

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

August 20, 2013 at 3:00 p.m.

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1. [09-31203](#)-E-13 ALFREDO DATANGEL OBJECTION TO CLAIM OF  
NLE-1 Jason S. Buckingham CITIMORTGAGE, INC, CLAIM NUMBER  
5  
7-1-13 [[65](#)]

Local Rule 3007-1(c)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, respondent creditor, and Office of the United States Trustee on July 1, 2013. By the court's calculation, 50 days' notice was provided. 44 days' notice is required.

**Final Ruling:** This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(c)(1) and (d). 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 Objection to Proof of Claim number 5-2 of CitiMortgage, Inc. is sustained and the claim is disallowed in its entirety.** No appearance required.

The Proof of Claim at issue, listed as claim number 5-2 of CitiMortgage, Inc. ("Creditor") on the court's official claims registry, asserts \$79,569.31 claim. The Chapter 13 Trustee objects to the Proof of Claim on the basis that the Creditor previously withdrew the original claim No. 5, and then subsequently filed the present claim on June 10, 2013. This amended proof of claim appears to be a copy of the original proof of claim with the addition of the cover page and striking all but the last four numbers of the loan number after a motion to restrict access. The claim was filed as secured, although the claim has been previously valued at \$0.00. The Trustee argues that the new claim is untimely, as the bar date for non-governmental units to file claims was October 14, 2009.

The Trustee argues that insufficient funds are left to be paid into the plan to pay the minimum 12% provided for in the latest confirmed plan. Trustee

August 20, 2013 at 3:00 p.m.

states \$3,052.53 remains left to be paid into the plan, leaving slightly more than \$2,747.27 available for distribution. Trustee asserts \$1,750.00 has previously been distributed to the debtor's attorney, \$792.99 to the Trustee and \$13,196.93 to general unsecured claims who had not previously withdrawn their claims.

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 the docket reveals that Creditor filed a Withdraw of Claim No. 5 on June 8, 2009, in the sum of \$79,569.31. Dckt. 27. The deadline for filing a Proof of Claim in this matter was October 14, 2009. The creditor's "amended" claim was filed June 10, 2013. However, since Creditor filed a withdraw of claim, the "amended" claim filed is in actuality a newly filed claim. As the bar date for filing claims in this case has passed, the claim is untimely.

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

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

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

The Objection to Claim of CitiMortgage, Inc. filed in this case 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 objection to Proof of Claim number 5 of CitiMortgage, Inc. is sustained and the claim is disallowed in its entirety.

2. [13-28203-E-13](#) LANCE/LISA MCKINNEY  
NLE-2 Jason Borg

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
7-25-13 [[17](#)]

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 July 25, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan fails the Chapter 7 Liquidation Analysis. Trustee argues that the Debtor's non-exempt equity totals at least \$42,082.45 and the Debtor is proposing a 39% dividend to unsecured creditors, which totals \$22,169.49 based on the estimate in the Debtor's plan. The Trustee states the following are non-exempt assets in this case:

(1) \$7,920.00 child support arrears;

(2) \$36,318.00 remains non-exempt in the real property at 9124 Launa Place Way, Elk Grove, California;

(3) the Debtor has failed to exempt \$1,272.00 in a checking and savings account;

(4) Debtor has claimed \$1,992.45 in exemptions in a Wells Fargo Custom Management Checking Expense Account, Wells Fargo Advantage Business Checking and Wells Fargo Business Market Savings accounts, to which the Trustee has objected; and

(5) \$2,500.00 from a Judgment by Annette Reyes.

The proposed plan having failed the Chapter 7 Liquidation Analysis, the plan cannot be confirmed pursuant to 11 U.S.C. § 1325(a)(4).

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.

3. [13-22012](#)-E-13 KENNETH/KRISTINE THOMPSON MOTION TO CONFIRM PLAN  
PGM-1 Peter G. Macaluso 7-3-13 [[41](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee objects on the grounds that the Debtor's plan fails the Chapter 7 Liquidation analysis. The Debtors propose no less

than 7.20% dividend to unsecured creditors, which totals \$13,534.04, but the Debtors have failed to list the business bank account on Schedule B and exempt any equity on Schedule C. The Trustee states he raised this issue in his prior Objection to Confirmation, which was sustained on April 23, 2013.

Debtor responds, stating the account is listed on Schedule B, but no value is assigned to the balance of the account. Debtor states the account is used by the business to pay ongoing monthly expenses and is included in the value of the business. As such, Debtor argues there is nothing to exempt.

The Debtor having addressed the Trustee's objection, the court grants the motion.

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 Motion to Confirm the Plan is granted, Debtor's Chapter 13 Plan filed on July 3, 2013 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. [11-31314](#)-E-13 EDWARD/TIFFANY LOVERIDGE MOTION TO MODIFY PLAN  
SJS-1 Scott J. Sagaria 7-16-13 [[32](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

**Final Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Confirm the Modified Plan is granted.** No appearance required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 16, 2013 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.

5. [11-48418](#)-E-13 MATTHEW HOGUE  
JT-2 John A. Tosney

MOTION TO MODIFY PLAN  
7-8-13 [[54](#)]

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, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 8, 2013. By the court's calculation, 43 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Trustee opposes confirmation offering evidence that the Debtor is \$870.00 delinquent under the terms of the proposed plan. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

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

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

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

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

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

6. [10-27622-E-13](#) TIMOTHY WOOD AND ANNE MOTION TO SPLIT/SEVER CHAPTER  
DBJ-4 MURPHY 13 CASE  
Douglas B. Jacobs 7-16-13 [[79](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion to Sever 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). 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 Sever the Debtors from the joint bankruptcy case to two individual bankruptcy cases is granted.** No appearance required.

Debtors seek an order bifurcating their Chapter 13 case, as the Debtors are in the process of dissolving their marriage. Debtors assert that as soon as the cases are bifurcated, Ms. Murphy will move to convert her case to one under Chapter 7 and Mr. Wood will move for a modification of the plan in his Chapter 13 case.

The Chapter 13 Trustee responded, noting that Debtors did not address if there is a domestic support obligation between them or support for the four minor children listed in Schedule I. Trustee notes that the bifurcation is routinely accomplished when one Debtor converts to a Chapter 7 proceeding, but neither Debtor has done so.

Debtor filed a response, confirming that Mr. Wood will continue the Chapter 13 plan, remain in the home, and Ms. Murphy will convert her case to one under Chapter 7. The children will reside with their mother, and Mr. Woods will move to amend his plan when the amount, if any, of child support is determined.

Section 302(a)1 permits a married couple to file a joint petition. Section 302 is designed for ease of administration and to permit the payment of one filing fee. *In re Crowell*, 53 B.R. 555, 557 (Bankr. M.D. Tenn. 1985). Here, Debtors have provided sufficient cause to sever the cases and the court grants the Debtor's request to sever the case.



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

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

The Motion to Sever the Bankruptcy Case 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 this Bankruptcy Case is severed as to Debtor Timothy Wood and Debtor Anne Murphy.

7. 10-33026-E-13 ARTIE/ALMA ELAHI  
JT-2 John A. Tosney

CONTINUED MOTION TO SUBSTITUTE  
DECEASED PARTY  
5-13-13 [[42](#)]

CONT. FROM 7-23-13, 6-11-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on May 13, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

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

#### **PRIOR RULING**

Debtors seek to substitute Debtor Artie Elahi for deceased Debtor spouse, Alma Elahi, who passed away on July 14, 2011. Debtor states Artie Elahi is fully capable of substituting himself for his deceased spouse, as she had no income and his income has been the only source of payment. Debtor states he has timely made all plan payments and only has three months

remaining. Debtor states further administration of this Chapter 13 is possible and in the best interest of all parties.

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

The Trustee states that the Debtors have made all payments according to the confirmed plan. The Trustee asserts that while no life insurance was listed on Debtors' Schedule B or C filed May 18, 2010, there is a life insurance expense in the amount of \$160.00 listed on Schedule J filed the same day. The Trustee is uncertain if there was a policy for the deceased Debtor and if there was, how much the policy was for and how the funds were spent. The Trustee is waiting on information from Debtor's counsel.

The court was concerned after a review of the petition, which shows a life insurance expense in the amount of \$160.00 on Schedule J filed May 19, 2010. Dckt. 1. While the Debtors did not list a life insurance policy on Schedule B or claim an exemption, there appears to be an expenditure for it being paid.

While the existence or non-existence of life insurance would not disqualify the surviving Debtor from being designated pursuant to Federal Rule of Civil Procedure 25 and Federal Rule of Bankruptcy Procedure 9014 to serve as the successor to the deceased Debtor, the failure to affirmatively disclose the existence or non-existence of a possible life insurance vested, matured right does raise significant ethical issues for someone to undertake such a responsibility.

Though afforded the opportunity to Reply to the Trustee's opposition and simply resolve the question concerning this possible income and asset, the surviving Debtor chose not to respond.

The court continued the hearing to allow Debtor to file supplemental pleadings.

#### **SUPPLEMENTAL DECLARATION**

Debtor filed a supplemental declaration, stating that when the bankruptcy was filed, he listed a term policy, which had no cash value. Debtor states that because the term policy had no value, he did not list it on his Schedule B or exempt it on Schedule C.

Debtor states that when his spouse passed away, he received \$50,000.00 from the term life insurance policy. Debtor testifies he spent \$12,000.00 for the funeral and burial costs. He states he spend \$4,000.00 for transportation costs for family members to come to the funeral and another \$12,000.00 for bills and other medical costs that were delinquent. Debtor also states that he then spend \$7,000.00 for a used car. Additionally, Debtor asserts he gave \$6,500.00 to his son and daughter due to their mother passing. Lastly, Debtor states the remainder was spend on miscellaneous household expenses over the last two years.

#### **TRUSTEE'S WITHDRAWAL**

Based on the response provided by the Debtor, the Trustee has no opposition to the relief requested in the Debtor's motion.

## CONTINUANCE

The court raised several concerns at the prior hearing regarding the surviving Debtor seeking to be given the responsibility for serving in a representative (fiduciary capacity) for the deceased Debtor.

Alma Elahi passed away on July 14, 2011, thirteen months into the 36-month plan. Though no insurance policy is listed on Schedule B or any amounts thereunder claimed as exempt on Schedule C, such insurance existed. It was only disclosed when the court declined to automatically approve the requested substitution. When forced, the Debtor disclosed that the estate received \$50,000.00 in post-petition insurance proceeds. From this he now testifies that he spent \$12,000.00 for funeral and burial costs. Further, that he used \$4,000.00 to pay transportation costs for family members (with no showing that gifting such money was reasonable or that such family members were financially unable to pay their own transportation expenses). The Debtor testifies that he pay another \$12,000.00 for bills and medical costs which were delinquent (testifying that while caring for his ill wife the Debtor was only able to work part-time).

The Debtor continued to use the insurance proceeds, spending \$7,000.00 to buy a used car. Schedule B lists the Debtors as having 2 vehicles. A 2008 Ford Edge (leased) and a 2008 Mercury Mariner. Dckt. 1 at 24. Patelco Credit Union holds a claim secured by the Mercury Mariner. Schedule D, Dckt. 1 at 27. The Chapter 13 Plan provides for Class 4 payments to be made directly by the Debtors to Patelco. The Plan also provides that the Debtors will assume the lease for the Ford Edge. Plan, Dckt. 1 at 3, 4. No reason is given for the Debtor paying \$7,000.00 to buy a third car for one debtor.

Finally, the Debtor gifted \$6,500.00 to his Son and Daughter. No reason for this gift is provide other than that it was due to their mother passing.

Under the Debtors' Chapter 13 Plan they sought to "lien strip" the 2<sup>nd</sup> Deed of Trust held by "Chase" with payments of \$0.00 made on this secured claim through the Plan. For creditors holding general unsecured claims, the dividend was 3.6%. With minimal plan payments, the Debtors properly sought the extraordinary relief available under the Bankruptcy Code.

However, with the passing of the Co-Debtor, the surviving Debtor appears to have moved beyond the good faith, ethical conduct of a debtor. Clearly his expenses were reduced as there is now only one debtor. The court accepted the statements under penalty of perjury as to the expenses for two debtors. No adjustment was made, and the Debtor withheld the information that one Debtor had passed away.

When the Debtor received the \$50,000.00 life insurance proceeds, he did not disclose this asset. While he may very well have used some of the proceeds for good faith, bona fide expenses (such as reasonable funeral and burial costs, medical bills, and expenses related to his inability to work full time), he also chose to make gifts to his family members (paying transportation expenses and giving \$6,500.00). Gifting assets of the estate to family members is inconsistent with a debtor seeking to make minimal plan payments, provide a 3.5% dividend on general unsecured claims, and to lien strip a 2<sup>nd</sup> Deed of Trust for a \$0.00 payment on the secured claim.

The court continued the hearing to allow the Trustee to consider whether substitution is appropriate and for Debtor to prepare a proposed order granting the motion, transmit it to the Chapter 13 Trustee, the Trustee was to approve the form of the order and lodge it with the order with the court. No such order has been docketed with the court to date.

While the court raised the above mentioned issues with the conduct of the Trustee, the court will grant the motion and refer this matter to both the Chapter 13 Trustee, David Cusick, and Assistant U.S. Trustee Antonia Darling, on behalf of the U.S. Trustee, for review and to take whatever action either believes is appropriate in connection with this bankruptcy case, including whether the case should be dismissed.

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 Substitute Deceased Party 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 Debtor Artie L. Elahi is substituted for Debtor Alma Elahi.

**IT IS FURTHER ORDERED** that the Clerk of the Court shall serve a physical copy of the Civil Minutes for this matter on David Cusick, the Chapter 13 Trustee, and Antonia Darling, Assistant U.S. Trustee.

8. [13-26330](#)-E-13 BARRY HENNING  
TSB-1 Peter G. Macaluso

CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY DAVID  
P. CUSICK  
6-27-13 [[20](#)]

CONT. FROM 7-23-13

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 27, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

**Final Ruling:** The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by General Order 05-03, Paragraph 3(c). Consequently, the Debtor, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. The court has determined that oral argument will be not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

**The Objection is overruled as moot and confirmation is denied.** No appearance required.

Subsequent to the filing of this Motion, the Debtor filed an amended Plan on August 8, 2013. The filing of a new plan is a *de facto* withdrawal of the pending Plan. The objection is overruled as moot and the plan is not confirmed.

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

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

The Objection to Confirmation of 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 is overruled as moot and the proposed Chapter 13 Plan is not confirmed.

**Notice Provided:** The Order to Appear was served by the Clerk of the Court through the Bankruptcy Noticing Center on Debtor, Attorney for the Debtor, Chapter 13 Trustee, Counsel for Jane Does 1-5, and Office of the United States Trustee on August 8, 2013. 12 days notice of the hearing was provided.

The court ordered J. Jeffries Goodwin, counsel for Jane Does 1-5, the "Doe Creditors" to appear at the hearing set for the Opposition on August 20, 2013, at 3:00 p.m. to address for the court the following issues:

A. Whether the pleadings titled "Opposition to Discharge in Bankruptcy" filed on August 1, 2013 (Dckt. 79) is an objection to discharge.

B. Whether the pleading titled "Opposition to Discharge in Bankruptcy" filed on August 1, 2013 (Dckt. 79) is an objection to confirmation of the Debtors' Chapter 13 Plan.

C. Whether the pleading titled "Opposition to Discharge in Bankruptcy" filed on August 1, 2013 (Dckt. 79) is a request for relief from the automatic stay.

The court further ordered that J. Jeffries Goodwin, counsel for the "Doe Creditors" shall file a written response to the above questions, and provide the court with such other information as counsel deems appropriate for the court to understand the relief being sought in the pleadings titled "Opposition to Discharge in Bankruptcy," and serve such written response on counsel for the Debtors, the Chapter 13 Trustee, and the U.S. Trustee (Sacramento Division).

#### **Doe Creditor Response**

The Doe Creditors are attempting to recover for their damages from the Debtor's professional practice insurance carrier. To date, the insurance carrier has denied coverage based on a contention that the acts of the Debtor from which the Doe Creditors' claims arise was intentional, for which no obligation to defend or indemnify arise under the insurance policy.

The Doe Creditors request relief from the stay so that they can conduct discovery in their state court action against the Debtor.

10. 13-22331-E-13 ERICH/CONNIE PARKS OPPOSITION TO DISCHARGE IN  
AJP-2 Al J. Patrick BANKRUPTCY  
8-1-13 [79]

**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Movants Jane Does 1-5 filed an "Opposition to Discharge in Bankruptcy" on August 1, 2013, in connection with DCN AJP-2, the Motion to Confirm Amended Plan. No Proof of Service was filed with the document. No Notice of Hearing was filed with the document (although it was filed in response to a Motion to Confirm Plan). No Declaration was filed in support of the document and no other evidence was presented with the document.

The "Opposition to Discharge in Bankruptcy" appears to be a request for relief from the automatic stay so that Jane Does 1-5 may proceed in the superior court "to the limit of debtor's insurance." Dckt. 79. No legal basis has been presented for the requested relief. Furthermore, no discussion regarding opposition to the Debtor's discharge appears in the document.

Based on the insufficient service and notice, lack of legal authority, and lack of supporting evidence, an "Opposition to Discharge in Bankruptcy" would be denied.

11. 13-22331-E-13 ERICH/CONNIE PARKS MOTION TO CONFIRM PLAN  
AJP-2 Al J. Patrick 7-16-13 [68]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 16, 2013. By the court's calculation, 35 days' notice was provided. 42 days' notice is required.

**Final Ruling:** The Motion to Confirm the Plan was not properly 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 court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court shall issue its ruling from the pleadings filed by the parties.

The Motion to Confirm the Plan is denied without prejudice. No appearance required.

## **NOTICE**

Local Bankruptcy Rule 3015-1(d)(1) requires that notice be given under Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 9014-1(f)(1). Therefore, to meet the requirements of Local Bankruptcy Rule 3015-1(d)(1), the hearing must be set on 42 days' notice (28 days' notice under Federal Rule of Bankruptcy Procedure 2002(b) and the 14-day deadline for written opposition required by Local Bankruptcy Rule 9014-1(f)(1)). By the court's calculation, only 35 days' notice has been provided in this case.

## **SERVICE**

Furthermore, Local Bankruptcy Rule 2002-1 provides that notices in adversary proceedings and contested matters that are served on the Internal Revenue Service shall be mailed to three entities at three different addresses, including the Office of the United States Attorney, unless a different address is specified:

### **LOCAL RULE 2002-1 Notice Requirements**

**(a) Listing the United States as a Creditor; Notice to the United States.** When listing an indebtedness to the United States for other than taxes and when giving notice, as required by FRBP 2002(j)(4), the debtor shall list both the U.S. Attorney and the federal agency through which the debtor became indebted. The address of the notice to the U.S. Attorney shall include, in parenthesis, the name of the federal agency as follows:

#### **For Cases filed in the Sacramento Division:**

United States Attorney  
(For [insert name of agency])  
501 I Street, Suite 10-100  
Sacramento, CA 95814

#### **For Cases filed in the Modesto and Fresno Divisions:**

United States Attorney  
(For [insert name of agency])  
2500 Tulare Street, Suite 4401  
Fresno, CA 93721-1318

. . .

**(c) Notice to the Internal Revenue Service.** In addition to addresses specified on the roster of governmental agencies maintained by the Clerk, notices in adversary proceedings and contested matters relating to the Internal Revenue Service shall be sent to all of the following addresses:



- (1) United States Department of Justice  
Civil Trial Section, Western Region  
Box 683, Ben Franklin Station  
Washington, D.C. 20044
- (2) United States Attorney as specified in LBR 2002-1(a)  
above; and,
- (3) Internal Revenue Service at the addresses specified on  
the roster of governmental agencies maintained by the  
Clerk.

The proof of service lists only the following addresses as those used for service on the Internal Revenue Service:

Internal Revenue Service  
PO Box 7346  
Philadelphia, PA 19101-7346

The proof of service states that the addresses used for service are the preferred addresses for the Internal Revenue Service specified in a Notice of Address filed by that governmental entity.

A motion is a contested matter. See Fed. R. Bankr. P. 9014. The proof of service in this case indicates service was not made on all three addresses, and service was therefore inadequate.

#### **JANE DOES 1-5 OPPOSITION**

Jane Does 1-5 filed a "Opposition in Discharge in Bankruptcy" connected to DCN AJP-2 (this Motion to Amend Plan) seeking the lifting of the automatic stay. Jane Does have not properly presented legal argument or sufficient evidence to opposition to an amended plan.

The motion was not properly set for hearing. The motion is denied without prejudice and the Chapter 13 Plan is not confirmed.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is denied without prejudice and the proposed Chapter 13 Plan is not confirmed.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 22, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 7333 Veterans Lane, Citrus Heights, California. The Debtor seeks to value the property at a fair market value of \$165,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$309,999.98. HSBC Mortgage Services, Inc.'s second deed of trust secures a loan with a balance of approximately \$43,197.00. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of HSBC Mortgage Services, Inc. secured by a second deed of trust recorded against the real property commonly known as 7333 Veterans Lane, Citrus Heights, California, is determined to be a secured claim in the amount of \$0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is \$165,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

13. [10-46537](#)-E-13 DANIEL/REBECCA BREEN MOTION TO MODIFY PLAN  
PGM-6 Peter G. Macaluso 7-12-13 [[101](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 12, 2013. By the court's calculation, 39 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects on the grounds that under the terms of the proposed plan, the Debtors have paid ahead \$62,965.00 under the proposed plan.

Furthermore, according to the Trustee's calculations, the plan will complete in 66 months as opposed to the 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

Debtors respond, stating that an error occurred and the plan should read "69,9953.00 through 7/13, then \$3,015 x 28, starting 8/13." Debtor argues that this will make the plan feasible.

The Debtor having addressed the Trustee's concerns, the court grants the motion to confirm.

The modified Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

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

**IT IS ORDERED** that Motion to Confirm the Plan is granted, Debtor's Chapter 13 Plan filed on July 12, 2013 is confirmed, and counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court..

14. [13-27337](#)-E-13 ELIAS/ETIENNETTE  
DJC-1 VILLASENOR  
Diana J. Cavanaugh

MOTION TO CONFIRM PLAN  
7-9-13 [[14](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 9, 2013. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee objects on the basis that the Debtor's proposed plan relies on four different Motions to Value Collateral. The court having denied all four motion on August 13, 2013, the court sustain's the Trustee's objections and denies the Motion to Confirm.

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

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

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

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

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

15. [12-38247](#)-E-13 MARTY/KATHERINE GONSMAN CONTINUED MOTION TO DISMISS  
TSB-3 Yelena Gurevich CASE FOR UNREASONABLE DELAY  
THAT IS PREJUDICIAL TO  
CREDITORS AND/OR MOTION TO  
DISMISS CASE  
7-17-13 [[119](#)]

CONT. FROM 7-31-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on July 17, 2013. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

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

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

#### **PRIOR HEARING**

The Trustee's Motion argues 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 June 11, 2013.

Debtor responds, asserting that a Motion to Avoid Second Lien and Motion to Confirm were denied for several technical reasons and then re-filed. They were refiled and subsequently denied again. The Debtors state they refiled the Motion to Avoid Second Lien and set it for hearing on August 20, 2013. Debtor states as soon as this motion is granted, they will file a Motion to Confirm. Counsel asserts that it is neither Debtors or counsel's intent to delay the confirmation of their Chapter 13 plan to the extent it prejudices creditors. Debtors assert they remain current on their Chapter 13 plan and have every intention of completing the 60-month plan.

The court reviewed the Motion to Avoid Second Lien and stated several concerns relating to these Debtors and the prosecution of their case. The

motion requests that the court void and extinguish a second deed of trust which secures a claim of Wells Fargo Bank, N.A. solely because "it is wholly unsecured." The Debtors assert that the claim secured by the first deed of trust against the same property exceeds the value of that property. The motion further alleges that "Debtor believes that Wells Fargo, N.A. holds a wholly unsecured lien and should be extinguished and reconveyed upon discharge of this case pursuant to 11 U.S.C. §506(a) and 1322(b)(2)." Motion, Dckt. 126.

The court ordered the Debtor to file supplemental pleadings regarding the Motion to Avoid Lien. The Debtor filed additional pleadings on August 13, 2013. After a review of these pleadings, the court granted the Motion to Value Collateral.

A review of the docket shows that Debtor has not yet filed a new plan or a motion to confirm a plan. However, Debtor has offered an explanation for the delay in setting the Plan for confirmation, as the Motion to Avoid Lien (which is really a Motion to Value Collateral) has been denied several times and the plan cannot be confirmed without this first being completed. The court having granted the Motion to Value Collateral, the Debtor shall file and serve an amended plan on or before September 3, 2013 and set it for confirmation.

If the Amended Plan, Motion to Confirm, and Supporting Pleadings are not filed and served on or before September 3, 2013, the court shall dismiss the bankruptcy case. If not timely filed, the Trustee shall file and serve the Debtors and Debtors' counsel with an ex parte motion to amend this order to provide for the dismissal of the case. Five days after service, the Trustee shall lodge with the court a proposed order amending this order and dismissing the case. The court, before signing the order, will review the docket to see if the Amended Plan, Motion, Supporting Pleadings, and Proof of Service attesting to timely service, were filed by the Debtors, and then rule on the ex parte motion to amend.

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 denied without prejudice, subject to the condition subsequent stated in this order.

**IT IS FURTHER ORDERED** that on or before September 3, 2013, the Debtors shall file and serve an Amended Plan, Motion to Confirm, and Supporting Pleadings.

**IT IS FURTHER ORDERED** that if the Amended Plan, Motion to Confirm, and Supporting Pleadings are not filed and served on or before September 3, 2013, the court shall dismiss the bankruptcy case. If not timely filed, the Trustee shall file

and serve the Debtors and Debtors' counsel with an ex parte motion to amend this order to provide for the dismissal of the case based solely on the grounds that the Debtors have failed to comply with this order for the filing and service of the pleadings. Five days after service of the ex parte motion, the Trustee shall lodge with the court a proposed order amending this order and dismissing the case. The court, before signing the order, will review the docket to see if the Amended Plan, Motion, Supporting Pleadings, and Proof of Service attesting to timely service, were filed by the Debtors, and then rule on the ex parte motion to amend.

16. [12-38247](#)-E-13 MARTY/KATHERINE GONSMAN MOTION TO AVOID LIEN OF WELLS  
YG-5 Yelena Gurevich FARGO BANK, N.A.  
7-22-13 [[126](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 22, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

**The court's tentative decision is to grant the Motion to Value Collateral.** 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 MOTION TO DISMISS**

On July 31, 2013, The Chapter 13 Trustee sought to Dismiss this bankruptcy case for failure to file a plan or a motion to confirm following the courts denial of confirmation. Debtors contended that states they re-filed a Motion to Avoid Lien, which was denied for several reasons.

The court reviewed the Motion to Avoid Second Lien and raised concerns relating to these Debtors and the prosecution of their case. The motion requests that the court void and extinguish a second deed of trust which secures a claim of Wells Fargo Bank, N.A. solely because it is wholly unsecured. The Debtors assert that the claim secured by the first deed of trust against the same property exceeds the value of that property. The motion



further alleges that Debtor believes that Wells Fargo, N.A. holds a wholly unsecured lien and should be extinguished and reconveyed upon discharge of this case pursuant to 11 U.S.C. §506(a) and 1322(b)(2). Motion, Dckt. 126.

This motion to avoid lien raises several issues. First, the court is unsure of what is meant by the Debtors asserting that Wells Fargo Bank, N.A. hold a wholly unsecured lien. Since liens secured obligations, it appears the Debtors are contending that the Wells Fargo Bank, N.A. obligation is secured by a lien, which lien is then further secured by a second lien.

Second, though the court has read and re-read 11 U.S.C. § 506(a) and § 1322(b)(2), and the discharge provisions, it cannot find a statutory basis for avoiding the second deed of trust of Wells Fargo Bank, N.A. On prior occasions this court has addressed the lien-stripping process in a Chapter 13 case. See *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of lien stripping in Chapter 13 case), and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, Adv. No. 12-2596, 2013 LEXIS 1622 (Bankr. E.D. CA 2013).

Based on these concerns, the court ordered the Debtors to file and serve on the Chapter 13 Trustee and U.S. Trustee, a supplemental points and authorities providing the legal basis for the court, pursuant to this motion, avoiding the lien of Wells Fargo Bank, N.A. Further, counsel for the Debtors was to provide the court with copies of orders from bankruptcy courts, and the related ruling or decision stating the legal basis therefore, which avoid a lien prior to the completion of a Chapter 13 Plan pursuant to 11 U.S.C. § 506(a) and § 1322(b)(2). No more than five such orders and ruling were required from counsel.

#### **DEBTOR'S SUPPLEMENTAL PLEADINGS**

Counsel for Debtors filed a supplemental memorandum of points and authorities providing authority pursuant to 11 U.S.C. § 506(A) and Federal Rule of Bankruptcy Procedure 3012 for a court to determine the value of a claim secured by a lien on real property. Counsel cites *In re Lam*, 211 B.R. 36 (9th Cir. B.A.P. 1997), *Nobelman v. American Savings Bank*, 506 U.S. 324 (1993), and *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002) for the contention that Chapter 13 debtors are entitled to "strip" totally unsecured junior mortgages on a principal residence where the claim of the junior lien-holder are unsecured, given that the value of the residence is less than the balance owed on the first deed of trust. Counsel also states *Dewsnip v. Timm*, 502 U.S. 410 (1992) does not apply in this Chapter 13 case, and the relevant cases are the Chapter 13 cases cited above, which turn on the courts' interpretation of 11 U.S.C. §§ 506(a) and 1322(b)(2).

Counsel also provides several rulings and orders. Dckt. 143. The first appears to be a Final Ruling on a Motion to Avoid Judicial Lien. The second is an Order Granting Motion to Avoid Junior Lien on Principal Residence by Judge Bardwil. However, no civil minutes are included with the legal basis. The remaining orders are discussions of Motion to Value Collateral based on 11 U.S.C. § 506(a).

#### **DISCUSSION**

Debtors seek to "extinguish and avoid the lien of the second trust deed holder, of Wells Fargo Bank, N.A." against Debtors' real property commonly known as 694 Cardoso Court, Galt, California. After further review of the motion and supplemental supporting pleadings, it appears Debtor seeks to Value the Collateral of Wells Fargo Bank, N.A. Debtor seeks to value the property at \$150,000.00, with the first deed of trust with a balance of \$238,711.82 and Wells Fargo Bank, N.A., the second deed of trust holder, has a current loan balance of \$59,043.07. Debtors thus request that the court grant the motion and issue an order determining the value of Debtor's residence to be \$150,000.00, determining the second deed of trust holder, Wells Fargo Bank, N.A. to be unsecured for the treatment under Debtors' Chapter 13 plan.

The court notes that a motion to value collateral does not require the removal (to extinguish or to avoid) of second deed of trust from the real property, contrary to Debtor's arguments. A request to determine the extent, validity, or priority of a security interest, or a request to avoid a lien, requires adversary proceeding. Fed. R. Bankr. P. 7001(2). The court cannot determine the extent, validity, or priority of the creditor's security interest through a motion. This portion of the requested relief is denied. If the creditor refuses to reconvey the security interest once the underling obligation has been satisfied, then the Debtor may bring an appropriate action.

The motion is accompanied by the Debtor's declaration. Exhibit A, Dckt. 129. The Debtor is the owner of the subject real property commonly known as 694 Cardoso Court, Galt, California. The Debtor seeks to value the property at a fair market value of \$150,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$238,711.00. Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately \$59,043.07. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. See 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

#### **REQUEST TO AVOID LIEN**

Debtors' Motion also requests that the court "avoid" the lien of Wells Fargo Bank, N.A. It states that the Debtors bring "this Motion in order to extinguish and avoid the lien of the second deed of trust holder WELLS FARGO, N.A., on the grounds that it is wholly unsecured." Motion, Dckt. 126. The court acknowledges that while the Motion and Points and Authorities make extensive reference to "avoiding the lien," the actual prayer requests that the secured claim be valued at \$0.00 and that the balance of the claim be treated as an unsecured claim under the bankruptcy plan.

This court has addressed with all the attorneys that motions to value under 11 U.S.C. § 506(a) are motions to value claims, not avoid liens. While 11 U.S.C. § 506(d) provides for a lien being void to the extent that it exceeds

the secured claim, it is clear that something more must be done than merely a debtor filing bankruptcy and the court valuing the secured claim (the creditor's interest in the debtor's interest in the collateral). See *Dewsnup v. Timm*, 502 U.S. 410, 416 (1992).

The court requested, and the Debtors have provided the court with other decisions relating to the "avoiding" of a lien pursuant to an 11 U.S.C. § 506(a) valuation. This court considers these rulings as follows:

***In re Cotta*, Bankr. E.D. Cal. No. 12-90894, Chapter 13, DCN:YG-1.**

In that Chapter 13 case the debtors filed a similar motion to Avoid Junior Lien on Property. 12-90894, Dckt. 28. The Civil Minutes from the hearing state,

The matter is resolved without oral argument. The courts records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds that the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

Civil Minutes, Dckt. 49. The court notes that the Civil Minutes for the Cotta ruling makes reference to an "impairment of an exemption." This is common language for addressing a motion to avoid a lien pursuant to 11 U.S.C. § 522(f), not a motion to value pursuant to 11 U.S.C. § 506(a).

The order issued by the judge in that case states that the motion is granted, and the words "and the lien described in the motion is avoided." *Id.*, Dckt. 53. This court cannot identify why, how, or what basis would exist for avoid a lien, other than the 11 U.S.C. § 522(f) language included in the Civil Minutes.

***In re Howard*, Bankr. E.D. Cal. No. 11-46602, Chapter 13, DCN YG-1**

In the *Howard* case, the Civil Minutes reflect that the motion to value the secured claim of Household Finance Corporation of California was granted, the secured claim was determined to have a value of \$0.00, no payments are to be made under the Chapter 13 plan on the secured claim. Civil Minutes, 11-46602 Dckt. 35. The Civil Minutes expressly state,

"Debtor bases her motion on 11 U.S.C. § 506(a) and § 1322(b){2}. Hence, Debtor seeks the courts valuation of her property in order to determine that the junior creditors deed of trust is under-collateralized. This Motion to Value Collateral must be distinguished from a Motion to Avoid a Lien that impairs an exemption, 11 U.S.C. § 522(f)(1)."

*Id.* The order on the motion in Howard clearly states that the secured claim is determined to have a value of \$0.00, with the balance of the claim to be paid as a general unsecured claim through the bankruptcy plan.

***In re Taylor*, Bankr. E.D. Cal. No. 13-90643, Chapter 12, DCN: ADJ-2.**

In the *Taylor* Chapter 12 case, the Civil Minutes state that the court granted the motion and determined the secured claim to have a value of \$0.00, and no payments were to be made on the secured claim through the bankruptcy plan. Civil Minutes, 13-90643 Dckt. 35-1. The order in *Taylor* states that the secured claim is valued at \$0.00, and the balance of the claim is to be paid as a general unsecured claim through the confirmed bankruptcy plan. *Id.*, Dckt. 38.

***In re Crowton, Bankr. E.D. Cal. No. 10-41805, Chapter 13, DCN: JPD-1.***

In the *Crowton* case, the Civil Minutes state that the value of the creditor's secured claim is determined to be \$0.00, and no further relief will be granted. Civil Minutes, 10-41805 Dckt. 65. The order in *Crowton* states that the secured claim of the creditor is determined to be \$0.00, and the claim to be treated as an unsecured claim in any Chapter 13 case. Order, *Id.* Dckt. 67. The order in *Crowton*, filed on August 6, 2013, is from the same judge who issued the order in *Cotta*, which was filed on July 19, 2012. The Civil Minutes in *Crowton* make no reference to a determination that the lien impairs an exemption of the debtor.

***In re Thomas, Bankr. E.D. Cal. No. 13-23405, Chapter 13, DCN: RIN-6.***

In *Thomas*, the Civil Minutes state that the creditor's secured claim is determined to have a value of \$0.00, and no further relief will be afforded. Civil Minutes, 13-23405 Dckt. 78. The court's order in *Thomas* (filed on August 9, 2013) determines the value of the creditor's secured claim to be \$0.00 and that the claim shall be treated as an unsecured claim in any Chapter 13 Plan. Order, *Id.* Dckt. 81.

What is clear from these rulings, the court's in this District do not avoid liens based solely on an 11 U.S.C. § 506(a) valuation. Other than the one order in which there was a finding that the lien impaired an exemption, none of the orders or ruling provide for avoiding or extinguishing any liens.

The Supplemental Points and Authorities contains a discussion of why the holding in *Dewsnup* should not apply in a Chapter 13 (or other reorganization) case, but does not address why, how, and when the "lien strip" becomes effective. This court remains convinced that it become effective upon consummation of the Chapter 11, 12, or 13 plan and the contractual rights between the parties of that plan being fixed. See this court's discussion of the "lien strip," whether as a matter of state law or 11 U.S.C. § 506(d), in *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case), and 11 U.S.C. § 349 (effect of dismissal).

Though not "avoiding the lien," the court grants the motion and values the secured claim to be \$0.00.

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

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

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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 694 Cardoso Court, Galt, 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 \$150,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

17. [11-49750](#)-E-13 JUDITH ROTH  
MOH-1 Michael O'Dowd Hays

OBJECTION TO CLAIM OF WELLS  
FARGO BANK, N.A., CLAIM NUMBER  
5  
7-23-13 [[31](#)]

Local Rule 3007-1(b)(2) Motion.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 28 days' notice was provided. 30 days' notice is required.

**Tentative Ruling:** This Objection to a Proof of Claim has not been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(2) and (d).

**The hearing on the Objection to Payment of Proof of Claim number 5 of Wells Fargo Bank, N.A. is continued to 3:00 p.m. on -----.** No appearance required.

Debtor objects to the claim of Wells Fargo Bank, N.A. filed on February 6, 2012. However, Local Bankruptcy Rule 3007-1(b)(2) requires that the objecting party file and serve an objection to claim at least thirty (30) days prior to the hearing date. If this were a motion to modify a Chapter 13 Plan, 35 days notice would be required. Here, only 28 days' notice was provided.

#### **REVIEW OF OBJECTION TO PAYMENT OF CLAIM OF WELLS FARGO BANK, N.A.**

The Debtor objects to the claim of Wells Fargo Bank, N.A. in the amount of \$22,424.90. Proof of Claim Mo. 5, filed February 6, 2012. As set forth in the proof of claim, this is an unsecured claim relating to a student loan. The Debtor co-signed for a loan obtained by Amy Doman (whom the Debtor identifies as her niece).

The Debtor asserts that she did not list Wells Fargo Bank, N.A. as a creditor since she considered her obligation as a co-signor to pay this claim

to arise only when and if her niece (the borrower) failed to make the payments on the loan. The Debtor's confirmed Chapter 13 Plan provides for payment of \$1,150.00 a month for 60 months. Of this, \$705.00 a month is used to pay an eighty-five percent (85%) dividend on general unsecured claims.

The Debtor's niece testifies that she understands that she has an obligation to pay \$34.50 a month to Wells Fargo Bank, N.A. and intends to make that payment. Amy Doman Declaration, Dckt. 35. She states that she has made all payments on this obligation.

The Objection states that the Trustee has been paying monthly dividends to Wells Fargo Bank, N.A. on its unsecured claim, with the amounts totaling \$1,747.78. The Debtor is not seeking a refund of the payments on this claim, but only that no further payments on this unsecured claim be made. If no payments are made, the Debtor computes that the plan can be consummated and the other creditors receive their 85% dividend.

The Motion is an ambiguous "Objection to Payment" of the Wells Fargo Bank, N.A. claim, which generally sounds in the form of an objection to claim. However, in substance, it appears that the Debtor actually wants to modify the plan to provide for Wells Fargo Bank, N.A. as a Class 6 unsecured claim to be paid by a third-party (the niece) since this is a co-signed debt.

The court cannot grant relief pursuant to the motion, as it is not clear to the court, nor Wells Fargo Bank, N.A., as to what relief is requested. The court cannot, and will not, merely say, "don't pay that claim."

Therefore, the court continues the hearing to allow the Debtor to amend the motion and re-notice the hearing clearly stating what she is intending to do - object to the claim based on a substantive ground that establishes the Bank has no right to receive payment through a plan; modify the plan to provide for the claim to be made by third-party payment; or such other relief which the Debtor may properly request. FN.1.

-----  
FN.1. The court makes no comment as to the effect of this bankruptcy filing and the dischargeability of any obligation asserted by Wells Fargo Bank, N.A. relating to this student loan.  
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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 Wells Fargo Bank, N.A. filed in this case 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 Objection to Payment of Wells Fargo Bank, N.A. is continued to 3:00 p.m. on -----, 2013. On or before -----, 2013, the Debtor shall file and serve an amended motion.

18. [13-22454-E-13](#) MAHMOOD/ROSELYN MOHAMMED MOTION TO CONFIRM PLAN  
MET-3 Mary Ellen Terranella 7-6-13 [[51](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 6, 2013. By the court's calculation, 45 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Trustee objects to the plan on the basis that the plan is not the Debtors' best effort because the plan does not provide for all of the Debtors' projected disposable income for the applicable commitment period. Trustee states that at the 341 meeting, Debtor Mahmood Mohammed admitted that in addition to his employment at Xerox, he currently works as a real estate agent and is making approximately \$1,000.00 per month from real estate sales. Trustee states that Debtor reported that in the three months prior to filing he made approximately \$3,600.00. However, this income is not reported on Schedule I or Form B22C. Trustee argues that without an accurate reporting of income, the Trustee is unable to determine whether the Debtors plan should be 60 months or 36 months as proposed.

As the Trustee has raised issues regarding unreported income, best efforts and applicable commitment period, the court denies the Debtors' Motion to Confirm the Amended Plan.

This lack of candid, truthful disclosure on the Schedules, which was made under penalty of perjury, raises serious issues in this, and any future Chapter 13 case for these two Debtors. The Chapter 13 Trustee, U.S. Trustee, creditors, and other parties in interest can best determine if, and how, these false statements are best addressed.

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

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

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

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

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

19.	<a href="#"><u>13-21862</u></a> -E-13	DANIEL CHENG	MOTION TO CONFIRM PLAN
	PGM-4	Peter G. Macaluso	7-8-13 [ <a href="#"><u>74</u></a> ]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 8, 2013. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Trustee opposes confirmation on the grounds that the plan is not Debtor's best effort and has not been filed in good faith. Trustee states that the Warren factors involved in a good faith analysis indicate that the plan is not filed in good faith: (i) amount of proposed payments and debtor's surplus; (ii) accuracy of expenses and percentage repayment of unsecured debt; and (iii) motivation and sincerity of debtor in seeking Chapter 13 relief.



Trustee states that Debtor did not fully disclose his income since Debtor listed his gross monthly income as \$5,848 on Schedule I while his paystubs indicate monthly income of \$13,971.91. Trustee states that Debtor has lowered deductions to the IRS, but it is not clear whether Debtor has made these changes with the payroll department.

Trustee states Debtor should not list promissory note repayment of \$1,083.33 on Schedule I since Debtor admitted that he is repaying this loan made to him by his employer.

Trustee states that Debtor is over median income and proposes pay unsecured creditors a 35% dividend. Trustee states that it does not appear unsecured creditors are receiving what they are entitled.

Trustee states Debtor lists the following deductions, which are questionable: (i) involuntary deduction of \$1,083.33 also listed as \$500; (ii) deduction of \$398.82 for Wells Fargo Bank, Trustee states it is not clear what this deduction is for; and (iii) deduction of \$670 for County of Sacramento residence, Trustee states this expense should not be listed since Debtor already receives a standard deduction for real property taxes.

Lastly, the Trustee opposes confirmation offering evidence that the Debtor is \$2,632.00 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).

#### **DEBTOR'S REPLY**

Debtor responds, stating that he intends to be current under the proposed plan on or before the date of the hearing.

The Debtor also states that he is willing to raise the plan to 100%.

However, Debtor has not provided evidence that he is in fact current under the terms of the proposed plan.

The amended Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed. This is sufficient to deny confirmation.

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

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

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

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

20. [13-21862-E-13](#) DANIEL CHENG  
TSB-2 Peter G. Macaluso

CONTINUED MOTION TO DISMISS  
CASE  
6-20-13 [[69](#)]

**CONT. FROM 7-31-13**

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, Debtor's Attorney, and Office of the United States Trustee on June 20, 2013. By the court's calculation, 41 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 grant the Motion to Dismiss and dismiss the case.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**PRIOR HEARING**

The Trustee seeks dismissal of the case on the basis that the Debtor is \$4,959.00.00 delinquent in plan payments, which represents multiple months of the \$2,937.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Trustee's Motion argues 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 May 14, 2013.

Debtors respond, asserting that he is now current with plan payments and has filed and set for confirmation an Amended Plan to be heard on August 20, 2013. However, no evidence is presented that the Debtor is current on plan payments and no allegation is made in the opposition that under the amended plan the Debtor is current on the payments made for which the Trustee has presented evidence.

A review of the docket shows that Debtor filed a Motion to Confirm Amended Plan on July 8, 2013, set for hearing on August 20, 2013.

**CONTINUANCE**

The court continued the hearing to be heard with the Debtor's Motion to Confirm Amended Plan. The court having denied the Motion to Confirm based on the continued delinquency, the court grants the motion to dismiss.

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

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

21.	<a href="#"><u>13-29064</u></a> -E-13    TERRY/REBECA BRISTER MET-1                      Mary Ellen Terranella	MOTION TO VALUE COLLATERAL OF FIRST FRANKLIN LOAN SERVICES 7-23-13 [ <a href="#"><u>14</u></a> ]
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 23, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

**The court's tentative decision is to deny without prejudice the Motion to Value Collateral.** 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:

Debtors seek to value the collateral of "First Financial Loan Services." 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. Declaration, Dckt. 16. The Debtors do not testify that they borrowed money from, signed a promissory note naming, or that a promissory note was assigned or transferred to First Financial Loan Services. 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.

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

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

22. [13-29769](#)-E-13 JOHN JAMES  
PGM-1 Peter G. Macaluso

MOTION TO EXTEND AUTOMATIC STAY  
8-1-13 [[11](#)]

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, Debtor, Chapter 13 Trustee, and Office of the United States Trustee on August 1, 2013. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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

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

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 12-29048-A-13) was dismissed on June 25, 2013, after Debtor defaulted on his plan payments. See Order, Bankr. E.D. Cal. No. 12-29048-A-13, Dckt. 64, June 25, 2013. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

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

those used to determine good faith under §§ 1307(c) and 1325(a) – but the two basic issues to determine good faith under § 362(c)(3) are:

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

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

Here, Debtor testifies states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed. Debtor states that a loan modification was necessary in order to afford him to keep his home, which he has now obtained as of April 2013. The modification reduces his payments by \$700 per month and reduced his interest rate to 2%. Debtor also testifies that work in his consulting business has increased and more consistent income has been coming in. Debtor also states his mother had a collapse due to early onset of dementia and he needed to assist her financially with her medical expenses. Since then, she has obtained Medicare and Army Survivor benefits in June 2013 and Debtor no longer needs to contribute to her medical expenses. Furthermore, Debtor states his daughter was enrolled in college at UC San Diego and he was contributing to her tuition. Since then, his daughter has graduated and he no longer has these expenses.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. Debtor asserts that several expenses related to his mother, daughter and mortgage payment have decreased. Debtor now asserts that he has sufficient income that will allow her to perform under the new Chapter 13 plan.

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

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

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

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

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

23. [10-45173](#)-E-13 FATIMA DELMENDO  
MRL-2 Mikalah R. Liviakis

MOTION TO MODIFY PLAN  
7-12-13 [[39](#)]

**Final Ruling:** The Debtor having filed a "Withdrawal of Motion" for the pending Motion to Modify Plan, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Modify Plan, and good cause appearing, **the court dismisses without prejudice the Debtor's Motion to Modify Plan.**

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

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

A Motion to Modify Plan having been filed by the Debtor, the Debtor having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

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

24. [13-27673](#)-E-13 ALFONSO/CHRISTIE YASONIA MOTION TO VALUE COLLATERAL OF  
SS-1 Scott D. Shumaker WELLS FARGO BANK, N.A.  
7-18-13 [[20](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 18, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

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

The motion is accompanied by the Debtor's declaration. The Debtor is the owner of the subject real property commonly known as 6308 Longdale Drive, North Highlands, California. The Debtor seeks to value the property at a fair market value of \$140,000.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The first deed of trust secures a loan with a balance of approximately \$143,277.76. Wells Fargo Bank, N.A.'s second deed of trust secures a loan with a balance of approximately \$25,702.42. Therefore, the respondent creditor's claim secured by a junior deed of trust is completely under-collateralized. The creditor's secured claim is determined to be in the amount of \$0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See 11 U.S.C. § 506(a); Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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



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

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted and the claim of Wells Fargo Bank, N.A. secured by a second deed of trust recorded against the real property commonly known as 6308 Longdale Drive, North Highlands, 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 \$140,000.00 and is encumbered by senior liens securing claims which exceed the value of the Property.

25. [13-22477](#)-E-13 JOSE AGUILAR AND ROSA MOTION TO CONFIRM PLAN  
TOG-2 ALCALA 7-9-13 [[95](#)]  
Thomas O. Gillis

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, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 9, 2013. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Chapter 13 Trustee opposes the motion on the basis that the Debtor has over paid according to the proposed plan. The Trustee calculates that the Debtor has over paid by \$6,475.00 and the Debtor would not have to make another payment into the plan for 11 months.

The Trustee also argues that the Debtor cannot make the plan payments because the Debtor's original Schedule J filed February 26, 2013, listed an

expense for estimated rental taxes and insurance in the amount of \$120.00, however, the Debtor amended Schedule J and deleted this expense without an explanation.

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

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

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

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

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

26.	<a href="#">08-39481</a> -E-13 CJY-2	ROOSEVELT WILLIAMS AND CATHERINE WILLIAMS-SHAW Christian J. Younger	MOTION TO MODIFY PLAN 7-9-13 [ <a href="#">50</a> ]
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Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 9, 2013. By the court's calculation, 42 days' notice was provided. 35 days' notice is required.

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

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

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Chapter 13 Trustee objects to the motion on the basis that the plan will

complete in more than the 60 months proposed, possibly taking up to 70 months. Trustee argues that the plan calls for payments of \$919.00 each month, leaving \$883.16 each month after projected Trustee compensation and expense. The ongoing mortgage payment is \$588.72, leaving \$294.44 for other debts. The other remaining debts, not counting late charges total \$4,262.75. This total at \$294.44 will take approximately 15 months, and Debtors have completed 55 months of their plan. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d).

The Trustee opposes confirmation offering evidence that the Debtor is \$919.00 delinquent in plan payments, which represents one month of the plan payment. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Trustee also argues that the Additional Provisions contain conflicting provisions and are not properly appended to the plan. The additional provisions are included on the signature page of the plan and are not numbered, as required by the terms of the plan. The first section states that Trustee shall suspend all payments through month 55 of the plan, but month 55 is included in the proposed new plan payments. The Trustee argues that the other provision implies that the \$1,752.06 disbursed to Creditor Wilshire Credit Corp/BAC Home Loans Servicing is not authorized but the Trustee is not required to have the creditor return the funds. Thus the terms appear to be conflicting.

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

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

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

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

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

27. [13-22083](#)-E-13 CYNTHIA BAKER  
PGM-1 Peter G. Macaluso

MOTION TO MODIFY PLAN  
7-11-13 [[26](#)]

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 July 11, 2013. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

**Final Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Confirm the Modified Plan is granted.** No appearance required.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the Motion was filed by the Chapter 13 Trustee or creditors. The modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, Debtor's Chapter 13 Plan filed on July 11, 2013 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.

28. [13-27994-E-13](#) DANIEL BELL AND AIDA  
NLE-1 RISTAU  
John A. Tosney

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
7-25-13 [[15](#)]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 25, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan is not the Debtors' best effort. The Trustee argues that the Debtors are over the median income and propose plan payments of \$1,045.00 for 4 months, then \$1,227.00 for 56 months with a 20% dividend (which totals \$4,522.00). The Debtors provided the Trustee with pay advices dated June 7, 2013, which reflects a bonus in the amount of \$7,339.00, which is not included in Schedule I or proposed to be paid into the plan. The Debtor also admitted at the First Meeting of Creditors that he receives quarterly bonuses.

The Trustee also argues that the Debtors cannot make plan payments. The Trustee states that the Debtor admitted at the First Meeting of Creditors that he owes monthly child support for his 13 year old son in the amount of \$763.00, but Debtor lists a deduction of \$718.94 on Schedule I and fails to list the 13 year old son on Schedule I. The Trustee also states that the Debtor admitted at the First Meeting of Creditors that his auto insurance expense is \$215.00 per month, but does not list one on Schedule J.

Lastly, the Trustee states that the Debtors' plan fails to provide for a tax lien owned to the Internal Revenue Service, which is listed on Schedule D. Trustee states that while treatment of secured claims may not be required, failure to provide the treatment could indicate that the Debtor either cannot afford the payments called for under the plan because they have additional

debts, or that the Debtor wants 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.

29.	<a href="#">13-27996</a> -E-13 NLE-1	FREDERICK/JACQUELYN TURNER Robert Hale McConnell	OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 7-25-13 [ <a href="#">29</a> ]
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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 25, 2013. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

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

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that the plan fails the Chapter 7 Liquidation analysis. The Trustee argues that he is not certain whether all of the Debtor's assets have been scheduled and if not, the plan may fail the Chapter 7 Liquidation analysis. The Debtor lists unsecured property taxes from a mother's property held in trust and then sold on Schedule F. Trustee states the Debtor admitted at the First Meeting of Creditors that he may be the beneficiary of the Trust, but Debtor has failed to list the Trust on Schedule B and exempt any equity on Schedule C. The Trustee has received a copy of the Trust but is not certain as to the current status of the Trust, which at one time held two real properties and at least two checking accounts.

The Trustee also argues that he is not sure the plan complies with applicable law, as the Debtor states in the additional provisions that he will use a portion of his non-income VA Disability award to fund the plan in the amount needed. The Debtor is under the median income and proposes plan payments of \$3,244.00 for 36 months, with a 0% dividend to unsecured creditors. The Debtors sources of income are from social security, VA disability and pension. Debtor receives a VA award listed at \$2,735.22 per month and is proposing to pay \$2,461.00 of that into the plan. The Trustee argues that whether or not the Debtor's VA Disability qualifies as income for a Chapter 13 proceeding is an issue for an adversary proceeding, as 11 U.S.C. § 1322 does not specifically authorize this determination and to obtain a declaratory judgment requires an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001(9).

The Trustee also argues that the Debtor may not be able to make the plan payments, as Schedule J reflects monthly net income of \$783.32, an amount less than the plan payment of \$3,244.00. The Debtor removes the entirety of the VA disability award as an expense. The Trustee notes Schedule F reflects payday loans on five different dates, past due debts for gas, electric, garbage and sewage and the Trustee is not sure the Debtor will not be able to make payments called for under the plan.

Lastly, the Trustee argues that the plan is not the Debtor's best effort. Trustee states the Debtor claims they are below median income with a family of two and claim \$150.00 for unspecified personal care, \$200.00 for Cable/DishTV, \$400.00 for home maintenance, \$170.00 for laundry and dry cleaning, \$660.00 for transportation, \$400.00 for recreation and \$58300 for charitable contributions.

#### **DEBTOR'S OBJECTION**

The Debtor objects on an evidentiary basis to the Trustee's objection regarding the Chapter 7 Liquidation analysis issue. Debtor does not provide a substantive response to the Trustee's concerns.

Debtor states that he is not seeking to file an adversary proceeding, but rather states 38 U.S.C. § 5301(1) specifically exempts payment of benefits by the Secretary of Veterans Affairs from the claim of creditors and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process. Debtor argues this prevents the Trustee, who is in the position of being a judgment creditor, from looking at or considering the amount of VA disability awards for any purpose. The Debtor states that an examination of the interrelationship of 38 U.S.C. § 301(1) and 11 U.S.C. § 1325(a)(1) is beyond

the jurisdiction of the Bankruptcy Court and would require a proceeding in the district court, should the Trustee desire to make that claim.

Though the Debtors state that 38 U.S.C. § 301(1) "exempts payment of benefits by the Secretary of Veterans Affairs from, inter alia, the claims of creditor, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever, either before or after receipt by the beneficiary." Opposition 2:16-20., Dckt. 41. However, 38 U.S.C. § 301 states,

§ 301. Department

(a) The Department of Veterans Affairs is an executive department of the United States.

(b) The purpose of the Department is to administer the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans.

(c) The Department is composed of the following:

- (1) The Office of the Secretary.
- (2) The Veterans Health Administration.
- (3) The Veterans Benefits Administration.
- (4) The National Cemetery Administration.
- (5) The Board of Veterans' Appeals.
- (6) The Veterans' Canteen Service.
- (7) The Board of Contract Appeals.

(8) Such other offices and agencies as are established or designated by law or by the President or the Secretary.

(9) Any office, agency, or activity under the control or supervision of any element named in paragraphs (1) through (8).

However, 38 U.S.C. § 5301 provides [emphasis added],

§ 5301. Nonassignability and exempt status of benefits

(a) (1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.** The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.



Debtors argue that since 11 U.S.C. § 1325(b) does not expressly state that veteran's benefits are included in income, then they should be excluded in the same manner as Social Security Benefits given that the anti-assignment language of veterans' benefits are the same as those for social security benefits.

#### TRUSTEE'S RESPONSE

The Trustee states that he did in fact receive a copy of the trust and the supplemental declaration by the Debtor clears up that issue for the Trustee.

The Trustee maintains his objection to confirmation because of the plan provision calling for the Debtor to use unspecified amount of VA disability to fund the plan. The Trustee maintains that his objection allows the court to determine what effect such a provision has on the plan. Trustee acknowledges that cases exist which support the Debtor's position, but that the method Debtor is using is procedurally inappropriate, if the Debtor wants to the court to decide the issue, it should be through a motion or more appropriately, an adversary proceeding.

The Trustee states that the Debtor has not addressed the ability to pay, citing four recent payday loans and past due utility debts.

The Trustee also maintains his objections as to the reasonableness of the expenses.

#### DISCUSSION

The court does not agree that an adversary proceeding is necessary to determine whether the VA benefits can be used to determine current monthly income. Here, the Trustee has raised several valid objections to a proposed Chapter 13 plan, one being whether or not the Debtor's VA Disability qualifies as income for this Chapter 13, which affects the confirmation of the proposed plan. The court can view this matter in order to determine whether confirmation of the plan is feasible.

Current Monthly Income ("CMI") is defined in 11 U.S.C. § 101(10A) [emphasis added] as,

(A) means the **average monthly income from all sources** that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) **without regard to whether such income is taxable income**, derived during the 6-month period ending on-

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but **excludes benefits received under the Social Security Act** [42 U.S.C. §§ 301 et seq.], **payments to victims of war crimes or crimes against humanity** on account of their **status as victims of such crimes**, and **payments to victims of international terrorism** (as defined in section 2331 of title 18) or **domestic terrorism** (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

Thus, there are several important exclusions from current monthly income. Most notably, benefits received under the Social Security Act are excluded. This exclusion will greatly assist many elderly and disabled recipients of Social Security benefits, not only protecting them from the relatively low median income means test thresholds for one or two person households, but also immunizing such income from being considered available to pay creditors in chapter 7 or chapter 13. 2 COLLIER ON BANKRUPTCY ¶ 101.10A (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

CMI is a component of a statutory means test that bankruptcy courts use to determine whether a debtor's bankruptcy petition is to be presumed an abuse of Chapter 7. See 11 U.S.C. § 707(b)(2). The means test is applied only if the debtor's CMI is above the safe harbor amount set forth in 11 U.S.C. § 707(b)(7). If the debtor's CMI minus certain expenses specified in the Internal Revenue Service's collection standards multiplied by 60 is either (1) greater than or equal to \$ 7,475 or 25 percent of the debtor's nonpriority secured debts, whichever is greater, or (2) greater than or equal to \$ 12,475, then the case is presumed to be an abuse and the bankruptcy court may either dismiss it under § 707(b) or, with the debtor's consent, convert it to Chapter 13. See *id.* §§ 707(b)(2)(A), (b)(1).

The Court of Appeals for the Ninth Circuit in *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) explained,

Before the BAPCPA, bankruptcy judges had authority to determine a debtor's ability to pay based on the individual circumstances of each case and each debtor. Congress replaced this discretion with a detailed, mechanical means test, which requires debtors with above-median income to calculate their "disposable income" by subtracting specific expenses from "current monthly income," as defined by the Bankruptcy Code.

*Id.* at 1130. The court further found that the calculation of "disposable income" now incorporates the definition of "current monthly income," and the definition of "current monthly income" excludes Social Security income. *Id.*

Once CMI is correctly calculated, "disposable income" for purposes of the confirmation test in § 1325(b) is the portion of CMI that is left after the following five deductions:

a. "[A]mounts reasonably necessary to be expended—" as determined under § 1325(b)(2)(A) and (B) if CMI is less than applicable median family income<sup>1</sup> and determined in accordance with § 707(b)(2)(A) and (B) if CMI is greater than applicable median family income;

b. Amounts included in CMI by § 101(10A)(B) that are not "received by the debtor";

c. "[C]hild support payments, foster care payments or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child";

d. "[A]mounts required to repay" a pension loan described in §§ 1322(f) and 362(b)(19); and

e. Wages withheld or payments received by an employer as contributions to an employee benefit plan, deferred compensation plan, tax-deferred annuity or health insurance plan described in § 541(b)(7).

Several courts have held that veterans benefits are not social security benefits and are included in current monthly income, notwithstanding that veterans benefits may be exempt under other state or federal law. *In re Waters*, 384 B.R. 432, 436-38 (Bankr. N.D. W. Va. 2008); *In re Wyatt*, No. 08-14792-SSM, 2008 WL 4572506 (Bankr. E.D. Va. Oct. 10, 2008) (holding Veterans Administration disability compensation is income for purposes of calculating CMI); *In re Hedge*, 394 B.R. 463, 466 (Bankr. S.D. Ind. 2008) (holding VA disability payments are included in CMI); *In re Redmond*, No. 07-80634-G3-13, 2008 WL 1752133 (Bankr. S.D. Tex. Apr. 14, 2008) (holding Veterans Administration disability payments are included in income for purposes of projected disposable income calculation.).

In *In re Waters*, the bankruptcy court held,

[U]nder the changes rendered to § 1325(b) by BAPCPA, the debtor's "current monthly income" for purposes of applying the disposable income test now includes any amount paid by an entity other than the debtor on a regular basis for the household expenses of the debtor. . . . Regarding the application of 11 U.S.C. § 101(10A) to the receipt of VA benefits, those benefits are "income" to the Debtor inasmuch as [the debtor] receives a monthly benefit check. . . . [T]he benefits are paid by the Department of Veterans Affairs, which is an "entity" . . . . [B]enefits are received on a regular, monthly basis . . . they are received to help pay for the household expenses of the debtor and/or the debtor's dependents. Accordingly, exempt VA benefits are properly included in the calculation of a debtor's current monthly income pursuant to § 101(10A) . . . regardless of the exempt status of those benefits under federal or State law.

*In re Waters*, 384 B.R. at 436-38.

Here, Debtor argues that Veteran's Disability is not "income" as defined by the United States Code pursuant to 38 U.S.C. 5301(1). However, 11 U.S.C. § 101(10A) states that "current monthly income" is income from all sources the debtor receives, excluding benefits received under the Social Security Act. Further, 38 U.S.C. § 5301(1) does not specifically exempt payment of benefits by the Secretary of Veterans Affairs from "current monthly income" calculation, rather it states the benefits "shall not be liable to attachment, levy, or seizure." Including the amount of benefits in the CMI calculation is not creating an attachment, levy or seizure upon the benefits. Rather it is merely a component of a statutory means test that bankruptcy courts use to determine whether a debtor's bankruptcy petition is to be presumed an abuse of Chapter 7. Debtor has not shown that the VA disability award is an exception to the CMI definition Congress created in 11 U.S.C. § 101(10A).

Finally, on this point the Debtors' contention that since the anti-garnishment and alienation provisions of the Veterans' Benefits are the same as Social Security Benefits they should be excluded confirms why Veterans' Benefits are included. Congress created a specific exclusion for Social Security Benefits from the definition of current monthly income. 11 U.S.C. § 101(10A). Congress demonstrated thereby how extremely broad the concept of "income" under the Bankruptcy Code and that absent such an exclusion, Social Security Benefits would otherwise be included in the computation of current monthly income-disposable income-projected disposable income.

Additionally, the Debtor has not addressed the reasonableness of the expenses raised by the Trustee. 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).

Lastly, the court denied the Motion to Value Collateral of GM Financial. This is also sufficient to deny confirmation.

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

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

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

The Objection to the Chapter 13 Plan filed by the 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.

**APPEARANCE OF ROBERT HALE MCCONNELL, COUNSEL FOR DEBTORS  
IS REQUIRED FOR AUGUST 20, 2013 HEARING  
TELEPHONIC APPEARANCE PERMITTED**

30.	<u>13-27996</u> -E-13 RHM-2	FREDERICK/JACQUELYN TURNER Robert Hale McConnell	MOTION TO VALUE COLLATERAL OF GM FINANCIAL 7-19-13 [ <a href="#">22</a> ]
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 9, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

**The court's tentative decision is to deny without prejudice the Motion to Value Collateral.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

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

Additionally, the court does not know who is "GM Financial." The California Secretary of State lists five corporations with the words "GM Financial" in their names. All but one, GM Financial Services, Inc., have been suspended or their corporate status forfeited. For GM Financial Services, Inc., the Secretary of State lists that the agent for service of process for this corporation has resigned. No limited liability companies or limited partnerships with the words "GM Financial" are listed with the California Secretary of State. <http://kepler.sos.ca.gov/>.

The motion seeks to value a claim secured by a 2009 Nissan Altima 2.5S. A \$14,399.32 claim has been filed by AmeriCredit Financial Services, Inc., for which the collateral securing the claim is identified as a 2009 Nissan Altima. Proof of Claim No. 1, filed June 28, 2013. It appears that AmeriCredit Financial Services, Inc. is the creditor whose claim the Debtors should be attempting 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 Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

31.	<a href="#">10-20499-E-13</a>	LAWRENCE/WENDY BARNES	MOTION TO INCUR DEBT
	RK-2	Steele Lanphier	7-18-13 [ <a href="#">75</a> ]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, respondent creditor, and Office of the United States Trustee on July 18, 2013. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

**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).

**No Tentative Ruling.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling

becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The motion seeks *nunc pro tunc* approval for Debtor Wendy Barnes to purchase a 2006 Jeep Liberty Limited Edition Sport Utility Vehicle. This is the Debtors' second motion attempting to obtain approval for financing previously obtained. In denying the prior Motion, the court rejected the after the fact request to approve the financing, which at that point in time was for a 15% per annum interest rate.

The Debtor has now returned to obtain approval on the financing, on slightly different terms - reduction of the interest rate to 13% per annum.

Ms. Barnes entered into a post-petition agreement with Autoville Motors to finance the Jeep on May 20, 2013, without her counsel being aware of the transaction. Ms. Barnes asserts she was unaware that she needed to seek court approval prior to entering into the transaction with Autoville. Ms. Barnes now seeks a court order that retroactively approves the transaction.

The loan amount is \$14,999.05 (total of all payments is \$22,608.60). The interest rate is 13% for a term of 57 months. The payments on the loan consist of one payment of \$351.91 and a final monthly payment of \$352. The court is not sure how much the remainder of the payments will be, as it is not stated in the motion. Ms. Barnes asserts that the financing of the vehicle is feasible.

Ms. Barnes further asserts that she needed to finance the Jeep because she and joint Debtor Lawrence Barnes separated in September 2012. The joint debtors live in separate households. Pursuant to a marital settlement agreement, Mr. Barnes received three vehicles, and Ms. Barnes received one vehicle, a 2004 Nissan Murano which is encumbered by School Credit Union. In May 2013, the Nissan was involved in an accident rendering it inoperable. The insurance proceeds on the Nissan were paid to the creditor Schools Financial Credit Union. Ms. Barnes relied on the Nissan to commute to work. The Debtor did not attempt to use the insurance proceeds to obtain a replacement vehicle.

Ms. Barnes asserts that the Jeep is feasible. A copy of the loan agreement is included with this motion. Exhibit "A," Dckt. 80. Additionally, Ms. Barnes has included what appears to be an updated Income Statement and Expense Statement (using the Schedule I and Schedule J forms). According to the current Income Statement, Ms. Barnes' income totals \$3,668.82. Exhibit B, Dckt. 80. Per the current Expense Statement, Ms. Barnes monthly expenses total \$2,900.86, which includes a \$356.86 car payment. This leaves Ms. Barnes with a net monthly income of \$767.96. Exhibit "B," Dckt. 80.

#### **TRUSTEE'S OBJECTION**

The Chapter 13 Trustee objects to the motion, stating a concern that Debtor cannot afford to make the payments. Trustee states that the current Income Statement adds \$658.00 on line #13 as rent "reimbursed by employer" and \$500 projected subchapter S pass-through has been removed. Trustee argues that Debtor did not address these changes in the recent declaration.

Debtor does offer the Declaration of Tabatha Barnes, supporting the \$500.00 "Daughter paying rent." Dckt. 79. However, the Tabatha Barnes declaration states that she contributes \$500.00 to her father's income.

The Trustee also states that the Debtor reduced the annual rate from 15% to 13%. No other information is provided by the Debtor.

#### **DEBTOR'S REPLY**

Debtor reply, stating that the projected \$500.00 subchapter S is no longer relied on for income to support the plan, but rent reimbursement and rent contributions from Debtor's daughter is being counted as part of the budget. Debtor also states that Debtor Wendy Barnes obtained a purchase money security agreement with 13%, hoping this would persuade the court in granting the motion.

The Debtor does not advise the court, Trustee, or Creditors why or how the \$500.00 a month from the subchapter S corporation disappears from income.

#### **CHAPTER 13 PLAN**

The First Modified Chapter 13 Plan was confirmed by this court on January 1, 2012. Order, Dckt. 62. Under the First Modified Plan the Debtors are to make \$400.00 a month payments for 54 months. The bankruptcy case having been filed on January 1, 2010, and the Modified Plan stating that the 54 months is computed from the date of filing, the last payment would be required on or about June 2015.

#### **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 does not take it lightly when a debtor violates the rules set forth in the Bankruptcy Code. Compliance with the rules is the price the debtor must pay for being afforded the relief she receives under the Bankruptcy Code. The debtor is not free to select the rules she wishes to follow and ignore those she does not particularly like.

The court remains concerned with the now 13% interest rate provided for in the contract. Debtor fails to provide any reasoning or evidence to the court how a 13% interest rate is reasonable under the circumstances. This is cause to deny the motion.

Further, the Debtors demonstrate that they cannot afford to make this payment, but are dependant on receiving \$500.00 a month in support from their daughter.