the court. Federal Rule of Bankruptcy Procedure 9014(d) provides that evidence relating to disputed material facts in a contested matter shall be taken in the same manner as testimony in an adversary proceeding.

The Debtor also makes the Request for Judicial Notice of the following documents:

(1) Docket #149, Motion to Confirm Debtor's Fifth Amended Plan Filed on 2/13/14,

(2) Docket #151, Declaration of Debtor In Support of Chapter 13 Plan,

(3) Docket #152, Fifth Amended Chapter 13 Plan,

(4) Docket #154, Amended Schedules I & J, and

(5) Docket #156, Supplemental Declaration of Christian Newman.

Debtor claims that he has submitted admissible lay opinion as to the source and amount of the monthly income in his household. While the Debtor is not married, the Debtor states that he does depend on his significant other's contribution as one household unit. Debtor requests that both the Debtor and the significant other be afforded the opportunity to present live testimony which will support confirmation of this plan as proposed at $2,375 per month.

DECISION

In light of Trustee's and the court's serious concerns regarding Debtor's candor regarding his employment, income, and household expenses, the court grants Debtor's request for an evidentiary hearing to present live testimony on his actual income from the operation of his handyman business, Ms. Blackmer's contributions to the plan, and the expenses of his household. The Trustee has adequately demonstrated that Debtor's inconsistent testimony, delinquency in plan payments, and repeated failure to address the grounds for Trustee's objections to confirmation of Debtor's plans is causing delay which is prejudicial to Debtor's creditors and constitutes cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

Debtor filed his case in June 21, 2012. No plan has yet been confirmed in the almost two years that have passed since the commencement of this case. Debtor's inconsistent declarations regarding his income and contributions from family members calls into question Debtor's credibility and prosecution of the case in good faith. Debtor's inability to confirm a plan and resolve previous issues with the Plan is testing the Trustee and court's patience, and casts doubt on whether a Plan can be confirmed in this case.

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

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

B. ----------, the ----------, shall lodge with the court and serve their Testimony Statements and Exhibits on or before , 2013.

C. ----------, the ----------, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 2013.

D. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 2013.

E. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before ----------, 2013

F. The Evidentiary Hearing shall be conducted at -------.m. on ----------, 2013.

32. 12-31671-E-13 CHRISTIAN NEWMAN
TSB-4 Peter G. Macaluso

CONTINUED MOTION TO DISMISS CASE
1-22-14 [143]

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's Attorney, and Office of the United States Trustee on January 22, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

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

Trustee's original Motion to Dismiss advanced the below arguments in favor of dismissal of the Debtor's bankruptcy case.

Failure to File Amended Plan

Trustee originally stated that the Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on November 19, 2013. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1). A review of the docket shows that Debtor filed an Amended Plan on February 13, 2014. Dckt. No. 152. The Motion to Confirm the Amended Plan was filed on the same day, Dckt. No. 149.

Debtor's Response

Debtor filed a response on February 4, 2014, stating that he will file, set and serve a motion to confirm prior to the hearing on this matter. No reasonable explanation to the delay was given.

Amended Plan

On February 13, 2014, the Debtor filed an Amended Plan, Motion to Confirm, and supporting pleadings. Dckts. 152, 149, 151. On February 14, 2014, the Debtor also filed Amended Schedules I and J to correct errors in the original Schedules I and J filed in 2012. Dckt. 154. This Income and Expense information is now almost 2 years old and of little relevance to the court in connection with confirmation of a Fifth Amended Plan.

If Amended Schedules I and J are taken as true (having stated under penalty of perjury that they truthfully state the Debtor's income and expenses as of June 2012),

A. The Debtor had income of $3,000.00 a month from his business.

B. From this the Debtor had expenses of only ($625.00) a month. To achieve only ($625.00) in monthly expenses, excluding mortgage, insurance and property taxes, the Debtor states under penalty of perjury,

1. Food and household supply expenses were $200.00 a month.

2. Clothing, Laundry, and Dry Cleaning were only $10.00 a month.

3. Personal care products and services were $0.00 a month.

4. Medical and dental expenses were only $10.00 a month.

5. Transportation expenses (excluding car payment and insurance) were only $120.00 a month.

6. Vehicle insurance expense was $0.00.

7. Health insurance expense was $0.00.

8. Income and Self-Employment taxes were $0.00.

9. Repair and maintenance expenses for home were $0.00.

Amended Schedules I and J, Dckt. 154.

Previously, the court had noted that in addition to providing no current income and expense information, Debtor's declaration provides no testimony as to how he could achieve the prior payments in this case with such expenses. Declaration, Dckt. 151. The court found that such statements under penalty of perjury in the Amended Schedules and in the Declaration to be "incredible" (as in not credible, rather than amazing). The Declaration told the court that during this case, the Debtor depended on the assistance of friends and family, while not providing testimony as to the Debtor's actual expenses. The court suggested that such cryptic and incomplete statements are indicative of the Debtor actually having greater income and expenses, and making such statements may have been an effort to hide that information from the court, Chapter 13 Trustee, U.S. Trustee, and other parties in interest.

SUPPLEMENTAL DECLARATION OF DEBTOR

Debtor submitted a supplemental declaration, presumably in response to the Trustee and court's concerns that Debtor's inconsistent testimony indicates a lack of candor in the prosecution of his bankruptcy case. Debtor attributes his "income" to the following sources:

1. First Call Handyman Services, Inc,;
2. Inc. Fred Fix It;
3. Scottland Yard Fence Company.

Debtor further estates that these are his "present expenses:"

Expense	Amount of Expense	Description
Food	$100.00	Weekly
Clothing, Laundry	$10.00	I shop at Ross and only wear motorcyle shirts
Personal Care	$10.00	
Gym Membership	$80.00	
Transport	$120.00	
Car Ins.	$200.00	Girlfriend pays
Electric	$100.00	SMUD and PG&E

Debtor states that he will comply with the plan and remit payments. Debtor states that he "dispatch for the most part and take care of daily jobs like people in my family have done for almost 400 years in the history of American Mormon Carpenters." Debtor also states that he has "several subcontractors" that he works with, and that they help each other out in "challenging times," and that he is usually paid upon completion of his

contracting jobs. ¶ 4, Declaration of Debtor, Dckt. No. 156. Debtor provides the invoice of Fred Fix It, Inc. for the date of March 6, 2014.

REQUEST FOR JUDICIAL NOTICE

On June 24, 2014, the Debtor filed a request for judicial notice for the following documents:

1. Docket #149 Motion to Confirm Debtor's Fifth Amended Plan Filed on 2/13/14;

2. Docket #151 Declaration of Debtor In Support of Chapter 13 Plan;

3. Docket #152 Fifth Amended Chapter 13 Plan;

4. Docket #154 Amended Schedules I & J 5. Docket #156 Supplemental Declaration of Christian Newman

Request for Judicial Notice, Dckt. No. 171.

CONTINUANCE

As stated in the court's ruling for Debtor's Motion to Confirm the Fifth Amended Plan, PGM-6, the court and Trustee have identified serious concerns with Debtor's inconsistent testimony regarding his income and expenses, in addition to his failure to file a confirmable plan within the last almost two years, spanning from the commencement of the case to the present. The court's decision is to continue the Motion to Dismiss to [time] at [date], to be heard in conjunction with the evidentiary hearing on Debtor's Motion to Confirm the Fifth Amended Plan, Dckt. N0. 159.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is continued to [time] on [date] to be heard in conjunction with the evidentiary hearing set on Debtor's Motion to Confirm the Fifth Amended Plan, PGM-6.

33. 14-23471-E-13 ERROL/SUZANNE BURR
KMT-2 Iain A. MacDonald

MOTION TO CONVERT CASE TO CHAPTER 7
6-3-14 [53]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorneys, the Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 3, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required for this Chapter 13 case.

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

The Motion to Convert the Chapter 13 Bankruptcy Case to a Case under Chapter 7 is granted and the case is converted to one under Chapter 7.

The Court's Decision is to grant the Motion to Convert or Dismiss and convert the case to one under Chapter 7 of the Bankruptcy Code.

MOTION TO CONVERT OR DISMISS CHAPTER 13 CASE

Gary Zolldan and Linda Zolldan (the "Zolldans"), creditors in the Chapter 13 bankruptcy case of Errol Burr and Suzanne Burr (the "Debtors"), seek an order converting the case to a case under Chapter 7 of the Bankruptcy Code.

The Zolldans assert that good cause for conversion exists because the Debtors have filed an amended Chapter 13 plan in "bad faith," and the plan is not confirmable. The Debtors' unsecured debt to the Zolldans is $528,255.00, an amount which exceeds the debt limitation of 11 U.S.C.

section 109(e). Debtors are thus ineligible for relief under Chapter 13.

The Zolldans argue that they are the Debtors' only *bona fide* creditors. The Zolldans have been engaged in litigation with the Debtors for approximately ten years in the Nevada County Superior Court (the "Superior Court") in an action entitled *Gary R. Zolldan and Linda L. Zolldan, plaintiffs, v. Errol D. Burr and Suzanne L. Burr, et al.*, d*efendants*, assigned the Superior Court's Case Number 6310 (the "State Court Action").

The Debtors filed their Chapter 13 petition just six (6) days before a hearing on the Zolldans' motion for attorneys' fees in the State Court Action, after the Superior Court awarded the Zolldans attorneys' fees in the State Court Action. The Zolldans argue that under the totality of these circumstances, the Debtors filed their Chapter 13 petition in bad faith for only one obvious purpose; to hinder and delay the Zolldans in the prosecution of the State Court Action against the Debtors.

The Zolldans assert that is in the best interests of creditors and the bankruptcy estate to convert the Case to a case under Chapter 7 rather than to dismiss the Case. They claim that Debtors have little disposable income to contribute to a Chapter 13 Plan or to pay their indebtedness to the Zolldans outside of a Chapter 13 Plan. The Zolldans identify the only significant source of payment as the Debtors' real property. The Debtors described this real property in Schedule A filed with the Court in the Case as a "Single Family Home with Circa 52 Acres". The Debtors have valued the Property in their Schedule A at $792,605.00.

In their First Amended Chapter 13 plan, the Debtors propose to liquidate the Property over a time period of up to five years, requiring the Zolldans to wait for payment. The Zolldans accuse the Debtors of fraudulently transferring $104,000 to their children and making preferential transfers to pay their credit card debt in full.

The Zolldans state that if the Case is converted to a case under Chapter 7, a Chapter 7 Trustee can take steps immediately to liquidate the Property and then distribute the net sales proceeds under the distribution provisions of 11 U.S.C. § 726. Additionally, a Chapter 7 Trustee can pursue avoidance of the fraudulent transfers to he Debtors' children and the preferential transfers to the Debtors creditors.

If the Case is dismissed, the Zolldans will be required to enforce their judgment for attorneys' fees and costs and potential damages against the Burrs in the Superior Court under state law, which will require significant additional work and expense and a significant delay in payment. Furthermore, the Zolldans will be required to file a fraudulent transfer action in state court against the Debtors' children causing additional expense and delay to the Zolldans. If the Case is dismissed, the preferential transfer avoidance actions against the Debtors' credit card companies will be lost. For these reasons, the Zolldans state that is in the best interests of the Zolldans and the Debtors' bankruptcy estate that the Case be converted to one under Chapter 7.

STATEMENT OF SUPPORT BY TRUSTEE

The Trustee states that he has filed an objection to the Debtors' Motion to Confirm the Amended Plan, MF-003, which is set for hearing on the same day as this matter.

OPPOSITION OF DEBTOR

In Opposition to the Motion, Debtors assert that they were compelled to file bankruptcy after having incurred heavy losses in the litigation with the Zolldans in state court--litigation which has spanned for more than 10 years, and have pushed Debtors to the brink of insolvency. Dckt. No. 75.

Debtors state that they had committed hundreds of thousands of dollars to the litigation with the Zolldans, practically exhausting their life savings. Despite their efforts to remain debt free, the Debtors state that they were put the position of being forced into bankruptcy so they could pay claims against them in an orderly fashion, thereby preserving their estate and their future. Through their Chapter 13 plan, the Debtors propose to pay allowed claims in full within five years of the petition date, to resolve the dispute with the Zolldans in state court, and to liquidate the claims against the Debtors' former counsel.

Debtors state that they filed for protection under Chapter 13 because they are eligible for relief under Chapter 13. As of the petition date, the Zolldans' claim was contingent and unliquidated because the Superior Court had not entered a final order awarding attorneys' fees and the Superior Court had not determined the reasonable amount of the attorneys' fees award—a matter which is subject to dispute before the Superior Court.

In this case, Debtors argue that dismissal is in the best interest of the estate. First, Debtors state the amount of the Zolldan claim is contingent because it results from an interlocutory judgment and unliquidated because the Superior Court has not yet determined the amount of reasonable attorneys' fees. Debtors argue that while a Chapter 7 Trustee may be able to liquidate some of the Debtors' nonexempt assets, the two largest assets—the Ranch and the claims against Raymond Shine—are bound up in the resolution of the Zolldan Action.

REPLY OF GARY AND LINDA ZOLLDAN

The Zolldans state that Debtors' argument misstates the law. The fact that a claim is disputed does not *per se* exclude the claim from the eligibility calculation under § 109(e), since a disputed claim is not necessarily unliquidated. Creditors argue that so long as a claim is subject to ready determination and precision in computation of the amount due, then it is considered liquidated and included for eligibility purposes under § 109(e), regardless of any dispute.

The Zolldans state that the amount of their claim for attorneys' fees is subject to ready determination based on the billing records the Zolldans submitted in support of their Motion for Attorneys' Fees filed in the Sierra County Superior Court Action. The Zolldans disagree that the billing records are unreasonably and have redacted time entries.

The Zolldans argue that Debtors have admitted that their real property is encumbered by the Zolldans' Notice of Pending Action and that unless this encumbrance is removed, the Debtors are unable to deliver marketable title and any sale subject to the encumbrance will be at a depressed price." A sale of the Debtors' real property is proposed in the First Amended Plan as the principal source of paying the Zolldans' claim and the administrative expenses of the Debtors' bankruptcy estate. However, Debtors state that they cannot sell this real property unless and until the Zolldans' Notice of Pendency of Action is removed from this real property. Considering the history of the litigation, a final resolution may occur after the five year time period proposed in the First Amended Plan. The Zolldans argue that under these circumstances, the First Amended Plan is highly speculative and it is not feasible.

Further, the Zolldans state that the Debtors admit that they transferred $104,000 to their two children in separate transfers that occurred within one year of the date that the Debtors filed their Chapter 13 bankruptcy petition. Suzanne Burr concedes the Burrs' $104,000 in cash gifts to their children were unprecedented. Declaration of Suzanne Burr, p. 4, para. 24. She admits the Burrs never made monetary gifts of that amount of money before, and they had not made gifts of any amount to their children in 2011 and 2012. The only other gift she identified was insignificant in comparison, an $11,000 gift to Suzanne's daughter in 2010 to pay off her college loans. Moreover, the Burrs did not identify any purpose whatsoever for their $104,000 in cash gifts to their children.

The Zolldans protest that the unexplained timing and purpose of the gifts occurred immediately after the Sierra County Superior Court entered its tentative judgment in favor of the Zolldans, and contemporaneously with the Zolldans' motion for attorneys' fees and at the same time the Burrs' consulted with a bankruptcy attorney, and left Debtors without any liquidity. Zolldans argue that this presents strong circumstantial evidence that the gifts were made with the intent to thwart and/or hinder the Zolldans' effort to recover their attorneys' fees in the Sierra County Superior Court lawsuit, i.e., a fraudulent conveyance. Under these circumstances, the Zolldans press the court to convert the Chapter 13 Case to one under chapter 7 to preserve the bankruptcy estate's avoidance action against the Debtors' children.

DISCUSSION

Standards

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a

> hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is one of the enumerated "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

Eligibility for Relief

Pursuant to 11 U.S.C. § 109(e), an individual with regular income that owes, on the date of the filing of the petition, "noncontingent, liquidated, unsecured debts of less than $383,175" may be a debtor under Chapter 13. The Ninth Circuit has held that a debt is liquidated for the purposes of calculating eligibility for relief under § 109(e) if the amount of the debt is **readily determinable**. *Slack v. Wilshire Ins. Co. (In re Slack)*, 187 F.3d 1070, 1073 (9th Cir. 1999). In *In re Fostvedt*, the Ninth Circuit Court of Appeals stated that the question of whether a debt is liquidated "turns on whether it is subject to 'ready determination and precision in computation of the amount due.'" 823 F.2d 305 (9th Cir. 1987) (quoting *Sylvester v. Dow Jones and Co., Inc. (In re Sylvester)*, 19 B.R. 671, 673 (B.A.P. 9th Cir. 1982)). Further, the Ninth Circuit Court of Appeals in *In re Wenberg* affirmed the reasoning in the Bankruptcy Appellate Panel opinion: "The definition of 'ready determination' turns on the distinction between a **simple hearing** to determine the amount of a certain debt, and an extensive and contested evidentiary hearing in which substantial evidence may be necessary to establish amounts or liability." *In re Wenberg*, 94 B.R. 631 (B.A.P. 9th Cir. 1988).

Here, on March 4, 2014, after a four-day trial, the Superior Court entered judgment in favor of the Zolldans and against the Debtors on the Supplemental Cross-Complaint, which awarded the Zolldans reasonable attorneys fees and costs of suit. See Exhibit D. It appears the Zolldans' claim for reasonable attorneys' fees is not contingent, but rather it has been reduced to judgment. After the entry of the Judgment, the Superior Court set a hearing on April 9, 2014 to determine the amount of the reasonable attorneys fees and costs of suit, to which the Zolldans filed their Motion requesting fees in the amount of $528,255.00. However, six days before the hearing, Debtors filed their Chapter 13 petition. The attorneys' fees included in the Zolldans' claim were obviously incurred before the Debtors filed their bankruptcy petition. While the Debtors dispute the amount, the liquidated test does not depend on whether the amount is disputed, but rather if the amount is readily determinable. It in fact would require one hearing (which was noticed and set before the filing) to determine the amount of reasonable attorneys fees to include in the judgment awarded by the Superior Court.

Every week bankruptcy judges across the country make determinations of attorneys' fees and costs pursuant to motions brought by counsel

representing debtors in possession, bankruptcy trustees, and Chapter 13 Debtors. In the Motion to Convert, Zolldans assert that the debt is $528,255.00. If this were the key issue, the court could conduct a hearing to consider the amount of attorneys' fees being asserted by Zolldans and make the necessary findings for the readily determinable amount.

However, that will not be necessary, as Zolldans have established that cause exists for relief to be granted pursuant to 11 U.S.C. § 1307.

Cause for Relief Pursuant to 11 U.S.C. § 1307

In denying confirmation of the Debtors Amended Chapter 13 Plan (DCN: MF-3) the court has addressed the issue of the proposed plan not having been proposed or prosecuted in good faith. "Cause" for relief under 11 U.S.C. § 1307 based on "bad faith" does not require a "fraudulent intent of the Debtor. *Levitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999). Unfair manipulation of the Bankruptcy Code, the bankruptcy case being prosecuted where "the debtor only intended to defeat state court litigation," and egregious behavior are all separate and independent grounds for concluding that bad faith exists. *Id.*

The Amended Chapter 13 Plan proposed by the Debtors not only shows that the state court litigation "manipulation" and delay is the only purpose of the Plan and this Bankruptcy Case. In substance, the plan says that the Debtors will proceed with liquidating the major asset only when Zolldans, the opposing party in the state court litigation, (1) removes the lis pendens from the Debtors' property and (2) agrees to terms with Debtors on the boundary line dispute for which there has been over ten years of litigation. The monthly Plan payment (which the court determined was not feasible based on the financial information in Schedule I and Amended Schedule J) would only be enough to fund payments to Debtors' state court litigation counsel on its pre-petition claim.

In denying confirmation, the court concluded that the expense information provided by Debtors was not accurate (or reasonable). Rather, it appears to be expenses constructed to reach a desired "monthly net income" which would be just enough to pay Debtors attorney on its secured claim. The expenses were not overstated to reach that result, but understated to make it appear that the proposed plan payment was feasible.

The Plan was proposed, and this case filed, to derail the state court litigation in which Zolldans, after more than ten years of litigation and having prevailed at trial, were days away from the hearing on the award of attorneys' fees to Zolldans.

The court finds that the proposed plan and prosecution thereof is and was prejudicial to the Debtors. The proposed plan was nothing more than an opened ended stay of the state court litigation unless and until Zolldans agreed to the Debtors terms for the boundary line dispute. Also, while the Debtors filed an Amended Plan, it was so deficient in providing substantive terms for the proper handling of claims that it did not comply with the requirements of 11 U.S.C. §§ 1322 and 1325. No plan which could colorably

be subject to a good faith confirmation hearing was filed or prosecuted by the Debtors.

In addition to having been embroiled in more than ten years of litigation with Zolldans (which is not to say that the court blames or thinks that it would be solely the Debtors who have caused the litigation to grind on for more than ten years, exhausting hundreds of thousands of dollars of resources) which has at least initially left the Debtors on the wrong side of a judgment, the Debtors have had pending since 2011 malpractice litigation. While reasons exist for malpractice litigation to be stayed while the "main show" is produced (the Zolldans litigation), the proposed Plan and bankruptcy strategy of the Debtors does not cause the court to believe that such litigation could be effectively prosecuted by the Debtors for the estate.

It cannot be forgotten that just months before the commencement of this bankruptcy case (in January 2014, the same month they paid their bankruptcy counsel the initial retainer), the Debtors gifted $104,000.00 to their two children. This gift was not addressed in the Plan proposed by Debtors, except in its absence of any obligation to prosecute a fraudulent conveyance action pursuant to 11 U.S.C. § 548 to recover the gift. This is another manifestation of the Debtors' attitude under the plan that they will not do anything required by the Bankruptcy Code except what they want and on the terms they want (such as providing for the Zolldans' claim only when Zolldans release the lis pendens and agree with the Debtors to resolution of the boundary dispute). The Debtors are not and have not attempted to prosecute a Chapter 13 Plan as permitted by the Bankruptcy Code, but merely in the guise of Chapter 13 presented a plan which provides that they pay nothing.

Cause exists pursuant to 11 U.S.C. § 1307 to dismiss or convert this case.

Conversion of the Case and Appointment of a Chapter 11 Trustee is in the Best Interest of the Estate, Creditors, and Debtors

The court having found that cause exists for relief under 11 U.S.C. § 1307(c), the court must determine the proper relief. Dismissal of the case in light of Debtors use, and abuse, of the Bankruptcy Code is not warranted. Conversion to Chapter 7 is an alternative, but such may not be in the best interests of the Estate.

The major asset of the estate, the Castle Ranch Road Property, is valued by the Debtors at $792,605.00. Schedule A, Dckt. 1. On Schedule B the Debtors list around $40,000.00 in personal bank accounts and $13,000.00 in a "Slate Castle Enterprises bank account. The Debtors have $23,423.00 in an IRA and $63,738.50 in a money market account ("Owned by Beneficiaries of Burr Family Trust UA").

As shown on Schedule I, Errol D. Burr is disabled and only has $1,700.00 a month in Social Security. For Suzanne Burr, she has only $1,100.00 in Social Security benefits, plus $1,200.00 a month in current income from her self employment.

From the Schedules it appears that the limited personal property assets of the Debtors will be necessary to provide for their living expenses to supplement their Social Security Benefits. To pay creditors, the one available asset is the real property. This is also the one asset in which the Debtors should have value which they can receive.

Rather than converting this case to one under Chapter 7, converting it to Chapter 11 and appointing a Chapter 11 Trustee is the best choice. The Debtors have demonstrated that left to their own devices as Chapter 13 Debtors, or as possible Chapter 11 debtors in possession, they cannot prosecute a plan of reorganization. Rather, their focus is lost on how the Bankruptcy Code can be bent (and abused) as part of their more than ten year litigation strategy.

If the Debtors had elected to just carry on that strategy in state court, they could have continued to wage battles and exhaust their resources to try and preclude Zolldans from recovering anything. But they did not so elect, instead availing themselves of the benefits under the Bankruptcy Code, and simultaneously accept the obligations thereunder.

11 U.S.C. § 1104 provides that "for cause" the court may order the appointment of a Chapter 11 Trustee. These grounds parallel the provisions of 11 U.S.C. § 1307. When considering the possible conversion or dismissal of a Chapter 11 case, 11 U.S.C. § 1112(b) provides that the court may as an alternative appoint a Chapter 11 Trustee if it is in the best interests of creditors and the estate.

The conversion to a case under Chapter 7 would result in the automatic appointment of a trustee, whose duties include, "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;...." 11 U.S.C. § 704(a)(1). Such "expeditious liquidation of the Debtors' main asset, the real property may well not be in the best interests of the estate, or the Debtors.

The litigation (and entry of judgment against them) that the Debtors sought to disrupt and avoid by filing this bankruptcy case has to be complex, it spanning more than a decade. Conversion to Chapter 11 and appointing a Chapter 11 trustee puts in place a fiduciary whose job is not to "liquidate" the assets, but manage them through a Chapter 11 plan. If the Zolldan and Shine litigation needs to take years, the Chapter 11 Trustee can advance a plan to so provide for the litigation.

For Zolldan and Shine, they may not have the Debtors to deal with as an opposing party, but they have a fiduciary whose concern is the best interests of the bankruptcy Estate. The trustee is not subject to fits of pique or "moral outrage" overcoming his or her fiduciary judgment in prosecuting these claims.

Conversion to Chapter 11 and the appointment of a Chapter 11 trustee provides the Debtors and their counsel with a real opportunity to advance their bona fide positions in the case. While they will be forced to address the realities of the litigation and having elected to be in bankruptcy, they can educate the Chapter 11 trustee as to the merits of their litigation

assets. To the extent that they have bona fide positions and rights, the Chapter 11 trustee becomes they ally. It is the Chapter 11 trustee, unencumbered by the prior alleged conduct (and misconduct) of the Debtors who can advance those rights and be a formal adversary to Zolldans and Shine.

The court having determined that cause exists to convert or dismiss the case, and that dismissal is not proper, the court converts the case. In light of the complexity of the two main assets (real property and Shine litigation) conversion to Chapter 11 and the appointment of a Chapter 11 trustee is in the best interests of the estate, and affords the Debtors an opportunity to prosecute a plan, either on their own or in conjunction with the trustee.

The case is converted to one under Chapter 11 and the appointment of a Chapter 11 trustee is ordered.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss or Convert the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the case is converted to a under Chapter 11 of Title 11, United States Code.
>
> **IT IS FURTHER ORDERED** that upon conversion, a Chapter 11 Trustee shall be appointed.

34. 14-23471-E-13 ERROL/SUZANNE BURR — MOTION TO CONFIRM PLAN
MF-3 Iain A. MacDonald — 5-22-14 [39]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 22, 2014. By the court's calculation, 40 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 creditors have filed opposition to confirmation of the proposed plan.

OPPOSITION BY TRUSTEE

The Chapter 13 Trustee opposes confirmation for several reasons:

A. Trustee states that Debtors may not be eligible for Chapter 13 Relief under 11 U.S.C. § 109(e). Schedule F lists Gary and Linda Zolldan as holding contingent, unliqudated, and disputed "Breach of Contract; Property Dispute Sierra County Superior Court Case No. 6310" claim, with a debt owed of "Unknown." Dckt. No. 1. Debtors' Statement of Financial Affairs Question No. 10 causes the Trustee even more concern because the Statement lists amounts paid to Stoel Rives LLP that are in excess of $330,000, paid during the period of April, 2012 to August 2013 in connection with the zolldan lawsuit. Schedule F lists Stoel Rives LLP with an unsecured debt in the amount of $65,572.34.

The Chapter 13 unsecured debt limit is currently $383,175.00. The amounts paid and remaining to be paid to Creditor Stoel Rives LLP, in conjunction with the Zolldan lawsuit, and coupled with the uncertain outcome of the Zolldan lawsuit causes the Trustee concern as to whether Debtors are eligible to be Chapter 13 debtors.

B. Debtors may not be able to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Debtors have filed two Motions to Employ Counsel in this case. One was the employment of Patrick J. Waltz, which was granted by the court on May 10, 2014, Dckt. No. 30, and the other for Michael B. Brown of Stoel Rives, LLP, which is still pending.

According to the exhibits filed with the motions to employ, Mr.

Waltz will be billing at a rate of $150.00 per hour, while Mr. Brown's firm will be billing at hourly rates from $200.00 per hour to $350.00 per hour depending on who performs the work.

Schedule J filed in this case, Dckt. No. 1, has no provision for potential attorney fees, and answers to Statement of Financial Affairs Question No. 10 show that Debtors paid to Stoel Rives LLP more than $330,000.00 during the period from April, 2012 to August, 2013 in connection with the Zolldan lawsuit; as well as amounts paid to the Qaltx firm of $5,000.00 in February, 2014. The only source of income listed on Schedule I is from Social Security, and from the self-employment of Mrs. Burr. Social Security is listed as a total of $2,800 per month, and the net income from self-employment is listed at $1,200.58.

C. Debtors' current plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4), if Debtors were unable to complete the plan. Debtors' Plan, Dckt. No. 43, calls or payments of $1,214.31 for 60 months, with no less than 100% to unsecured debts listed at $65,572.34, although there is an "Unknown" claim of the Zolldans. Statement of Financial Affairs Question No. 7 lists gifts to the Debtors' son and daughter, totaling $104,000.00 ($52,000.00 each) within 3 months of filing this case.

The plan also calls for the payment of the potential claim in a pending law suit with the only other creditor in the case, other than the Zolldans. The payment of this claim is contingent on the sale of Debtors' property, and the "resolution of the Burr. V. Shine matter" to satisfy this claim.

The Trustee notes that no claims have been filed by any creditors in this case. The claims bar date for creditors, other than governmental creditors, is August 13, 2014, and for governmental creditors, September 30, 2014.

D. Trustee argues that the Plan may not be filed in good faith under 11 U.S.C. § 1325(a)(3). Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren,* 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389-1390 (9th Cir. 1982)). Factors to consider include:

1) The amount of the proposed payments and the amounts of the debtor's surplus;

2) The debtor's employment history, ability to earn, and likelihood of future increases in income;

3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

5) The extent of preferential treatment between classes of creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

11) The burden which the plan's administration would place upon the trustee.

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))).

Factor 3: The Trustee is uncertain of the plan's expected duration. Although Debtors have filed a plan proposing a payment for a term of 60 months, the additional provisions of the plan seem to cause confusion as to the actual length of the plan. Section 6.01 discusses the unsecured claim of Gary and Linda Zolldan:

> 6.01. Unsecured Claim of Gary and Linda Zolldan. The Claim of Gary and Linda Zolldan is contingent, unliquidated, and disputed. If the Claim of Gary and Linda Zolldan becomes an allowed claim, the Debtors will pay the claim in full, plus interest at the federal judgment rate established by 28 U.S.C. § 1961 as of the Petition Date (0.13%), from the proceeds of (a) the resolution of the Burr v. Shine matter (described in paragraph 6.02) and (b) the sale of their real property (described in paragraph 6.03). The payment from sale of the Debtors' property will be made directly from escrow and without involvement of the Chapter 13 Trustee. All payments on account of the allowed claim of Gary and Linda Zolldan will be completed within five years of the petition date as authorized by 11 U.S.C. § 1322(d).
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> Dckt. No. 43 at 6.

Based on the language in the additional provisions, the length of the plan is not fixed. The Plan depends on the outcome of litigation as further described in Section 6.02 of the Additional

provisions, and Section 6.03 of the Additional provisions calling for the sale of Debtors' real property. The Trustee also objects to the payment from escrow without the involvement of the Trustee.

Factor #4: The Trustee is uncertain of the accuracy of the plan's statements of the debts, expenses, and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court.

Schedule A lists Debtors' interest in their real property as Beneficiaries of Burr Family Trust, UA 09-13-1999 valued at $792,605.00 with no secured debt. Schedule B lists a Money Market Account - Vanguard (Owned by Benficiairies of the Burr Family Trust UA 09-13-1999), with a value of $69,738.50, as well as Brokerage Account- Vanguard (Owned by Beneficiaries of Burr Family Trust UA 09-13-1999), with a value of $9,357.28; however Line No. 20 fails to list the Burr Family Trust UA 09-13-1999). Dckt. No. 1 and 27.

Schedule F lists the Zolldan claims, with a debt of "unknown" and the debt owed of "65,572.34" to Stoel Rives LLP for "Professional Fees Re: Zolldan Litigation." The Debtors do not list any information as to how long the litigation has been pending, other than to say on the Statement of Financial Affairs No. 4 listing the status as pending. There is no mention of whether the case has been reduced to judgment, and no mention of the dollar amounts being discussed in the law suit.

As stated previously, Debtors have filed two Motions to Employ Counsel in this case. Amended Schedule J has no provision for these potential attorney fees, and answers to Statement of Financial Affairs Question No. 10, cause the Trustee even more concern in that they list amounts paid to Stoel Rives LLP in excess of $330,000 during the period from April, 2012 to August, 2013, in connection with the Zolldan lawsuit; as well as amounts paid to the Waltz firm of $5,000.00 in February of 2014.

Section 6.04 of the additional provisions discuss compensation fo the professionals. Compensation is to be paid through re-petition retainers or from the sale of the property and proceeds from the *Burr v. Shine* matter, as well as "additional one-time payments from unencumbered assets of the estate as are necessary to fully pay (a) allowed fees awarded to professionals employed by the estate, and (b) the Trustee's statutory fee on said disbursement." Dckt. No. 43.

E. Factor #10: Trustee is concerned with the motivation of Debtors in filing this case. It appears the only Creditor other than their state court attorney is the Zolldans. The Debt is listed as contingent, unliquidated, disputed and unknown on Schedule F. It appears from the Plan that this claim, if allowed and a dollar amount placed on it, is to be paid from the sale of the Debtors' residence as well as proceeds from the *Burr v. Shine* matter. However, as stated above, the time frame set for the sale of property is contingent not only on the claim being allowed (the

claim is still being litigated in state court, and a Motion to Modify the Automatic Stay, KMT-1, to proceed with this action in state court was granted on May 20, 2014), but Section 6.03 of the additional provisions adds more confusion and states in part:

> 6.03. Sale of Residence; Additional Plan Payments. Within 30 days of entry of the Court's order confirming this plan, the Debtors will engage the services of a real estate agent, and seek the Court's approval of that agent's employment, for the purpose of listing the Debtors' real properties for sale. Working with the agent and the analysis of the value of the property on the then-existing market, the Debtors will list the property for sale within 14 days after the release of the Lis Pendens (recorded on March 23, 2004, in the Official Records of Sierra County as document number 2004140160, a copy of which is attached as Exhibit "B") and establishment of the boundary line between the real property owned by the Debtors and real property owned by the Zolldans, and the relative obligations of the Debtors and the Zolldans. Exercising their business judgment, the Debtors will sell the property at a price that will maximize the return to the estate, with the sale closing and the payment from escrow occurring within five years of the petition date as authorized by 11 U.S.C. § 1322(d).
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> Dckt. No. 43 at 6.

Trustee maintains that there is too much uncertainty in the plan and its provisions, in that it calls for the sale of Debtors' real property and settlement proceeds from the Burr v. Shine matter. Debtors' attempt to put a time frame on the sale is contingent on too many facts. Trustee states that it appears that the Debtors' plan is more of a delay tactic than an actual attempt to reorganize.

OPPOSITION BY CREDITOR RAYMOND SHINE

Raymond E. Shine, Esq. ("Shine"), listed as an unsecured creditor in this proceeding, objects to confirmation of the debtors' amended plan on the basis that the Debtors' plan may not have been filed in good faith. Dckt. No. 65.

The proposed plan calls for creditor claims to be satisfied from the use of funds allegedly to be recovered via the Debtors' legal malpractice action against creditor Shine and his law firm in the Sierra County Superior Court entitled, *Burr v. Shine*, et al., Case No. 7195 (referred to as the "Legal Malpractice Case").

Mr. Shine claims that several material facts about the Legal

Malpractice Case are missing from the proposed plan, which Creditor Shine claims casts doubt on the Amended Plan's good faith.

First, the Legal Malpractice Case has been stayed since shortly after it was filed in January, 2011. It remains stayed today. Mr. Shine states that nothing has been done on the case: the Defendants have not even filed an responsive pleading; no discovery has been conducted; and the case is "years" from resolution.

The stay was sought and obtained *ex parte* in March 2011 by the attorneys then representing the Debtors in the Legal Malpractice Case, Stoel Rives. Mr. Shine states that when the underlying case from which the alleged legal malpractice arose is still pending (here, *Zolldan v. Burr*), it is common for the legal malpractice case to be stayed pending the outcome of the underlying case. *See*, e.g., *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 758 (1998) ("The case management tools available to trial courts, including the inherent authority to stay an action when appropriate and the ability to issue protective orders when necessary, can overcome problems of simultaneous litigation if they do occur.").

Although briefly agreeable to lifting the 2011 stay, the defendants in the Legal Malpractice Case now oppose lifting the stay for any purpose other than the preservation of certain testimony. Thus, even if the 11 U.S.C. § 362 automatic stay is lifted, the Legal Malpractice Case will remain stayed due to the pendency of the underlying litigation, and defendants in the Legal Malpractice Case will oppose lifting that stay (other than to preserve certain testimony) on the basis of the need for the underlying *Zolldan v. Burr* case to be first resolved, i.e., to "overcome problems of simultaneous litigation..."). *Id.*

Second, contrary to the prayer for relief in the complaint filed in the Legal Malpractice Case, Mr. Shine states that there is no provision for the prevailing party to recover attorneys' fees. Thus, any recovery that the debtors may achieve in the Legal Malpractice Case will be net of the fees paid to the attorneys retained to prosecute that action.

Third, Mr. Shine is concerned that the Debtors have not informed this Court of two interrelated factors in Debtor's legal situation:

> (1) that the Debtors have a strong – an apparently undisclosed – claim (which belongs to their bankruptcy estate) for legal malpractice and breach of fiduciary duty against the attorneys who took over the *Zolldan v. Burr* lawsuit from creditor Shine in late 2009: Stoel Rives; and
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> (2) even if the Debtors continue in their refusal to assert their claim for legal malpractice and breach of fiduciary duty against Stoel Rives in the Legal Malpractice Case, defendants will argue based upon established principles of California law that all damages caused by the negligence and breach of fiduciary duty will be imputed to the debtors and their recovery from defendants, if any, will be reduced dollar per dollar.

Mr. Shine and his attorney have informed both the attorney retained to prosecute the Legal Malpractice Case and Debtors' counsel of all of these concerns (with the possible exception of Mr. Shine's reasons for refusing to agree to lift the stay in the Legal Malpractice Case). Declaration of Betsy S. Kimball. Dckt. No. 67.

OPPOSITION BY GARY ZOLLDAN AND LINDA ZOLLDAN

Gary Zolldan and Linda Zolldan, the "Zolldans," oppose the Motion to Confirm. Dckt. No. 71. The Zolldans assert that the Plan cannot be confirmed because it violates 11 U.S.C. section 1325 in four significant respects.

Ineligibility for Relief Under Chapter 13

First, Zolldans assert that the Plan violates 11 U.S.C. section 1325(a)(1) because it does not comply with the provisions of 11 U.S.C. section 109(e); the Debtors are ineligible for relief under Chapter 13.

The State Court awarded the Zolldans their reasonable attorneys' fees and costs pursuant to a judgment in the State Court Action. The amount of the Debtors' debt to the Zolldans for attorneys' fees is liquidated. Although the Debtors have opposed the Zolldans' Attorneys' Fees Motion filed in the State Court Action, the "liquidated" test does not depend on whether there is a dispute regarding the amount. Rather, a debt is liquidated if the amount of the debt is readily determinable. *In re Slack*, 187 F.3d 1070, 1073 (9th Cir. 199); *In re Nicholes,* 184 B.R. 82, 89 (B.A.P. 9th Cir. 1995). Whether a debt is subject to ready determination depends on whether the amount is easily calculable or whether an extensive hearing is needed to determine the amount of the debt. *Slack*, supra, 1074. The test for ready determination is whether the amount due is fixed or certain or otherwise ascertainable by reference to an agreement or by a simple determination. A debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided. *In re Ho*, 274 B.R. 867, 874 (B.A.P. 9th Cir. 2002).

Here, an extensive hearing is not required to determine the $528,255 indebtedness of the Debtors to the Zolldans for attorneys' fees in the State Court Action. This amount can be readily ascertained by reference to the billing records attached to the declarations filed in support of the Zolldans' Attorneys' Fees Motion. Placing the amount of these attorneys' fees in context with the amount of attorneys' fees the Debtors have incurred in the State Court Action in the two years before they filed their Chapter 13 petition, the Debtors paid their attorneys, Stoel Rives, the sum of $330,065.99 and they owe Stoel Rives an additional $65,572.34 for pre-petition attorneys' fees.

Furthermore, the Debtors monthly disposable income is so meager, it is unlikely that it can meet their monthly living expenses. Schedule I appears to have been manipulated to inflate the Debtors' monthly income by not including the business expenses of the Debtors. Schedule J appears to have been manipulated to understate the Debtors' expenses to show disposable income. If the Debtors have no disposable income, this provides another basis for a determination that they are ineligible for Chapter 13 relief. *In*

re Gavia, 24 B.R. 573, 575 (B.A.P. 9th Cir. 1982) Under these circumstances, confirmation of the First Amended Plan must be denied because the Debtors' unsecured indebtedness exceeds the debt ceiling of 11 U.S.C. section 109(e) and the Debtors have no disposable income. The Debtors are ineligible for relief under Chapter 13.

Plan Not Proposed in Good Faith

Second, the Plan violates 11 U.S.C. section 1325(a)(3) because it has not been proposed in good faith; the Zolldans believe the plan has been proposed as a litigation tactic and to hinder, delay, and disrupt litigation that has been pending for approximately ten years between the Debtors and the Zolldans in the *Superior Court of Sierra County* (the "Superior Court") in an action entitled *Zolldan vs. Burr*, et al., assigned the Superior Court's Case No. 6310 (the "State Court Action").

The First Amended Plan is a Litigation Tactic

Debtors propose that they are not required to list their real property for sale until fourteen days after the release of the notice of pendency of action the Zolldans recorded in connection with the State Court Action and the resolution of the boundary line dispute and related obligations of the parties and the court action is resolved. The Zolldans argue that there is no basis on which the Debtors can say with reasonable certainty when the State Court Action will be finally resolved. The State Court Action involves the Zolldans' complaint and Debtors' cross-complaint alleging 18 causes of action involving numerous boundary line, easement, trespass and nuisance disputes and damages claims that have been litigated for 10 years, and yet not a single issue has been resolved other than a stipulation involving maintenance of a bridge. Upon reaching a settlement on bridge maintenance in 2004, the parties' agreed to bifurcate the remaining issues of the case, but tried the issues related only to the establishment of a common upper boundary line, while delaying all remaining other claims. A tentative decision was made in the upper boundary line trial in 2009 trial, a ruling that went in favor of the Zolldans and against the Debtors. However, no final ruling has been given on the tentative ruling. See Scheidt Decl., paras. 2-9.

The Zolldans state that the Debtors are proposing the First Amended Plan to leverage the Zolldans into settling the State Court Action or to hinder and delay the Zolldans' efforts to obtain and enforce a judgment in the State Court Action.

The Terms of the Proposed Sale of Real Property Are Unreasonable

Zolldans argue that Debtors have made no effort to locate a real estate agent for the sale of their real property and they have made no effort to market and sell their real property. They propose to engage the services of a real estate agent only after the First Amended Plan is confirmed, which may never occur or which may be delayed significantly. They propose to list their real property for sale only after the State Court Action has been finally resolved, which could take another two to three years. The Debtors propose that they be allowed to sell their real property on terms that are within their "business judgment."

Furthermore, the Debtors' real property is entirely unique, consisting of fifty-two acres of forested land with a home and appurtenant out buildings all located in a remote location. There is no established market for the real property and it is unrealistic to expect that the real property will be sold within a reasonable period of time after it is listed for sale. Without any guidance from a real estate agent or from the market place, there is no basis on which to form an opinion of the value of the real property or the time it may take to sell the real property.

The First Amended Plan is Designed Only to Assist the Debtors in Their Litigation of the State Court Action

The Zolldans assert that it is "readily apparent" that the First Amended Plan has been proposed for the purpose of assisting the Debtors in litigating the State Court Action and defeating the Zolldans in their litigation of the State Court Action. First, the First Amended Plan does not provide for any payments to the Zolldans from the Debtors' meager disposable income, if any. All of the Debtors' disposable income, if any, will be paid to Stoel Rives, the Debtors' trial attorneys in the State Court Action. Second, the First Amended Plan provides that the Debtors will pay Stoel Rives and the Waltz law firm from the unencumbered assets of their bankruptcy estate. There are no unencumbered liquid funds in the estate to make these payments (other than the Debtors' retirement funds), only real property and personal property. If these real property and personal property assets are liquidated to pay the administrative expenses of the attorneys' fees of the Debtors' professionals, then the funds from the sale of the Debtors' assets will be depleted and made unavailable to pay the claim of the Zolldans. By the time the State Court Action is fully litigated, there will be no funds available to distribute to the Zolldans based on the attorneys' fees paid by the Debtors pre-petition. They all will have been paid to the Debtors' attorneys as payment of administrative expenses.

Debtors' sale provisions of the Plan are designed to delay the Zolldans in the exercise of their provisional remedies and judgment enforcement remedies that they would otherwise exercise in the State Court Action to secure a source of payment of their judgment. Under the Plan, these remedies will be delayed for up to five years while the Debtors litigate with the Zolldans in the State Court Action and while the automatic stay remains in place. During this delay, the Debtors will incur substantial administrative expenses in attorneys' fees litigating the State Court Action.

The First Amended Plan is Not Feasible

The Zolldans argue that the Plan violates 11 U.S.C. section 1325(a)(6) because it is not feasible; it relies on the speculative outcome of a malpractice lawsuit the Debtors filed against their former attorney in the State Court Action and the speculative sale of the Debtors' real property pursuant to unreasonable terms for listing the real property for sale over an unreasonably long period of time.

The Plan proposes to pay the claim of the Zolldans in full from the sales proceeds of the Debtors' real property and the proceeds of the Debtors' malpractice lawsuit against Raymond Shine only after the State

Court Action is finally resolved, only after all of the Debtors' attorneys' fees incurred in the State Court Action have been paid in full, only after the Debtors have successfully recovered a judgment against Raymond Shine, and only after the Debtors have sold their real property over a period of five years. However, the Debtors have not begun to employ a real estate agent or to market their real property for sale. This real property has no established market, it is entirely unique, and it is located in a remote location.

The Zolldans state that the Debtors have provided no information regarding their malpractice lawsuit against Raymond Shine and it is probable that this lawsuit lacks any merit considering the nature of the lawsuit and the status of the State Court Action. The First Amended Plan amounts to nothing more than a contingent liquidation of the Debtors assets. The appropriate recourse for the Debtors, whose First Amended Plan is a liquidation, is Chapter 7, not Chapter 13. *In re Gavia*, 24 B.R. 573, 575 (B.A.P. 9th Cir. 1982). While a bankruptcy court may allow a debtor to sell real property to fund a plan (*In re Kincaid,* 316 B.R. 735, 742, n. 11 (Bankr. E.D. Cal. 2004)), the terms of sale cannot be speculative.

Bad Faith in Filing Plan

Fourth, the Zolldans argue that the Plan violates 11 U.S.C. section 1325(a)(7) because the action of the Debtors in filing their Chapter 13 petition was not in good faith when it is viewed under the totality of the circumstances.

Here, the Case involves essentially a two-party dispute between the Zolldans and the Debtors that can be resolved in the State Court Action. The Zolldans state the Debtors have no other bona fide creditors in the Case. The Debtors have no bankruptcy purpose in the Case; they have no arrearage to pay or other creditors to pay. Debtors also paid their children $104,000 in gifts and paid their other creditors $10,000 in full payment of their debts shortly before filing their bankruptcy case. The Zolldans accuse Debtors of timing the filing of their Chapter 13 petition to occur six days before a hearing was to be held in the State Court to determine the reasonable amount of the Zolldans' attorneys' fees.

The Zolldans state that Debtors have improperly claimed tools of the trade exemptions in personal property when they have no trade or business (but did not file an objection to claims of exemptions made by the Debtors). The Debtors have proposed the Plan to delay paying their indebtedness to the Zolldans for up to five years while paying their attorneys in full for pre-petition debt incurred in the State Court Action. The First Amended Plan provides for the Debtors to continue paying their attorneys from the assets of the estate while they litigate with the Zolldans, which could leave the estate with no funds to pay the Zolldans' claim.

CONSOLIDATED RESPONSE OF DEBTORS IN SUPPORT OF DEBTORS' MOTION TO CONFIRM THE FIRST AMENDED CHAPTER 13 PLAN

Debtors respond by stating that their First Amended Chapter 13 Plan proposes a feasible reorganization of their affairs, by paying allowed claims in full over 60 months through a mixture of payments from their

future income--together with the proceeds from the Debtors' nonexempt assets, including the sale of their real property and the liquidation of claims the Debtors hold against their former counsel, Raymond Shine.

Debtors state that the plan is confirmable because the Debtors are eligible for relief under Chapter 13. The purported claim held by the Zolldans is contingent because it is not the product of a final judgment and it is unliquidated because there is a bona fide dispute as to the reasonableness of the requested attorneys' fees. Moreover, the Debtors' schedules demonstrate that the Debtors have sufficient income to support the proposed plan payment.

Debtors insist that the bankruptcy petition was filed in good faith because, considering the totality of the circumstances, the Debtors do not have an interest in delaying the Zolldan Action—they merely have an interest in an orderly payment of allowed claims. The proposed sale of the Debtors' real property is reasonable under the circumstances because the property is unique and is burdened by the Zolldans' notice of pending action, requiring a longer marketing interval to obtain the highest and best price.

Debtors state that they have already moved to market the property by filing their application to retain a real estate broker. The Debtors hold a claim against Shine which they have properly asserted and which will be litigated in due course. Shine's attempt to create a conflict of interest between the Debtors and their counsel in the Zolldan Action and to distract the Court's attention from the matter is not evidence of bad faith on the part of the Debtors; Debtor characterize this as merely an attempt to make and end run around the public policy of this state. Debtors argue that the plan meets the liquidation analysis because the plan provides for payment of allowed claims in full. To the extent any allowed claim is paid less than the full amount due because of the payment of administrative expenses, such treatment does not violate the liquidation analysis because a Chapter 7 Trustee would also pay those expenses.

I. The Plan Meets the Requirements of 11 U.S.C. § 1325 (a) because Debtors are Eligible for Relief and the Schedules Demonstrate Regular Monthly Income to Fund a Plan

A. As of the Petition Date, the Zolldan Claim was Contingent and Unliquidated, so that the Claim is Ignored for Determining Debtor Eligibility

The amount of the debt for the purposes of eligibility is determined on the petition date. 11 U.S.C. § 109(e); *Slack v. Wilshire Ins. Co. (In re Slack*), 187 F.3d 1070, 1073 (9th Cir. 1999); *Scovis v. Henrichsen* (*In re Scovis*), 249 F.3d 975, 982 (9th Cir. 2001). Because here the amount of the reasonable attorneys' fees awarded to the Zolldans had not been determined by the Superior Court, the claim is unliquidated. A debt is liquidated if the amount of the debt is readily determinable. *Ho v. Dowell* (*In re Ho*), 274 B.R. 867, 873 (B.A.P. 9th Cir. 2002) (citing *Slack*, 187 F.3d at 1073).

A debt is readily determinable turns on whether the amount owed is easily calculable or whether an extensive hearing is needed to determine the amount of the debt. *Ho*, 274 B.R. at 873; see also *Nicholes v. Johnny*

Appleseed of Wash. (*In re Nicholes*), 184 B.R. 82, 89 (B.A.P. 9th Cir. 1995) ("The test for 'ready determination' is whether the amount due is fixed or certain or otherwise ascertainable by reference to an agreement or by a simple computation."). If the amount of claim is subject to a bona fide dispute, then the amount of the claim is not subject to a ready determination, and therefore is not liquidated. *FDIC v. Wenberg* (In re Wenberg), 94 B.R. 631, 634–635 (B.A.P. 9th Cir. 1988).

Debtors argue that here, the amount of the award to which the Zolldans' are entitled to recover is subject to a bona fide dispute. Under California law, the Zolldans are entitled to recovery only their reasonable attorneys' fees and costs as a prevailing party on the supplemental compliant. Cal. Civ. Code 1717(a). The Debtors dispute the amount of reasonable attorneys' fees and the matter has not yet been resolved by the Superior Court. Because a determination as to the reasonableness of the fee request has not been made by the Superior Court and because the reasonableness of the fees is subject to a bona fide dispute, the amount of the award is not liquidated. Nor is the judgment awarding the attorneys' fees final.

Debtors state the order from the Court of Appeal indicates that the judgment upon which the Zolldans' rely may be an interlocutory order and not finally determine the Debtors' liability. If the judgment is not final, then the purported claim held by the Zolldans is contingent because liability on the claim depends upon entry of the final order by the Superior Court.

B. The Debtors' Schedules Demonstrate That They Have Monthly Income To Support a Plan Payment.

Debtors state that their Amended Schedule I (Doc. No. 16 at 9–11) and Amended Schedule J (Doc. No. 45) demonstrate that Debtors have monthly net income of $1,218.34—an amount sufficient to fund their plan payment of $1,214.31. Debtors state that the Zolldans' allegation that the Debtors have "manipulated" their income and expenses by excluding business expenses and understating their living expenses is unsupported by any evidence and ignores the record before the Court. Specifically, Schedule I is supported by a statement showing the Debtors' business expenses, see Doc. No. 16 at 11, and Schedule J describes the Debtors' living expenses, see Doc. 45. The Zolldans do not even identify which expenses they believe are missing or are understated.

II. The Debtors Filed the Bankruptcy in Good Faith pursuant to 11 U.S.C. § 1325(a)(3) and (a)(7)

Debtors state that they commenced this case with the hope of reorganizing their affairs, a valid bankruptcy purpose. The Debtors continued to pay their debts as they came due to the best of their ability, which is consistent with their prior conduct. As the Debtors testified at the Meeting of Creditors, they made gifts to their children to help them in their time of need.

A. **Considering the Totality of the Circumstances, the Debtors Commenced This Case in an Effort to Reorganize Their Affairs, a Proper Bankruptcy Purpose.**

Debtors state that they merely want to resolve the state court litigation, which is why Debtors stipulated to relief from the automatic stay—to permit the underlying litigation to be promptly resolved so they may move forward with an orderly distribution of their estate and move on to the next phase of their lives.

Debtors have proposed to repay claims in full within five years of the petition date as authorized by law. Because marketing the property is dependent upon resolution of the underlying Zolldan Action, an action which has been pending for more than ten years and which the Debtors believed they had resolved once before, it is difficult for the Debtors to project when they will be able to bring the property to market. Debtors are committed, however, to bringing this case and the Zolldan Action to a prompt and equitable resolution. Debtors state that their pre-petition conduct was equitable and consistent and in good faith.

B. The Plan's Proposed Duration is 60 Months, Within the Term Authorized by Congress.

Trustee alleges there is confusion regarding the proposed term of the plan. Specifically, the Debtors propose to fund plan payments from the liquidation of their claim against Raymond Shine and the sale of the Ranch. The Trustee worries that these payments may not be made within he 60 month term of the plan and objects to a direct payment of the claims. The Debtors intent is to propose a plan with a maximum term of 60 months.

The Debtors propose to modify the plan's language to make clear that plan payments must be made within 60 months of the petition date—as required by the Bankruptcy Code—to require that ongoing payments are distributed on a pro rata basis toward allowed claims, that proceeds from the Shine Litigation and the sale of the Ranch will be deposited with the Trustee so the Trustee may make the required distributions, and to add a savings clause that voluntarily dismisses the case pursuant to § 1307(b) if the payments are not completed within 60 months upon declaration by the Trustee.

C. The Plan's Proposed Sale of the Ranch is Proper Considering the Circumstances.

The Debtors propose to sell the Ranch to raise additional liquid assets to fund plan payments. Specifically, the Plan provides for retention of a real estate broker and listing of the Ranch for sale on the occurrence of certain milestones in the case. See Plan § 6.03.

Debtors state that they have retained a real estate broker—ahead of schedule; the Debtors filed an application to approve the employment of High Sierra Realty as their real estate broker on June 23, 2014. Dckt. Nos. 80–83. The Debtors set the asking price based on their conversations with the proposed broker and are working with the broker to develop a marketing plan. Moreover, as demonstrated by the proposed listing agreement, the sale is subject to approval by the Bankruptcy Court. See Residential Listing Agreement § 21, Doc. No. 82 at 7.

Debtors assert that they are acting in the best interests of the estate to move forward with a prompt sale of the Ranch at the highest and

best price. While the Debtors retain the right to exercise their business judgment in accepting an offer, exercise of business judgment in the sale of estate assets by the party entitled to possession of the assets has long been recognized and upheld by the courts. See, e.g., *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (standard under 11 U.S.C. § 363(b)(1) is "business judgment"); *In re Pomona Valley Medical Group, Inc.*, 476 F.3d 665, 670 (9th Cir. 2007) (applying business judgment standard).

Debtors admit that the timing of the sale of the Ranch is bound up with the resolution of the Zolldan Action because the Zolldans recorded a Notice of Pending Action, preventing the Burrs from providing clean title to any successor. Given that the Burrs have already entered into one settlement agreement with the Zolldans on the record in open court—which resolved the lot line dispute—only to have the Zolldans subsequently refuse to execute the written agreement that memorialized that agreement, it is hardly equitable for the Zolldans to now complain about the time required to sell the property. The Debtors wish to resolve this decade-long dispute in an equitable manner and pay just claims against their estate as quickly as possible.

D. The Plan's Proposed Liquidation of the Claim Against Raymond Shine is Reasonable.

Debtors argue that Raymond Shine attempts to short circuit the litigation of the claim against him by arguing that the claim against him cannot serve as a source of recovery by the Burrs. This matter is more appropriately resolved in the litigation, not in an objection to confirmation of the plan. Any concerns about how the Shine Litigation progresses can be resolved by this Court since the Debtors are in the process of removing the Shine Litigation from the Superior Court to the Bankruptcy Court. Debtors characterize Shine's attempt to disqualify the Debtors' litigation counsel in the Zolldan Action is nothing more than an end run around the well-established public policy of California. *See Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537, 1541–1543 (1999) (discussing the strong public policy of California prohibiting an attorney sued for malpractice from seeking indemnification from a successor attorney in the same matter).

The Burrs retained their current counsel, Stoel Rives, after Shine "botched" the first phases of the Zolldan Action and failed to timely submit the Zolldan Action to the Burrs' title insurer. Debtors do not believe they currently possess a claim against Stoel Rives because (1) any purported malpractice in the complaint against Shine are curable and not prejudicial, and (2) they believe that Stoel Rives has ably represented them in the Zolldan Action in attempting to cure Shine's malpractice and bring the matter to a successful conclusion.

E. The Debtors' Schedules Disclose Their Assets and Liabilities.

Debtors state that they fully disclosed their interests in property, including their interest held by virtue of their living trust, on Schedules A and B. Debtors did not separately list their living trust on line 20 of Schedule B, which Debtors state is not material because they fully disclosed the assets of the living trust elsewhere on Schedule B and they provided the

Trustee with a copy of the trust agreement.

Debtors state that their schedules accurately describe the contingent, unliquidated, and disputed claim of Gary and Lina Zolldan; concerns regarding supplemental information regarding the Zolldan Action have been addressed by the extensive filings before this Court. The Debtors' accurately schedules accurately described their pre-petition interactions with their attorneys. The Debtors anticipate funding administrative expenses from the unencumbered assets of the estate, including the Debtors' interest in a money market and brokerage account valued at approximately $80,000, cash holdings of approximately $55,000, the Debtors' recovery from the pending Shine Litigation, and sale of the Ranch.

III. Debtors' Monthly Payments and Proceeds are Sufficient to Pay the Claims in Full

The Trustee also objects on the basis that the Debtor cannot make the proposed plan payments and that the plan does not meet the liquidation analysis. Debtors state that their schedules demonstrate that the Debtors can make the proposed plan payments, together with the Debtors history of making timely payments required by the Plan. Debtors state that they have liquid, nonexempt assets from which they may fund the administrative costs of the estate. The value of any claims against their children is compensated by the Debtors contribution of future income to the Plan, and any reduction in the distribution to unsecured creditors because of payments on account of administrative expenses does not violate the liquidation analysis. 11 U.S.C. §§ 507(a)(2), 726(a)(1).

DISCUSSION

In considering this Motion, the court finds the evidence to support the arguments of the Chapter 13 Trustee and Creditors – confirmation of the proposed Amended Plan is not proper under 11 U.S.C. §§ 1325 and 1322. While the court does not accept Debtors' arguments that the Zolldan's claim is unliquidated and contingent, that is not the determining issue in denying confirmation. The proposed Chapter 13 plan (1) is not feasible, (2) is not proposed in good faith, and (3) does not provide for any payment of claims as required under the Bankruptcy Code. As discussed below, the "Plan" is one in which the Debtors do nothing until Zolldans capitulates on its position in the decade old litigation and aggress to terms acceptable to the Debtors.

Plan Not Feasible

The court begins with the financial information provide by the Debtors for income and expenses. Without accurate, credible information, little ability exists for Debtors to confirm a Plan.

Amended Schedule I lists $1,700.00 in income for Errol D. Burr, which is from Social Security benefits. Amended Schedule I, Dckt. 16. Schedule I also states that Mr. Burr is "Disabled and Retired." For Suzanne Burr, Amended Schedule I states that she is a self employed independent contractor. She lists having $1,200.58 monthly net income from her business. The attachment to Amended Schedule I lists gross business income

of $1,696.00 and expenses of ($495.42), yielding the $1,200.58 monthly net income. Suzanne Burr is also shown to receive $1,100.00 a month for Social Security benefits. After allowing for a ($156.00) self employment tax expense, the Debtors' gross monthly income is $3,844.58.

Schedule J states that the Debtors have $1,218.34 in Monthly Net Income. Dckt. 45. Having disposable income to fund a Chapter 13 Plan is one of the elements to qualify as a Chapter 13 Debtor. 11 U.S.C. § 109(e); *In re Gavia*, 24 B.R. 573, 575 (B.A.P. 9th Cir. 1982). In reviewing Amended Schedule J there are questionable expenses provided for or excluded for this family of two persons, which include,

a. Food and Housekeeping Supplies.....($350.00)
b. Personal Care Products and Services.....($ 0.00)
c. Transportation.....($ 0.00) FN.1

FN.1. Schedule B lists the Debtors owning a Ford 350 Diesel, Kubota Tractor, 2006 Jeep Liberty and 2007 Toyota FJ Cruiser. Dckt. 1 at 16. The Burrs list vehicles insurance expenses of $178.33 a month and DMV Registration of $67.60 a month on Amended Schedule J. Owning and insuring vehicles, and then stating that there are no transportation expenses (such as gas and maintenance) is not credible.

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d. Taxes.....($ 0.00) FN.2.

FN.2. Schedule B filed by the Burrs state that they are to receive a $1,617.00 tax refund from the State of California and $5,392.00 from the Federal Government. This indicates that the Burrs made substantial tax payments in 2013. Also, it indicates that the Burrs may well have greater income than stated on Amended Schedule I.

The information on Schedules I and J show that the proposed plan is not feasible. The Burrs' expenses are not credible and appear to significantly understate the expenses. The income information is equally suspect, the Burrs receiving significant tax refunds for the 2013 tax year.

In addition to the financial information about the Debtors' income and expenses not being credible, the terms of the Plan itself demonstrate it is a feasible plan that complies with 11 U.S.C. §§ 1322 and 1325. The Chapter 13 Plan provides for the payment of $0.00 to the Class 1, Class 2, Class 4, Class 5, and Class 6 claims. No property is surrendered pursuant to Class 3. The Debtors provide that the Class 7 general unsecured claims will be paid a 100% dividend, based on an estimate of there being $65,572.34 in general unsecured claims. This $65,572.34 is one general unsecured claim which is owed to Stoel Rives, LLP, the Debtors' state court attorney. No amount is included for any other creditor, nor for Zolldan who has prevailed in their claims in the state trial court.

Thus, the plan is "feasible" if the Debtors are correct, and the state court is wrong, and the Debtors ultimately prevail on reconsideration or appeal. "Promising" to pay 100% on all unsecured claims while ignoring a creditor asserting a substantial claim against you does not make a plan

feasible.

The Debtors' Plan is that property will be liquidate at some future date, when the Debtors decide to sell the property. Any sale of property, which is necessary to fund a plan, requires Zolldan (with whom Debtors have litigated for more than ten years, to (1) voluntarily release the *lis pendens* concerning the disputed easement and boundary dispute and (2) agree with the Debtors on a resolution to the boundary dispute. After ten years of litigation, it is not feasible for the Plan to have a condition precedent of a consensual resolution of that litigation. FN.3.

FN.3. The court discusses below the additional plan funding provision of monies from the sale of property at some time during the next five years of the plan. Providing for money, when and if the Burrs decided that (1) they want to sell the property, (2) the time is right for them to sell the property, and (3) they like the price that they may receive for the property is not part of a feasible plan. Rather, it is part of a plan which is merely a possible payment after delaying any action for five years.

The Debtors also proposed to fund the plan with proceeds from the Shine Litigation. While not more than a decade old, the Shine litigation was filed in 2011 and has been stayed since that time. That is because the malpractice claim which the basis of that litigation turns on the conclusion of the Zolldan litigation. Stating that the Shine Litigation will fund the plan is not reasonable or a feasible method of funding the plan.

The court denies confirmation based on the evidence establishing that the Plan, as proposed, is not feasible.

The Plan is Not Proposed in Good Faith

It should be recognized that filing bankruptcy and prosecuting a plan to manage out of control state court litigation is not, in and of itself, an indication of bad faith. Many debtors are forced to deal with "wild plaintiffs" through the controlled environment of a Chapter 11, Chapter 12, or Chapter 13 Plan. The conduct of the debtors and what they propose to do in the bankruptcy case is objective evidence of whether the case is filed and being prosecuted in good faith.

The terms of this plan do not provide for all or a portion of future earnings or other future income of the Debtors which will be necessary for the execution of the Plan. 11 U.S.C. § 1322(a)(1). Instead, the Plan provides for an unrealistic amount of projected disposable income to be paid into the plan. The "real money" is to come from the liquidation of the Debtors' real property.

While this court has readily confirmed Chapter 13 Plans which fund a portion (even a majority of the monies) from the sale of property, such is done on a commercially reasonable time line. Here, no money from the sale of any property is to fund the plan until Zolldan agrees to settle the more than ten year old litigation with the Debtors. No provision is made for paying the Zolldan claim, unless and until Zolldan enters into an agreement

with the Debtors.

Rather than providing for payment, the proposed Plan merely allows the Debtors to not pay the claim until it is on the terms that the Debtors dictate in a settlement. That is not a good faith prosecution of a Chapter 13 Plan.

The Chapter 13 Plan does not comply with the requirements of Chapter 13. 11 U.S.C. § 1325(a)(1). As discussed above and in this section, the Plan is not prosed in good faith. 11 U.S.C. § 1325(a)(3). Rather, it is advanced as a thinly veiled permanent injunction to preclude Zolldan from enforcing rights in the state court.

The Chapter 13 Plan does not meet the Chapter 7 liquidation test in that at least one creditor, Zolldan, will be paid only what the Debtors determine is Zolldan's claim (settlement with Debtors required as a condition of selling property to pay the claim). 11 U.S.C. § 1325(a)(4). In a Chapter 7 case Zolldan would be paid on its unsecured claim as it exists, and not be required to agree to an amount set by the Debtors.

The Debtors disclose in their Statement of Financial Affairs that within the one-year period prior to the commencement of the bankruptcy case they made a $52,000.00 gift to their son and a $52,000.00 gift to their daughter. No provision is made in the Chapter 13 Plan to recover these transfers, or protect them for the estate, as possible fraudulent conveyances under 11 U.S.C. § 548. Rather, they are just ignored under the Plan. While the court appreciates the Debtors' candor in disclosing the transfers (notwithstanding the federal crime for making false statements under penalty of perjury on bankruptcy schedules), it appears that the Debtors attitude to be that the transfers were made, we wanted out kids to take our money, now we just move on. This cavalier attitude is consistent with the illusory plan terms whereby provision is made for the Zolldan claim if, and when, Zolldan agrees to terms set forth by Debtors.

Debtors Plan frees them from even listing their real property for sale until fourteen days after the release of the notice of pendency of action the Zolldans recorded in connection with the State Court Action and the resolution of the boundary line dispute and related obligations of the parties and the court action is resolved. Thus, by this term the Debtors seek to embed in a Chapter 13 Plan a requirement that they do not have to try and sell the property until the Zolldan capitulate and remove the notice of their asserted interest in the property. Further, Zolldan must agree to settle the more than ten year old litigation on terms that are acceptable to (or dictated by) the Debtors. This is not evidence of prosecution of a bankruptcy plan in good faith, but a plan intended to circumvent the Bankruptcy Code and avoid paying bona fide claims. It appears that facing the end of the road in state court (the hearing on determination of the amount of attorneys' fees), the Debtors' strategy switched to using the Bankruptcy Code to impose an indefinite plan injunction on Zolldan enforcing their rights.

After more than ten years of litigation and then not having to even attempt to sell the property until Zolldan agrees to terms with Debtors, the Plan give the unfettered discretion to Debtors in selling the property to

whomever they want at whatever price the Debtors determine is proper in the exercise of the *Debtors' business judgment*. There is no provision for the sale to either be approved by the court pursuant to 11 U.S.C. § 363 or that the sale will be made consistent with the provisions of that section. Even after a settlement, the Debtors could sell the property to a friend, family member, or other friendly insider for a nominal price and avoid paying even the amount capitulated to by Zolldan after being brought to their knees by the indefinite Plan injunction. This is not a plan proposed or prosecuted in good faith.

In addition to not being feasible, the proposed Amended Chapter 13 Plan is not proposed in or prosecuted in good faith.

Confirmation of the Amended Chapter 13 Plan is denied.

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

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

35. 12-38173-E-13 DANIEL/REBECCA BODENHAMER
NSV-3 Nima S. Vokshori

MOTION FOR COMPENSATION BY THE LAW OFFICE OF VOKSHORI LAW GROUP, APLC FOR N. STEPHEN VOKSHORI, DEBTORS' ATTORNEY(S) 5-28-14 [89]

Final Ruling: No appearance at the July 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 28, 2014. By the court's calculation, 34 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(6) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirements.) The court shortens the notice period one day.

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

The Motion for Allowance of Professional Fees is granted.

FEES REQUESTED

Stephen Vokshori ("Applicant"), Counsel for Daniel Bodenhamer and Rebecca Bodenhamer, the Chapter 13 Debtors ("Clients"), makes a Request for the Allowance of Fees and Expenses in this case. Applicant seeks $1,450.00 in additional fees and $85.44 in additional expenses for unanticipated post-confirmation services provided to the Debtors in their bankruptcy case.

Applicant provides a short description of the work performed, and attaches billing statements as exhibits in support of this Motion. Dckt. No. 91.

Applicant states that he has served as attorney for the Debtors since October 10, 2012. On October 10, 2012, Applicant received a retainer of $2,000.00. As reflected in the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" document and in the Bankruptcy Rule 2013(b) disclosure statement, applicant, the Debtors agreed that the initial fee for

legal services and expenses in connection with this Chapter 13 case would be $3,500.00. To date, no additional fees have been allowed by orders of this Court.

Applicant asserts that the initial agreed-upon fee, as well as additional fees previously allowed, are not sufficient to fully compensate the attorney for the legal services rendered. Applicant files his time sheets in support of this Motion as "Exhibit A" which detail all tasks performed in connection with this Chapter 13 case.

Applicant seeks additional compensation for "necessary, substantial, and unanticipated post-confirmation services." Specifically, on September 18, 2013, the Trustee filed a Motion to Dismiss, after the Debtors' Plan had been confirmed in February 25, 2013, due to debtors' plan payment default. In response, Counsel for the Debtors drafted and filed a modified plan, and a motion to confirm the plan, which was granted by the Court at the hearing held on December 10, 2013. Civil Minutes, Dckt. No. 83.

On September 6, 2014, the Trustee filed a statement of non-opposition to Applicant's Motion for Compensation.

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or
(ii) services that were not--
(I) reasonably likely to benefit the debtor's estate;
(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, is obligated to consider:

> (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits for the estate included responding to a Motion to Dismiss filed by the Trustee for the Debtors' default in their plan payments, by reviewing with clients their monthly expenses, income, and checking payment ledgers in devising and preparing a modified Chapter 13 Plan. Counsel calculated modified plan payments, drafted Amended Schedules I and J, assembled evidence to fulfill the burden of proof of confirmation of a plan by preparing declarations, responding to the Trustee's Objections, and communicating with the Debtors on their financial circumstances. These efforts led to the successful confirmation of the Debtors' modified Plan on December 17, 2013. Civil Minutes, Dckt. No. 84.

The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES ALLOWED

The fees request are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Managing Attorney, Stephen Vorkshori	0	$350.00	$0.00
Associate Attorney, Ryan Stubbe	5.8	$250.00	$1,450.00
Support Staff	0	$125.00	$0.00
Total Fees For Period of Application			$1,450.00

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. Fees in the amount of $1,450.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $85.44.00 pursuant to this applicant.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage/Mailing - Service Package (Motion to Confirm First Modified Plan, First Modified Plan, and Supporting Documents)		$82.56
Postage/Mailing - Reply to Opposition to Motion to Dismiss		$2.88
Total Costs Requested in Application		$85.44

The Costs in the amount of $85.44 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee under the confirmed plan from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

Applicant is allowed, and the Chapter 13 Debtor is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$1,450.00
Costs and Expenses	$ 85.44

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Stephen Vokshori ("Applicant"), Attorney for 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 Stephen Vokshori is allowed the following fees and expenses as a professional of the Estate:
>
> Stephen Vokshori, Counsel for the Chapter 13 Debtors
>
> Fees in the amount of $ 1,450.00
> Expenses in the amount of $ 85.44,
>
> **IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

36. 14-25674-E-13 MS-1 | **VALERIY/VALENTINA PANASYUK**
Mark Shmorgon | **MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.**
5-30-14 [8]

Final Ruling: No appearance at the July 1, 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, parties requesting special notice, and Office of the United States Trustee on May 30, 2014. By the court's calculation, 32 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.

The Motion to Value filed by Valeriy Panasyuk and Valentina Panasyuk, "Debtors" to value the secured claim of "Creditor" is accompanied by Debtors' declaration. Debtors are the owner of the subject real property commonly known as 7772 Heathston Court, Antelope, California, "Property." Debtors seek to value the Property at a fair market value of $165,000.00 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 $217,837.19. Creditor's second deed of trust secures a claim with a balance of approximately $39,762.72. 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 Valeriy Panasyuk and Valentina Panasyuk, "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., secured by a second in priority deed of trust recorded against the real property commonly known as 7772 Heathston Court, Antelope, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $165,000.00 and is encumbered by a senior liens securing a claim in the amount of $217,837.19, which exceed the value of the Property which is subject to Creditor's lien.

37. 09-44080-E-13 CARRIE ROSELL
CYB-2 Candace Y. Brooks

MOTION TO APPROVE LOAN MODIFICATION
6-17-14 [57]

Tentative Ruling: The Motion to Approve Loan Modification 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 all creditors, parties requesting special notice, the Chapter 13 Trustee, and the Office of the United States Trustee on June 17, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Approve Loan Modification 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 Court's Decision is to set an evidentiary hearing on the Motion to Approve Loan Modification for ----- x.m. on --------, 2014. Debtor shall subpoena representatives of the creditor and loan servicer, and all such documents as Debtor believes necessary, to establish the identity of the creditor [as defined in 11 U.S.C. § 101(1)] for approval of the loan modification is requested.

The Motion to Approve Loan Modification filed by Debtor Carrie L. Rosell ("Debtor") seeks court approval for the Debtor to incur post-petition credit. Debtor states that she is seeking permission to obtain credit for the purpose of modifying the existing mortgage on her residence in order to lower her payment on her existing mortgage loan. Debtor claims that she has been approved for a permanent modification on her existing mortgage loan.

Debtor acknowledges that her current mortgage loan is with HSBC Bank USA, N.A. as Trustee for ACE Securities Corp. Home Equity Loan Trustee, Series 2006-OPI Asset Backed Pass-Through Certificate (which she identifies as the "lender"), and that this entity is the holder of the first deed of trust against Debtors' real property located at 3900 Kern Street, Sacramento, California.

The Motion states that Debtor's attorney contacted Megan Lees of Pite Duncan, who is the attorney of record for HSBC Bank USA, N.A. as Trustee for ACE Securities Corp. Home Equity Loan Trustee, Series 2006-OPI Asset Backed Pass-Through Certificate regarding the loan modification agreement listing Ocwen Loan Servicing, LLC, as a creditor. Ms. Lees advised, however, that she does not represent Ocwen Loan Servicing, LLC. Debtor's Counsel contacted Ocwen Loan Servicing, LLC, and was directed to Trupti M. Acharya, who has been assigned as the Debtor's relationship manager, and attempted to obtain documentation regarding authority of Ocwen to enter into a modification agreement.

The Motion states that Ms. Acharya did not understand the issue regarding the loan agreement being named as the servicer. Debtor's counsel then requested that she be directed to counsel, but was not successful. Debtor's counsel has filed this Motion in an attempt to satisfy the requirement pursuant to the loan modification offered to the Debtor.

Debtor states that she has been approved for a new permanent loan modification. The amount payable under the Note and Security Instruments is $226,856.50. $102.406.50 of the new principal balance shall be deferred, and Debtor will not pay interest or make monthly payments on this amount. The new principal balance less the deferred principal balance shall be referred to as the interest bearing principal balance and this amount is $124,450.00. There is a balloon payment disclosure attached to the modification agreement. The disclosure provides that the deferred principal balance will decrease, provided the Debtor remains eligible for the principal reduction for the time period specified in 3(C) of the filed Agreement.

The new monthly payment will be $921.47 beginning on June 1, 2014, and continuing hereafter on the same day of each succeeding month until the interest bearing principal balance and all accrued interest has been paid in full. The yearly rate of 4.875% will remain in effect. A copy of the Loan Modification Agreement was filed as Exhibit "A" in support of the Motion. Exhibit A, Dckt. No. 61.

INCORRECT PARTY TO LOAN MODIFICATION

Unfortunately, the Debtor and Debtor's counsel themselves are uncertain whether the entity who has entered into the subject loan modification agreement with Debtor, Ocwen Loan Servicing, LLC, has the authority to modify the obligation admittedly held by HSBC Bank USA, N.A., serving as the Trustee for ACE Securities Corp. Home Equity Loan Trustee, Series 2006-OPI Asset Backed Pass-Through Certificate. Although the court recognizes the efforts of Debtor's counsel to obtain documentation regarding the authority of Ocwen Loan Servicing, LLC, to enter into the agreement, the parties have still not demonstrated that Ocwen Loan Servicing, LLC, is the holder of the underlying claim. Although it is the party contracting with

the Debtor to modify the subject loan, the court is uncertain that this acknowledged loan servicing company, an agent for the actual creditor, can enter into the loan modification agreement that Debtor seeks to be approved.

The parties have not provided credible evidence that Ocwen Loan Servicing, LLC is the creditor or that it is authorized as the named principal to modify this loan. The court cannot approve an loan modification that will not be effective against the actual owner of the obligation, which Debtor admits to be HSBC Bank USA, N.A., acting as the Trustee for ACE Securities Corp.

The Loan Modification Agreement identifies Ocwen Loan Servicing, LLC as the "Servicer," and does not indicate that it is the actual creditor to enter into a contract to modify the Loan. Dckt. No. 61. While the Loan Modification Agreement clearly identifies and requires proof of identity for the Debtor, the signature block for the "creditor" who has the claim only lists "Mortgage Electronic Registration Systems, Inc. – Nominee for Servicer" as signing the contract. The court does not know what it means to be "nominee of servicer," what agency powers such a "nominee" may have, and how the nominee of the servicer is the creditor or authorized to bind the creditor (who is not disclosed in the Loan Modification Agreement).

The court has now been presented with multiple instances of different loan servicing companies misrepresenting 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 case the loan servicing company was merely that, 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.

This court has made it clear on many occasions that it can and will only issue orders against parties properly named in motions and for which there is a colorable basis for the court issuing an order effecting the rights of such party. The Debtor provides no evidence for the court to determine that this loan servicing company is a creditor in this case. The Debtor does not testify that they have borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred to Ocwen Loan Servicing, LLC.

Though the Debtor is ordering Ocwen Loan Servicing, LLC, OneWest Bank, FSB, and several others to appear and respond to this issue of identity of the creditor and loan servicer, that will not promptly address the issue for this poor consumer debtor. The proper solution is to allow this Debtor to have an evidentiary hearing and subpoena the creditor and servicer to appear and produce the necessary documents to establish the real party with whom the Debtor is entering into this Loan Modification.

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

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

B. Carrie Rosell, Movant, shall lodge with the court and serve their Testimony Statements and Exhibits on or before -------, 2014.

C. Any persons desiring to file any responsive pleadings to the Motion shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 2014.

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

38. 14-20181-E-13 DANTE THOMAS **MOTION TO CONFIRM PLAN**
MHL-1 **5-22-14 [40]**

CASE DISMISSED 5/28/14

Final Ruling: The case having previously been dismissed, the Motion is denied 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 denied as moot, the case having already been dismissed.

39. 12-38183-E-13 EMIR/JILL MACARI MOTION TO MODIFY PLAN
GG-2 Gerald B. Glazer 5-13-14 [38]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 13, 2014. By the court's calculation, 49 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. In this instance, the Chapter 13 Trustee opposes confirmation of the Plan for two reasons.

First, the Trustee is uncertain of the percentage proposed to unsecured claim holders. Debtors' Motion and Declaration state that Debtors' modified plan is a 100% Plan, while Section 2.15 of the Modified Plan proposes 0% to unsecured claim holders. To date, the Trustee has disbursed $267.20 to unsecured claim holders under the confirmed plan, which is a 100% plan.

Second, the Trustee is uncertain as to how Debtors will afford the proposed increase in plan payments. Debtors' modified plan proposes plan payments of $4,635.00 for 24 months, $5,135.00 for 6 months, then $5,935.00

for 30 months. Debtors' plan payments under the confirmed plan are $4,635.00 for 60 months.

Debtors' last Schedules I and J, filed on October 25, 2012, support a plan payment of $4,635.00. Debtors' Motion and Declaration provide no information as to how Debtors will afford the proposed income in plan payments and Debtors did not file Amended Schedules I and J showing their current income and expenses.

DEBTORS' REPLY TO OPPOSITION

Debtors respond by stating that they are willing to put in the order confirming the Modified Plan that unsecured claim holders will be paid 100% (Dckt. No. 49), but do not address Trustee's concerns regarding whether Debtors will be able to afford the gradual increase in plan payments called for in their proposed plan. Debtors have not filed up-to-date Schedules I and J, demonstrating that they will be able to afford the increased payments that come due after the 24th month of the Plan.

Thus, 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.

40. 14-24186-E-13 DPC-1 RICHARD/JUDY HUTCHINSON Matthew J. Gilbert

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 6-5-14 [24]

Final Ruling: No appearance at the July 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on May 21, 2014. By the court's calculation, 34 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). Consequently, the creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's decision is to overrule the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtors cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). Trustee states that the plan relies on the pending Motion to Value the Secured Claim of JPMorgan Chase Bank, N.A.

The court having granted the Motion to Value the Secured Claim of JPMorgan Chase Bank, N.A. on June 24, 2014 (Civil Minutes, Dckt. No. 28), the Trustee's singular objection is resolved. The Trustee's objection is overruled.

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 Trustee's Objection to Confirmation of Plan is overruled. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by

the Trustee shall be lodged with the court.

41. 14-24288-E-13 DPC-1 DARREN/MICHELLE MURPHY Mikalah R. Liviakis

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 6-5-14 [19]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors and Debtors' Attorney on June 5, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to sustain the Objection.

The Chapter 13 opposes confirmation of the Plan for two reasons. First, Debtor Michelle Murphy failed to appear at the First Meeting of Creditors held on May 29, 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 has been continued to June 26, 2014 at 10:30 am.

Second, Debtors' plan fails to provide for the secured claim of the Internal Revenue Service (Proof of Claim No. 1), which indicates that the IRS has a secured debt of $16,626.95, and $63,065.51 of unsecured debt. Debtors list this creditor on Schedule E as unsecured for $38,406.57, and provide for it as Class 5 debt through the plan for only $1.00.

While the 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 Debtors either cannot afford the payments called for under the Plan because they have additional debts, or that Debtors want to conceal the proposed treatment of a creditor.

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.

42. 11-26889-E-13 MOHAMMED/NAZMA BARI — MOTION TO MODIFY PLAN
PR-3 Patrick Riazi — 5-30-14 [99]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 30, 2014. By the court's calculation, 32 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. Here, the Chapter 13 Trustee opposes the proposed plan for two reasons. First, Debtors filed two proposed modified plans, on May 29, 2014 and May 30, 2014, that appear to be identical. The supporting Motion, Dckt. No. 99, does not address the date that the proposed plan was filed.

Second, the Trustee is uncertain whether the Debtors can make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6). It appears that the Debtors' current Schedule I, Dckt. No. 103, reflects the same figures as Schedule previously filed on August 29, 2011. Dckt. No. 54. Trustee questions if Debtor is continuing to receive unemployment benefits in the amount of $1,476.00. Additionally, Debtors' current Schedule J, Dckt. No. 103, pages 4-5, appear to be incomplete. No expenses are provided for Clothing, Laundry, Dry Cleaning, Personal Care Products and Services, Medical and Dental, and Entertainment. This does not appear to be credible, or that the statement of expenses is truthful. Rather, it appears

that the "expenses" are a mere fabrication to create the illusion that the plan can be performed. If the court were to draw an inference from the evidence presented, it would be that the Debtors have greater income than disclosed and that such income is being diverted outside the plan.

The modified Plan currently 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.

43. 14-22789-E-13 JME-1 — DAVID COTA AND KAREN SLAVICH-COTA — Julius M. Engel — MOTION TO CONFIRM PLAN 5-16-14 [23]

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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2014. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and

Federal Rule of Bankruptcy Procedure 2002(b). 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 opposes confirmation of the Amended Plan.

The Trustee opposes confirmation on the following grounds:

1. Debtors cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6) because the Plan relies on the Motion to Value the Secured Claim of Wells Fargo Home Mortgage, which has not yet been set for a hearing. Debtors' plan does not have sufficient monies to pay the claims in full.

2. While the plan proposes to pay the attorney $2,000.00 through the plan under Local Bankruptcy Rule 2016-1(c), the Disclosure of Compensation of Attorney for Debtors appears to list that attorney services do not include some services required under that rule, such as a relief from stay action. Counsel appears to be effectively opting out of Local Bankruptcy Rule 2016-1(c), and Trustee will oppose attorney fees being granted under that section. This means that Counsel will have to file a motion for attorney fees.

3. Trustee is unable to determine whether Debtors can make the payments under the plan or comply with the plan under 11 U.S.C. § 1325(a)(6). The Motion and declaration conflict with the plan.

   a. Debtors' amended plan calls for payments of $3,850.00 for 1 month, $4,200 for months 2-10 and $4,375 for months 11-60. In the declaration, Debtors state that their disposable income is $3,850.00. Debtors are admitting that they cannot afford their plan, and fail to indicate how they propose to increase the plan payments or even why an amended plan has been proposed.

   b. Debtors' Motion refers to the plan filed on March 19, 2014. However, Debtors filed their First Amended Plan on May 16, 2014. Trustee is uncertain which plan the Debtors are attempting to confirm.

4. The Plan fails the Chapter 7 liquidation analysis under 11 U.S.C. § 1325(a)(4). Debtors' non-exempt equity totals at least $17,920.00 and the Debtors are proposing a 6% dividend to unsecured creditors, which will pay approximately $3,573 to general unsecured claims. Non-exempt equity consists of $17,920.80 in stock. Debtors also list an account with Golden One Credit Union, #9950-0, which is described as savings/retirement account with a balance of $0.00, but has a note underneath asking attorney to ask "debtor for amount

invested into this account." Schedule B, Court Dckt. No. 1, page 17. It appears that Debtor have an additional amount in the Golden One Bank that is not exempt. Debtors' plan will pay in a sufficient amount to satisfy liquidation; the plan dividend of 6% is insufficient.

5. Section 6 of the plan specifically states, other than to insert text into designated spaces, the form has not been altered. In the event there is an alteration, it will be given no effect. It further states, Debtors may propose additional provisions that modify the preprinted text. All additional provisions shall be on a separate piece of paper appended at the end of this plan. Debtors have inserted a section 6.1 above the signature lien, rather than attaching a separate page for their provisions, and as such they should be given no effect.

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.

44. 14-24589-E-13 LETICIA ROJAS **OBJECTION TO CONFIRMATION OF**
DPC-1 Aaron C. Koenig **PLAN BY DAVID P. CUSICK**
6-5-14 [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 June 5, 2014. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The court's decision is to overrule the Objection.

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the Plan does not provide for the secured debt of the US Department of HUD ("Creditor"). This debt is not disclosed in Debtor's Schedules or the Plan. Creditor filed a secured claim, Proof of Claim No. 1, for $12,779.37. According to the Claim attachments, the loan appears to be secured by a subordinate deed of trust on Debtor's real property, located at 4928 1st Parkway, Sacramento, California.

While the 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 Debtor either cannot afford the payments called for under the Plan because they have additional debts, or that Debtor wants to conceal the proposed treatment of a creditor.

REPLY BY DEBTOR

Debtor responds by stating that the secured creditor holds a subordinate deed of trust. The total amount owed on the Creditor's claim is $12,779.37. Dckt. No. 22.

Under the terms of the note no payment is due until the year 2040 as long as the following conditions have not occurred:

a. The Borrower has paid off the primary mortgage in full;

b. The maturity date of the primary Note has been accelerated, or the Note and related mortgage, deed of trust or similar Security Instrument are no longer insured by the Secretary; or

c. The property is not occupied by the purchaser as his or her principal residence.

Here, Debtor states that none of these conditions have occurred. The primary mortgage has not been paid in full, the maturity date of the primary Note has not been accelerated, and the property is occupied by the purchaser as her primary residence.

It appears from the Subordinate Deed of Trust attached to Claim No. 1, the sums due under the note are not due until June 1, 2040. The deadline to pay all amounts remaining unpaid is not accelerated until one of the above-listed events have occurred. The Debtor's failure to include the secured claim in Debtor's Chapter 13 Plan does not render the plan non-confirmable. Dckt. No. 23 at 9. The Objection is overruled.

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. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

45. 14-20091-E-13 MARLENE MCCRARY **MOTION TO MODIFY PLAN**
DBJ-2 **5-21-14 [26]**

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> A Motion to Modify Plan having been filed by the Chapter 13 Debtor, the Chapter 13 Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Modify Plan is dismissed without prejudice.

46. 14-23793-E-13 TUAN DOAN **OBJECTION TO DEBTOR'S CLAIM OF**
DPC-1 Dale A. Orthner **EXEMPTIONS**
5-27-14 [27]

Final Ruling: No appearance at the July 1, 2014 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on May 27, 2014. By the court's calculation, 35 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). 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 sustain the Objection to Debtor's Claim of Exemptions.

Debtor has claimed California Civil Code of Procedure § 704.100 to exempt interest in Ameriprise Variable Universal Life Policy in the amount of $12,200. The state allowance for an exemption of an unmatured life policy totals $9,700.00.

The Trustee states that the Debtor has over-claimed his exemption by $2,500.00. Trustee requests that the court disallow the Debtor's claim for exemption by $2,500.00.

DISCUSSION

California Civil Code of Procedure § 704.100 permits debtors to claim exemptions on unmatured life insurance policies (including endowment and annuity policies), in an aggregate loan value subject to the enforcement of a money judgment, but exempt in the amount of nine thousand seven hundred dollars ($9,700). Civ. Proc. Code § 704.100.

Here, Debtor has claimed an exemption of $12,200.00 under California Civil Code of Procedure § 703.140(b) 704.100 in an insurance policy described on Debtor's Schedule C as "Ameriprise Variable Universal Life, $2M face value, $116,584.39 loan against..." This exceeds the exemption amount allowed for unmatured insurance policies under California Civil Code of Procedure § 704.100. The Debtor has not revised his schedules to exempt an amount permitted by Section 704.100.

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 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 sustained, and the exemption claimed in the Ameriprise Variable Universal Life insurance policy in Debtor's Schedule C stated in the amount of $12,200.00 is disallowed in the amount of $2,500.00, thereby reducing the exemption to $9,700.00 as permitted by California Civil Code of Procedure § 704.100.

47. 13-30296-E-13 EUBLOGIO OLIVARES **MOTION TO CONFIRM PLAN**
SJS-5 Scott J. Sagaria **5-14-14 [73]**

Final Ruling: No appearance at the July 1, 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 14, 2014. By the court's calculation, 48 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 May 14, 2014 is confirmed, and counsel for the Debtor shall prepare an appropriate order

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