

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

**Honorable Ronald H. Sargis**  
**Chief Bankruptcy Judge**  
**Sacramento, California**

**April 20, 2021 at 2:00 p.m.**

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1. [18-24079-E-13](#) **VALAREE ST. MARY** **MOTION TO MODIFY PLAN**  
[MJD-7](#) **Matthew DeCaminada** **2-25-21 [158]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 25, 2021. By the court's calculation, 54 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtor, Valaree Jade St. Mary ("Debtor") seeks confirmation of the Modified Plan after becoming delinquent on plan payments due to a 10 percent reduction in income by her employer and a raise in pay at her current job which has enabled her to afford increased plan payments and bring monthly payments current under the plan. Declaration, Dckt. 162, ¶¶ 5-7. The Modified Plan provides

payments of \$210.00 for the remainder of the Plan, and a zero (0) percent dividend to unsecured claims totaling \$36,343.41. Modified Plan, Dckt. 160. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## **CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 6, 2021. Dckt. 167. Trustee opposes confirmation of the Plan on the basis that Debtor is delinquent on plan payments.

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$210.00 delinquent in plan payments, which represents one month of the \$210.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Valaree Jade St. Mary (“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 Modified Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2021. By the court’s calculation, 50 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Plan is denied.**

The debtor, Miller Hongphong Le (“Debtor”) seeks confirmation of the Chapter 13 Plan. The Plan provides monthly payments of \$880.00 for 60 month and a 100 percent dividend to unsecured claims totaling approximately \$39,000. Plan, Dckt. 2. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 6, 2021. Dckt. 35. Trustee opposes confirmation of the Plan on the basis that Debtor has not filed all required tax returns.

**DISCUSSION**

**Failure to File Tax Returns**

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2018 tax year has not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Miller Hongphong Le (“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 to Confirm the Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

3. [19-25877](#)-E-13      **SHANITA JEFFERSON**      **MOTION TO MODIFY PLAN**  
[TLA-3](#)                      **Thomas Amberg**                      **2-24-21 [86]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 21, 2021. By the court’s calculation, 58 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is ~~XXXXX~~.**

The debtor, Shanita Lorain Jefferson (“Debtor”) seeks confirmation of the Modified Plan

because Debtor's income was impacted by "rebounding from COVID-19" and reductions in pay from her employer. Declaration, Dckt. 88. The Modified Plan provides payments of \$325.00 for the remainder of the plan, and a zero (0) percent dividend to unsecured claims totaling \$26,735.84. Modified Plan, Dckt. 90. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## **CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 6, 2021. Dckt. 98. Trustee opposes confirmation of the Plan on the basis that Debtor is delinquent in plan payments.

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$325.00 delinquent in plan payments, which represents one month of the \$325.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor filed a Response on April 15, 2021 explaining that Debtor failed to set automated payments but that after the Opposition was filed, Debtor made the outstanding payments, which posted on April 14, 2021, and has set her future payments up via TFS. Dckt. 101.

At the hearing **xxxxx**

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Shanita Lorain Jefferson ("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 Modified Plan is **xxxxx**.



cause exists to extend the stay as to Debtor Jeffrey as well. Dckt. 16.

The Trustee's observation is correct in that Debtor does not allege why the prior case was dismissed and what has changed. Rather, all Debtor alleges is that the stay should be extended to protect the Debtor's assets (presumably, to the extent that such assets are not property of the bankruptcy estate). Motion, p. 3:16-20. Merely because a Debtor desires to have protection of the stay does not good faith make. Debtor's declaration does not provide testimony as to why the defaults and dismissal of the prior case occurred. From reviewing the Civil Minutes from the prior case, there was at least \$14,000 of defaults in plan payments in the prior case. 20-23411; Civil Minutes, Dckt. 77. It is not clear whether that is \$14,000+ that Debtor never had, or \$14,000+ of monies that Debtor had and diverted to other places or uses.

On Schedule I, debtor Jeffrey Mayhew lists having retirement income of \$3,427 a month and \$1,830 (after expenses) from Instacart driving. Dckt. 1 at 39. Debtor Yelena Mayhew has monthly take home income of \$8,809. *Id.*

### Applicable Law

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). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 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, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at \*6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). 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:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

*In re Elliot-Cook*, 357 B.R. at 814–15.

~~Debtor has sufficiently demonstrated the case was filed in good faith/rebutted the~~

~~presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.~~

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

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

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

~~—————The Motion to Extend the Automatic Stay filed by Jeffrey Scott Mayhew and Yelena M Mayhew (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

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

**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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 6, 2021. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 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 offer 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. At the hearing, -----

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**The Motion to Extend the Automatic Stay is granted.**

Lerida Garcia Diaz and Edwin Obinque Diaz (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor’s second bankruptcy petition pending in the past year. Debtor’s prior bankruptcy case (No. 20-21932) was dismissed on March 5, 2021, after Debtor became delinquent in plan payments. *See* Order, Bankr. E.D. Cal. No. 20-21932, Dckt. 42, March 5, 2021. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed after not being able to work until Debtor Lerida recovered from her current illness, spinal stenosis. Declaration, Dckt. 4. Debtor Lerida is now back at work and so she can make plan payments. *Id.*

Trustee filed a Response on April 12, 2021 stating non-opposition to the relief requested and noting that Debtor is refiled due to financial hardship and that Debtor Lerida has since returned to work from being off due to COVID and her current illness, spinal stenosis. Dckt. 20.

## DISCUSSION

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). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor’s cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 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, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at \*6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). 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:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

*In re Elliot-Cook*, 357 B.R. at 814–15.

Debtor has sufficiently demonstrated the case was filed in good faith/rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

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

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

The Motion to Extend the Automatic Stay filed by Lerida Garcia Diaz and Edwin Obinque Diaz (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

6. [19-26304-E-13](#)      **LUCIAN FREIRE**      **MOTION TO MODIFY PLAN**  
[MET-2](#)                      **Mary Ellen Terranella**                      **2-24-21 [50]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 24, 2021. By the court’s calculation, 55 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is ~~XXXXX~~.**

The debtor, Lucian Anthony Freire (“Debtor”) seeks confirmation of the Modified Plan to address the remaining delinquency as Debtor became unemployed from April 2020 to January 2021. Declaration, Dckt. 53. The Modified Plan provides payments of \$2,300.00 for 16 months and \$2,510.00 for 49 months, and a 0 percent dividend to unsecured claims totaling \$3,196.00. Modified Plan, Dckt. 56. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

**CHAPTER 13 TRUSTEE’S RESPONSE**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response on April 5, 2021 stating non-opposition but noting that because of the Notice of Mortgage Payment Change filed March 3, 2021, the plan payment must increase from \$2,510.00 to \$2,529.48 in April 2021. Dckt. 61.

## DISCUSSION

Trustee alleges that the Plan payments must increase because of the Notice of Mortgage Payment Change. Because the Plan payments do not sufficiently fund the Plan, the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The proposed payments of \$2,500.00 are insufficient to pay for the Plan in the allotted time. Thus, the Plan may not be confirmed.

At the hearing ~~xxxxxxx~~

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Lucian Anthony Freire ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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~~**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan, as amended to provide ~~xxxxxxx~~, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, which states the above amendment, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditor, and Office of the United States Trustee on March 10, 2021. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Complete Sale of Property is granted.**

The Bankruptcy Code permits Marvin John Burgess and Jeanine Marie Burgess, Chapter 13 Debtor (“Movant”), seeks permission to complete the sale of auto parts and inventory (“Property”) pursuant to 11 U.S.C. §§ 363(b) and 1303 which predated the filing of this bankruptcy case by approximately two months and permission to pay any and all proceeds to creditor Umpqua Bank. Debtor asserts that once the petition was filed, the escrow company stopped further efforts to close the escrow.

The purchaser of the Property is Genuine Parts Company, a Georgia Corporation, received the Property but the \$126,000.00 payment for the Property has yet to be made.

Debtor explains that Umpqua Bank asserts a purchase money security interest in the parts in the amount of \$220,389.29 and provides the UCC filing as Exhibit B (Dckt. 89). After the sale, Umpqua will be owed \$94,389.29, which Debtor will pay through their Chapter 13 plan.

#### **TRUSTEE’S RESPONSE**

On April 6, 2021, the Chapter 13 Trustee, David Cusick (“Trustee”) filed a Response. Dckt. 94. Trustee notes that the Estimated Statement reflects \$250,402.63 (a review of the Estimated

Settlement Statement shows that the correct amount is \$230,402.63) due from seller. *Id.* Because there are no escrow instructions included as an exhibit, the Trustee is not certain of the result if seller does not pay the \$250,402.63. *Id.*

Moreover, Trustee notes that the Statement lists due \$101,000.00 to the Internal Revenue Service, \$13,000.00 to Franchise Tax Board, and \$43,388.63 to CanCapital. *Id.* Yet the Trustee points out that Trustee is not certain that any of these parties or the escrow company have been served with the motion based on the certificate of service. *Id.*

## **CREDITOR’S OBJECTION**

On April 6, 2021, the Creditor, Umpqua Bank (“Creditor”) filed a Conditional Opposition stating non-opposition to the sale of the Property, but wants to make sure that the sales proceeds are turned over to Creditor via escrow. Dckt. 97. Creditor requests clarity and assurance that Creditor’s claim will be paid out of escrow, with Creditor receiving all of the sale proceeds, and that Creditor’s lien shall remain on the real property known as 609 7th Street, Williams, California and all the inventory and items as provided in the UCC Financing Statement. *Id.*

## **MOVANT’S REPLY**

On April 8, 2021 Movant filed a Reply to Creditor’s Opposition confirming their intent to use all of the proceeds from the sale at issue to pay down the lien held by Creditor and further understands and consents to the reality that any monies remaining owed to Creditor will remain secured by any business assets of Movant and that any Order sustaining this motion reflect same. Dckt. 100.

## **DISCUSSION**

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

Debtor has failed to address Trustee’s concerns regarding service of the instant Motion to various party. At the hearing **xxxxxxx**

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will finalize the sale of Property that has been pending for almost a year and allow Debtor to move forward paying the creditor with a secured claim.

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

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

The Motion to Sell Property filed by Marvin John Burgess and Jeanine Marie Burgess, Chapter 13 Debtor, (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Marvin John Burgess and Jeanine Marie Burgess, Chapter 13 Debtor, is authorized to complete the sale pursuant to 11 U.S.C. §§ 363(b) and 1303 to Genuine Parts Company, a Georgia/Corporation or nominee (“Buyer”), the Property commonly known as auto parts and inventory (“Property”), on the following terms:

- A. The Property shall be sold to Buyer for \$126,000.00, on the terms and conditions set forth in the Estimated Settlement Statement, Exhibit A, Dckt. 89, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs and other customary and contractual costs and expenses incurred to effectuate the sale.
- C. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. Creditor Umpqua Bank shall be paid directly from escrow the amount of \$126,000.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 5, 2020. By the court’s calculation, 68 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Amended Plan is ~~XXXXX~~.**

The debtors, Marvin John Burgess and Jeanine Marie Burgess (“Debtor”), seek confirmation of the Amended Plan. The Amended Plan provides for monthly payments of \$2,495 from November 2020 through the remainder of the plan and a 100 percent dividend to unsecured claims totaling \$1,450.00. Amended Plan, Dckt. 44. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

**CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on December 23, 2020. Dckt. 50. Trustee opposes confirmation of the Plan on the basis that the Plan exceeds the time allowed under the Bankruptcy Code.

## **DISCUSSION**

### **Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Trustee, the Plan will complete in 72 months because the plan estimates unsecured claims of \$1,450 to be paid 100%, where filed unsecured claims total \$33,422.41. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Trustee notes that, according to Amended Schedule J, Debtor's net monthly expense is \$4,555.00 and Debtor have the ability to increase the Plan payments, in or for the Plan to complete in 60 months.

Additionally, according to Trustee, Debtor does not specify the source of the lump sum payment in the amount of \$120,000 identified in the plan as to be paid sometime during the first 12 months of the plan. Trustee does note that the Motion refers to an open escrow.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### **Response of Debtor**

Debtor filed a Response on January 6, 2020 addressing Trustee's concerns. Dckt. 56. Debtor first suggests that the dividend paid to unsecured claims be reduced to no less than 10% and clarifies that the \$120,000 lump sum comes from the sale of most of the tools of Napa Auto Parts, which after payment of \$4,000 to the escrow company to complete that transaction, will leave \$120,000 to pay to the bank, who has a secured purchase money lien on the tools. Debtor also notes that a motion for court approval to complete the transaction will be filed.

The interest rate for Umpqua bank 6.5% on its secured claim.

The court continued the hearing to allow Debtor to serve the proposed amendments on all parties in interest in this case.

## **SUPPLEMENTAL PLEADINGS**

On January 19, 2021, Debtor filed a Supplemental Reply to Trustee's Opposition. Dckt. 65. The next day on January 20, 2021, Debtor filed an Amended Response. Dckt. 67. The court thus discusses for purposes of this disposition, Debtor's latter Amended Supplemental Reply. Debtor proposes that Trustee's opposition be addressed by incorporating the following additions in the order confirming the plan:

- A. That the plan will pay the sum received from Napa Auto Parts for the purchase of the tools in the approximate amount of \$120,000 to Umpqua Bank on the secured note.
- B. That the debtors will further pay interest at 6.5% to Umpqua Bank on the remaining balance of their loan and will retire the note within 18 months

of the commencement of this bankruptcy case;

C. That the plan will pay no less than 10% to the unsecured creditors.

Trustee filed an Amended Supplemental Reply to Trustee's Objection. Dckt. 67. Trustee continues to object to confirmation on the following grounds.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6) or the Plan may not be Debtor's Best Effort under 11 U.S.C. § 1325(b)(1). Trustee argues that if Debtor intends to pay Umpqua Bank in full within 18 months, with a due balance of \$102,000, the Trustee calculates would require a \$5,963.00 payment per month. However, the Plan calls for monthly payments of \$2,495.00, and Trustee calculates that payments to Umpqua under the Plan may require \$1,996.00 for a 60 month payout.

Additionally, Trustee argues that Debtor has failed to explain how they will retire the note and if paying directly, Debtor has not revealed the source and direct payment which is contrary to the terms of the plan. Trustee further objects on the basis that Debtor may not be paying more funds into the plan that could result in paying more monies to creditors with unsecured claim which Debtor now proposes to pay less than a 10% dividend.

Debtor's counsel filed a Reply to Trustee's Amended Reply. Dckt. 72. Debtor proposes that within 18 months from the filing of this bankruptcy Debtor will be able to refinance the money owed to Umpqua Bank to retire that loan and that the first part of the loan will be paid through the escrow for the sale of tools to Napa Auto Parts. *Id.*, at ¶ 3. Debtor states that this will leave an approximate balance due of \$102,000, and the plan proposes adequate protection payments to the bank. *Id.*

### **February 9, 2021 Hearing**

At the hearing, counsel for the Debtor reported that this matter should be continued to February 23, 2021, at 2:00 p.m. to be heard in conjunction with a motion to sell.

### **February 23, 2021 Hearing**

In a Supplemental Reply, Dckt. 77, stating that with the court approving the sale of the auto parts, the plan is sufficiently funded. At the February 23, 2021 hearing, the court denied without prejudice the Motion to Sell.

### **April 20, 2021 Hearing**

Trustee filed a Second Amended Response now stating that Trustee no longer opposes the Motion to Confirm and that Debtor is now current in plan payments after having paid \$21,585.00 into the Plan. Dckt. 92.

At the hearing ~~xxxxx~~

~~—————The proposed Amended Chapter 13 Plan, **as amended above**, complies with 11 U.S.C. § 1322 and § 1325; and the Motion is granted and the Plan is confirmed.~~

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Marvin John Burgess and Jeanine Marie Burgess (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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~~**IT IS ORDERED** that the Motion is granted, and Debtor’s Amended Chapter 13 Plan, as amended to provide **xxxxxxx**, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, which states the above amendment, transmit the proposed order to the Chapter 13 Trustee, David Cusick (“Trustee”), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

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

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

Sufficient Notice **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 17, 2021. By the court’s calculation, 34 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

Movant provided less than the days required by the bankruptcy code and local rules. At the hearing **xxxxxxx**

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Sell Property is granted.**

The Bankruptcy Code permits Edward C. Casarino and Janet L. Casarino, Chapter 13 Debtor, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 2157 Clearview Cir., Benicia, California (“Property”).

The proposed purchaser of the Property is George & Nadejda Claudatos, and the terms of the sale are:

- A. Purchase price of \$420,000.000 for the Property.
- B. Close of escrow shall occur on April 16, 2021.
- C. \$12,600.00 for the initial deposit.

- D. Seller to pay for a natural hazard zone disclosure report, including tax and environmental; county transfer tax, Homeowner's Association fee, any HOA special assessments, and for a one-year home warranty plan.
- E. Buyer to pay escrow fee and for owner's title insurance.
- F. Broker's fees totaling 5% with the listing agent receiving a commission of 2.5 percent for \$10,500.00, and selling agent receiving commission of 2.5 percent for \$10,500.00.
- G. Wells Fargo Bank, NA (Claim No. 5) to be paid \$169,144.24.

### Creditor's Response

On March 18, 2021 Creditor Wells Fargo N.A. filed a Response stating non-opposition to the sale so long as their lien is paid off in full satisfaction of the debt. Dckt. 154.

### DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will generate monies for the estate and pay off creditor Wells Fargo and all allowed claims.

Movant has estimated that a 5.0 percent broker's commission from the sale of the Property will equal approximately \$21,000.00, with listing agent receiving a commission of 2.5% totaling approximately \$10,500, and selling agent receiving a commission of 2.5% totaling approximately \$10,500. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than 2.5 percent commission.

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

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

The Motion to Sell Property filed by Edward C. Casarino and Janet L. Casarino, Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

~~IT IS ORDERED that Edward C. Casarino and Janet L. Casarino, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to George & Nadejda Claudatos or nominee ("Buyer"), the Property commonly known as 2157 Clearview Cir., Benicia, California ("Property"), on the following terms:~~

- A. The Property shall be sold to Buyer for \$420,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 144, and as further provided in this Order.
- B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
- C. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
- D. Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount not more than 5.0 percent of the actual purchase price upon consummation of the sale, with 2.5 percent commission shall be paid to Chapter 13 Debtor's broker, Chris Cochi, and 2.5 percent commission to be paid to buyer's agent.
- E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

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

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

Sufficient Notice **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 17, 2021. By the court's calculation, **34** days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

Movant provided less than the days required by the bankruptcy code and local rules. At the hearing **xxxxxxx**

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is granted.**

The debtor, Edward C Casarino and Janet L. Casarino ("Debtor") seeks confirmation of the Modified Plan because Debtor has filed a Motion to Sell their home and want to modify their plan to add Capital One to Class 2 so that it may be paid through the Trustee's demand upon approval of the sale. Declaration, Dckt. 145. The Modified Plan provides \$0.00 to be paid through months 40 and 41, and by month 42, after the sale of the property, Debtor will commit the necessary funds in order to pay off all allowed claims estimated at \$84,864.00, and a 100 percent dividend to unsecured claims totaling \$36,956.23. Modified Plan, Dckt. 150. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on April 5, 2021 stating non-opposition but noting that the plan relies on the Motion to Sell to be heard on the same day as this motion. Dckt. 163.

~~\_\_\_\_\_ The court having granted Debtor's Motion to Sell, the Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.~~

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

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

~~\_\_\_\_\_ The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Edward C. Casarino and Janet L. Casarino ("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's Modified Chapter 13 Plan filed on March 16, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

**Tentative Ruling:** No appearance at the April 20, 2021 hearing is required.

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

Sufficient Notice **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 24, 2021. By the court’s calculation, **27** days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

Movant provided less than the days required by the bankruptcy code and local rules. At the hearing **xxxxxxx**

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

**The Motion for Allowance of Professional Fees is Granted.**

Chad M. Johnson, the Attorney (“Applicant”) for Edward C. Casarino and Janet L. Casarino, the Chapter 13 Debtor (“Client”), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period October 31, 2019, through December 10, 2019 and May 28, 2020 through March 16, 2021. Applicant requests fees in the amount of \$1,998.50 and costs in the amount of \$82.30.

## APPLICABLE LAW

### Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant’s services for the Estate include modifying the Plan twice, filing a Motion to Sell, and communicating with Debtor’s broker. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Motion to Modify Plan BLG-4: Applicant spent 0.9 hours in this category. Applicant communicated with Client and Broker, drafted motion, and reviewed ruling on motion.

Motion to Sell BLG-7: Applicant spent 3.2 hours in this category. Applicant communicated with Client, and drafted and filed motion.

Motion to Modify Plan BLG-7: Applicant spent 1.4 hours in this category. Applicant communicated with Client, prepared plan, and drafted and filed motion.

The court notes that the work as listed in the Motion totals 5.5 hours, yet Applicant requests to be paid for 7.2 hours. The fees as requested and computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate for services provided are:

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Chad Johnson, Partner	3.1	\$400.00	\$1,240.00
Tina Perez, Paralegal	4.1	\$185.00	\$758.50
<b>Total Fees for Period of Application</b>			<b>\$1,998.50</b>



Costs and Expenses \$82.30

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

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

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

The Motion for Allowance of Fees and Expenses filed by Chad M. Johnson (“Applicant”), Attorney for Edward C. Casarino and Janet L. Casarino, Chapter 13 Debtor, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

~~**IT IS ORDERED** that Chad M. Johnson is allowed the following fees and expenses as a professional of the Estate:~~

\_\_\_\_\_  
Chad M. Johnson, Professional employed by Chapter 13 Debtor,

\_\_\_\_\_  
Fees in the amount of \$1,998.50

\_\_\_\_\_  
Expenses in the amount of \$82.30;

\_\_\_\_\_  
as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Chapter 13 Debtor.

\_\_\_\_\_  
~~**IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay the fees and costs allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.~~

**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.

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

-----  
Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on February 22, 2021. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of 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). Debtor, Creditors, the Chapter 13 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 Objection, 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 Objection.

**The Objection to Confirmation of Plan is ~~XXXXX~~.**

The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

- A. Debtor failed to appear at the Meeting of Creditors.
- B. The Plan exceeds maximum months allowed under the Bankruptcy Code.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Failure to Appear at 341 Meeting**

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear

and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The meeting was continued to March 11, 2021, and then again to March 18, 2021. Debtor appeared at both continued meetings and Trustee reports that the meeting has been concluded as to Debtor. Thus, this objection is resolved in favor of Debtor.

### **Plan Exceeds Term**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to Trustee, the Plan will complete in 81 months due to unsecured creditors receiving 35% dividend, and Trustee fees and attorney fees also need to be paid. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

At the hearing, counsel for the Debtor stated that the claims have come in higher than expected, and will file a response and serve an amendment to address the objection which lowers the percentage to around 20% to 25%.

### **April 20, 2021 Hearing**

At the hearing **xxxxxxx**

**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.

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

-----

Local Rule 9014-1(f)(2) Objection—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney on March 25, 2021. By the court’s calculation, 26 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of 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). Debtor, Creditors, the Chapter 13 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 Objection, 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 Objection. At the hearing -----

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**The Objection to Confirmation of Plan is XXXXX.**

The Chapter 13 Trustee, David Cusick (“Trustee”), opposes confirmation of the Plan on the basis that:

- A. The Plan will take 72 months to complete, and
- B. Debtor may be delinquent in plan payments.

**Debtor’s Response**

On April 4, 2021, Debtor filed a Response to Trustee’s Objection. Dckt. 19. Debtor has agreed to pay an additional \$70.00 in order for the plan to complete in 60 months or less. Debtor has also made her first payment and is now current under the proposed Plan. Debtor provided Exhibit A, properly authenticated in Debtor’s Declaration, which Debtor argues shows that Trustee accepted a \$1,647.69 payment on April 1, 2021. See Dckt. 21.

## DISCUSSION

Debtor has made a plan payments and it has been accepted by the Trustee. Thus, this issue is resolved in favor of Debtor.

Debtor has agreed to pay an additional \$70.00 in order for the plan to complete in 60 months or less. The court seeks clarification that Debtor means that the plan payment will be increased by \$70.00 a month for the remainder of the plan. At the hearing xxxxxxxx

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

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

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

**IT IS ORDERED** that the Objection is overruled, and Debtor's Chapter 13 Plan, as amended to provide xxxxxxxx, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, **which states the above amendment**, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 17, 2021. By the court’s calculation, 62 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtor, Angela Rusfeldt (“Debtor”) seeks confirmation of the Modified Plan to incorporate her mortgage forbearance into the Plan. Declaration, Dckt. 121. The Modified Plan provides payments of \$4,400.00 for 37 months beginning February 25, 2021, and a zero (0) percent dividend to unsecured claims totaling \$46,101.00. Modified Plan, Dckt. 125. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

**CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 5, 2021. Dckt. 130. Trustee opposes confirmation of the Plan on the basis that:

- A. Trustee is uncertain the Plan was served on all creditors, and
- B. Debtor may not be able to make plan payments.

## DISCUSSION

Federal Rule of Bankruptcy Procedure 2002(b)(2) requires twenty-eight days' notice "for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan." FED. R. BANKR. P. 2002(b)(2). The Proof of Service does not list the proposed Plan as a document served or indicate service to the United States Attorney (For Internal Revenue Service) or United States Department of Justice as indicated by the Roster of Governmental Agencies. That failure to provide notice violates Federal Rule of Bankruptcy Procedure 2002(b)(2).

Debtor filed a Reply to Trustee's Opposition on April 15, 2021 indicating that a notice was mailed to both the Internal Revenue Service and the U.S. Department of Justice. A review of the newly filed Proof of Service, Dckt. 135, shows that the U.S. Attorney for the Internal Revenue Service and the U.S. Department of Justice were served. The Proof of Service however, still does not list the proposed Chapter 13 Plan as having been provided with the rest of the documents served. *See* Dckt. 135.

At the hearing **xxxxxxx**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Declaration in support of the Motion mentions the household income has returned to pre COVID-19 levels, but the most recent Schedules I and J were filed January 17, 2020. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

In support of the Reply, Debtor filed her Declaration testifying that the household income has substantially returned to pre-Covid 19 levels and their average expenses have not increased. Dckt. 134. Schedules I and J were filed attached to the Declaration. The Schedules have not been filed separately as Supplemental Schedules I and J in the court's docket. At the hearing **xxxxxxx**

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Angela Rusfeldt ("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 Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 22, 2021. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is ~~XXXXX~~.**

The debtor, Stephen Anthony Gingold and Karen Michelle Gingold ("Debtor") seek confirmation of the Modified Plan for the following reasons:

1. In May 2020, in response to COVID-19, Mr. Gingold's employer initiated monthly one-week furloughs which affected Debtor's income.
2. Debtor's home required urgent repairs.
3. A family vehicle was totaled in an accident.
4. Debtor received an unexpected property tax assessment that is currently in dispute.

Declaration, Dckt. 109. The Modified Plan provides payments of \$3,845.00 for 42 months, and a 0 percent dividend to unsecured claims totaling \$19,741.26. Modified Plan, Dckt. 107. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## CHAPTER 13 TRUSTEE'S NON-OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an statement of Non-Opposition on March 12, 2021. Dckt. 118. Trustee does not oppose confirmation of the Plan and states that Debtor is current under the proposed plan. *Id.*

## CREDITOR'S OPPOSITION

Provident Trust Group, successor to Polycomp Trust Company, Custodian FBO Brian L. Kraft IRA ("Creditor") holding a secured claim filed an Opposition on March 16, 2021. Dckt. 120. Creditor opposes confirmation of the Plan on the basis that:

- A. The plan is not feasible.
- B. The plan is not proposed in good faith.
- C. The plan fails to solve Debtor's financial problems.
- D. Even if Debtor could perform as proposed, Debtor would be left "in a position of having to payoff the entire [Creditor] principal and the IRS lien within months of the case's conclusion."

## DISCUSSION

### Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Creditor states the plan is not feasible because:

- A. The proposed payment of \$3,845 is insufficient where after accounting for Trustee's fees, administrative expenses, arrearage payments, vehicle payments, and a priority dividend to the IRS total \$4,101.84. Thus, Debtor's proposed payment is insufficient by \$256.84.
- B. The involvement of Ms. Gingold in budgeting and bill-paying means there will be problems as it had previously happened and the court had been informed that Debtor Stephen would be the one in charger of their bookkeeping procedures.
- C. The new property tax defaults show Debtor's inability to make their required payments and Debtor has failed to detail the terms of the payment plan or how they will be able to make said payments outside of the bankruptcy plan.

Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### Modification of an Obligation Secured Only by Principal Residence

Creditor argues that Debtor's Plan was not filed in good faith and is an improper

modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Debtor's Schedules indicate that this is Debtor's primary residence. Creditor argues that Debtor's failure to repay Creditor for his cure of the post-confirmation property tax delinquency is an impermissible modification.

Moreover, Creditor argues that his claim would be in fact a modification for which he has not consented to because the plan proposes to forgive and cure all the following defaults:

- Debtor are using the property as their personal residence instead of investment property as it was agreed;
- Debtor has failed to make monthly payments before and after the filing of this case;
- they have missed arrearage payments; and
- have failed to pay property taxes.

Creditor asserts that these defaults are incurable.

This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

### **Good-Faith Filing**

Additionally, Creditor alleges that the Plan was not filed in good faith. *See* 11 U.S.C. § 1325(a)(3). Good faith depends on the totality of the circumstances. *In re Warren*, 89 B.R. 87 (9th Cir. BAP 1988). Thus, the Plan may not be confirmed. Factors to be considered in determining good faith include, but are not limited to:

- 1) The amount of the proposed payments and the amounts of the debtor's surplus;
- 2) The debtor's employment history, ability to earn, and likelihood of future increases in income;**
- 3) The probable or expected duration of the plan;
- 4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;**
- 5) The extent of preferential treatment between classes of creditors;
- 6) The extent to which secured claims are modified;
- 7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
- 8) The existence of special circumstances such as inordinate medical expenses;

**9) The frequency with which the debtor has sought relief under the Bankruptcy code;**

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

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

*In re Warren*, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988) (quoting *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (emphasis added).

According to Creditor, Debtor's modification is not proposed in good faith. Even if Debtor "perfectly performs" the plan, the property will still be subject to both Creditor's lien and the IRS lien after the plan has been completed. Further arguing that this will make it difficult for Debtor to refinance. Thus, the plan should provide for a sale of the property.

Creditor has filed a Countermotion for Remedies Upon Default/Motion to Confirm Termination or Absence of the Stay/Motion for Relief from Stay on March 16, 2021. Dckt. 122.

Creditor also notes that in this iteration of the Chapter 13 Plan, in addition to having previously listed an elderly parent who is listed as a dependent, who provides no contribution to the household expenses, Debtor now lists a 30 year old child, who makes no contribution to household expenses, and a grandchild as dependents. Supplemental Schedule J, Dckt. 108.

For the two debtors, they list \$1,100 a month in food and housekeeping expenses. *Id.* They also list having \$650 a month in transportation expenses for the two debtors. *Id.* Rather than increasing withholding for their proper income taxes, Debtor includes on Schedule J a monthly "expense" for increased withholding and \$100 for "temporary employer payback for deferred benefits."

## **DECISION**

Under the currently confirmed First Amended Plan and Order Confirming (Dckts. 52, 80) Creditor's claim is to be paid as a Class 1 Secured Claim, with both the current post-petition regular monthly payment and the arrearage cure payment made through the First Amended Plan. In its Opposition Creditor requests that the court confirm that the automatic stay has terminated as to Creditor pursuant to 11 U.S.C. § 362(c)(3), or alternatively grant relief pursuant to 11 U.S.C. § 362(d)(1). It is asserted that the Property was revested in the Debtor upon confirmation of the Plan, thus taking it out of protection from the 11 U.S.C. § 362(c)(3) termination of the stay as to Debtor.

Creditor asserts that "Incongruously, Section 3.11(c) of the Amended Plan seems to indicate that Class 1 claim holders, like [Creditor], must seek relief from the stay after confirmation." Motion for Relief, ¶ 8; Dckt. 122. Creditor finds the terms of a confirmed plan provide for the automatic stay to continue to protect property, which would be property of the bankruptcy estate if converted to a case under Chapter 7 for the benefit of the estate and creditors with unsecured claims, to be an abomination [the court's choice of terms, not Creditor's]. As this court has addressed in other cases, Congress drops the "repeat filer axe" on the automatic stay as protecting creditors and the bankruptcy estate in 11 U.S.C. § 362(c)(4). When the debtor has two prior cases that were pending and dismissed within one year of the subsequently filed case, the (c)(4) provisions explode and no stay goes into effect at all. With 11

U.S.C. § 362(c)(3), Congress keeps the automatic stay protections in place for the estate and creditors (telling them to wake up and smell the coffee to make sure they act to enforce/protect their rights). Having a plan term which continues the protections for the estate for properties that post-confirmation are revested in the debtor but would be part of the Chapter 7 case if converted is not inconsistent with 11 U.S.C. § 362(c)(3) and (c)(4) enacted by Congress.

Creditor's claim as stated in Proof of Claim 8-1 was (\$233,181.30) as of the commencement of this case. By Creditor's own admission (and the court appreciates the accuracy of Creditor in making statements under penalty of perjury), in 2019 when this case was filed the Property securing the claim had a value of \$315,000. Proof of Claim 8-1, ¶ 9. This is consistent with the value stated by Debtor on Schedule A/B. Dckt. 1.

Creditor asserts that misrepresentations were made in Debtor obtaining the loan and that Debtor defaulted beginning with the first payment due under the Note and were six months in default when Creditor recorded its notice of default in June 2019. Motion for Relief, ¶ 4; Dckt. 4. The first payment was due December 2018 (Note, Exhibit A; Dckt. 128). To be six months in default by June 2019 would require Debtor to have defaulted in all payments due under the Note, or, if the month of June 2019 payment is included in the six defaults, only have made one of seven payments that had come due.

As Creditor notes, the court was very clear and direct in addressing Debtor's conduct in denying the Motion to Extend the Stay as to the Debtor. Civil Minutes, Dckt. 26.

Looking at the Supplemental Schedule I filed by Debtor, they list their gross monthly income to be \$9,871.33. Dckt. 108 at 5. The deductions from Mr. Gingold's wages includes \$270.83 for voluntary contributions to a retirement plan. *Id.* at 6. Debtor lists an additional \$286.00 in mileage reimbursement and \$774.00 in incentive bonus pay each months, for a total take home income of \$8,201.34. *Id.*

On Supplemental Schedule J, Debtor lists (\$4,356) in necessary monthly expenses, which do not include a mortgage payment, but does include property taxes, insurance, and maintenance.

Looking at the proposed Modified Plan (Dckt. 107), several items stand out:

- A. For the 2019 Hyundai Elantra and the 2017 Toyota Corolla, Debtor's plan provides for paying these creditors 7.75% interest, approximately double what the court allows/requires under a *Till* analysis.
  - 1. On Schedule A/B Debtor lists owning three cars: (1) a 2013 Toyota Corolla in good condition; (2) a 2017 Toyota Corolla in good condition; and (3) a 2019 Hyundai Elantra in excellent condition (having been purchased shortly before this bankruptcy case was filed).
    - a. In the Modified Plan, Debtor seeks to pay \$551 a month for the Elantra and \$374 a month for the Corolla.
      - (1) In light of Debtor owning a third car free and clear, one of these two "nicer" car could be given up. If it were

the Hyundai, for the 42 months of payments required under the Plan, that would save Debtor \$23,142 to help fund the plan over the next three and one half years.

- B. The monthly plan payment by Debtor will be \$3,845 beginning with March 2021. Modified Plan, § 7 Nonstandard Provisions. This \$3,845.34 is the monthly net income shown on Supplemental Schedule J. Dckt. 108 at 8.
1. As noted above, the Debtor's necessary expenses of \$4,356 include:
    - a. (\$1,100) a month for food and housekeeping supplies for the two debtors;
    - b. (\$279) a month for personal care products and services;
    - c. (\$650) for transportation (it is not clear if this is in addition to the \$286 mileage reimbursement or the total amount to which the reimbursement is applied);
    - d. (\$100) for payment for deferred benefits;
  2. In addition, Debtor has (\$270.83) withheld monthly for voluntary retirement contributions.
- C. Additionally, Debtor now lists an adult son (30 years old) as a "dependent" who makes no contribution to the household expenses that he and his 5 year old son cause Debtor.

It appears that with some modest tweaks and a modest contribution for a share of the household expenses/rent by the 30 year old son, Debtor could have another \$1,000 a month to fund the Plan.

As Creditor has noted and the court address in the Ruling on the Motion to Extend the Stay, this is not the Debtor's first, second, or even third bankruptcy case in the last decade. In the period from January 1, 2010 and the August 2019 filing of this case, Debtor filed eleven prior cases (with one prior case in 1997, 2008 and 2009). Other than a Chapter 7 case in 2013 and one in 1997 in which the two debtors obtained Chapter 7 discharges, none of the other prior Chapter 7 cases or Chapter 13 cases were successfully prosecuted and ended up either being closed without a discharge or dismissed.

Debtor has a valuable asset with \$100,000 in equity to protect. However, Debtor has demonstrated an inability to protect it. Additionally, if Creditor is to be believed, Debtor purchased the property not as a residence, but as a short turnaround investment and faces personal liability for any shortfall in the event of a default and judicial foreclosure (which appears unlikely given the value a year ago, which has probably increased). However, as addressed in connection with the Countermotion by Creditor, Debtor has provided an email string in which Debtor represents to Creditor that Debtor intends to keep and retire in the house, and refinance Creditor's loan.

At the hearing, counsel for the Trustee reported that the Debtor is current and does not

oppose confirmation.

Counsel for Debtor advised the court that while there may be some adjustments in the budget, Debtor son continues to be unemployed. For the benefit reimbursement, it is for health care provided by Debtor's employer during furlough periods.

Counsel for Objecting Creditor states that the 2019-2020 taxes have been cured by Creditor, but there 2020-2021 is in default.

### **MARCH 30, 2021 HEARING**

The Parties agreed to continuing the hearing to allow for Debtor to amend the treatment of Creditor's Claim.

### **APRIL 20, 2021 HEARING**

As of the court's preparation of this pre-hearing disposition, no further documents have been filed.

At the hearing **xxxxxxx**

**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.

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

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Local Rule 9014-1(i) Countermotion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 16, 2021. By the court’s calculation, 14 days’ notice was provided. 14 days’ notice is required. LOCAL BANKR. R. 9014-1(i) (requiring filing and service by the last day that opposition to the original motion is due).

The Countermotion for Remedies Upon Default/Motion to Confirm Termination or Absence of the Stay/Motion for Relief from Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(i). Debtor, creditors, the Chapter 13 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 offer 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.

**The Countermotion for Remedies Upon Default, Motion to Confirm Termination of the Stay and/or Relief from Stay is **XXXXX**.**

Provident Trust Group, successor to Polycomp Trust Company, Custodian FBO Brian L. Kraft IRA (“Movant”) seeks remedies upon default pursuant to Section 6.4 of the confirmed plan and relief from the automatic stay with respect to Stephen Anthony Gingold and Karen Michelle Gingold’s (“Debtor”) real property commonly known as 236 E. Kentucky, Fairfield, California (“Property”). Movant has provided the Declarations of Mark Gorton and Brian Kraft to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant provides evidence that there are eight (8) pre-petition payments in default, with a pre-petition arrearage of \$16,181.30. Declaration, Dckt. 127. Movant also argues Debtor has incurred

an unpaid late charge in the amount of \$144.67 as part of the post-petition payments due. *Id.*

Additionally, Creditor asserts that Debtor are delinquent in the real property taxes in the sum of \$6,402.21, which he advanced in order to protect the priority of his Deed of Trust. *Id.*

Two declarations are filed in support of the present Countermotion. The first is by Brian Kraft, a person who is not the Movant. Dckt. 127. In the Declaration he testifies:

1. He owns an IRA, and one of the IRA investments he made was a loan to Debtor. Declaration, ¶ 2; Dckt. 127.
2. He has an “IRA custodian” who handles Mr. Kraft’s “nontraditional investments” and the IRA custodian provides “alternative asset custody. *Id.*
3. The loan was actually made by “Polycomp Trust Company, Custodian FBO Brian L. Kraft IRA,” with Polycomp having now been acquired by Provident Trust Group, which is not the current IRA custodian. *Id.*
4. In the Declaration, Mr. Kraft defines the word “I,” when referencing himself to actually mean “Polycomp Trust Company” acting in its fiduciary capacity as the custodian of the IRA. *Id.*
5. Polycomp Trust, as custodian (Mr. Kraft referring to that entity as “I”) made the loan in the principal amount of \$217,000. *Id.*, ¶ 3.
6. It is asserted that Karen Gingold “led me [not clear if it that references Polycomp Trust, which entity made the loan, or Mr. Kraft] to believe that the residence was being acquired so they could flip it.” [Other than the conclusion as being “led to believe,” no testimony is provided as how Polycomp Trust or Mr. Kraft was “led” into making the loan.] *Id.*
7. Mr. Kraft testifies that “I,” presumably Polycomp Trust, received only one of the first nine payments due on the loan before this bankruptcy case was filed. *Id.* ¶ 5.
8. Mr. Kraft further testifies that “I,” presumably Polycomp Trust (to be consistent with the Notice of Default exhibits) rescinded the initial Notice of Default filed without knowledge of Debtor’s first bankruptcy case and filed a second Notice of Default before Debtor filed the current case. *Id.* ¶ 6.
9. Mr. Kraft testifies that he “understands” that the pre-petition arrearage is to be cured through the Plan, but that the payments are in default \$1,787.90 or \$2,1-4.23 “based on the Trustee’s Report.” *Id.* ¶ 12. Mr. Kraft does not testify what default in the arrearage payments exist based on the IRA custodian’s or Mr. Kraft’s records.

10. Mr. Kraft testifies that he authorized the IRA custodian to advance \$6,402.21 to bring the real property taxes current by March 31, 2021. *Id.* ¶ 13.
11. Mr. Kraft computes the post-confirmation defaults and arrearage to be cured to be \$12,682.51.

Counsel for Provident Trust Group, the successor IRA custodian from Polycomp Trust Company, has filed his declaration. Dckt. 125. In it, the counsel states that the \$2,712.21 shortfall in payments is not that due to Provident Trust Group, IRA custodian, but what is computed to be the total payments due to the Trustee under the confirmed plan. Declaration, ¶ 5; Dckt. 125.

## CHAPTER 13 TRUSTEE'S RESPONSE

David P. Cusick (“the Chapter 13 Trustee”) filed a Response on March 23, 2021. Dckt. 130. Trustee asserts that according to Trustee’s records, Debtor is not delinquent in post-petition Class 1 contract payments to Creditor. Trustee explains that the total disbursement to ongoing mortgage will be \$27,506.06 as of that date.

According to Trustee’s records, Debtor are not delinquent in post-petition Class 1 contract payments where Trustee has paid 18 mortgage payments to the Creditor thru February 2021 which is what has come due since the case was filed in August 2019 (making the first payment due September 2019 and that would make February 2021 month 18 in the case). Trustee does note that Creditor is due \$2,273.14 for the pre-petition arrears dividends that the Trustee has not been able to disburse due to the Debtor’s delinquency.

Trustee requests the court take into consideration that according to Creditor, the loan made to Debtor was meant for investment purposes with the intent for it to be “flipped,” but that Debtor has made this property their sole residence as evidenced in Schedules A/B and C.

## DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$233,181.30 (Declaration, Dckt. 127), while the value of the Property is determined to be \$315,000.00, as stated in Schedules A/B and D filed by Debtor.

### 11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the

bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Creditor argues that such cause exists where Debtor has defaulted in post-confirmation payments pursuant to Section 6.04 of the confirmed Plan. Creditor presents evidence and Trustee has confirmed, that Debtor has failed to cure pre-petition arrearage dividend due. Moreover, Creditor has presented evidence that Debtor has failed to pay real property taxes due.

### **11 U.S.C. § 362(j)**

The Bankruptcy Code states the following:

(j)On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

11 U.S.C. § 362(j). Here, Creditor requests the court such order where the stay expired without extension as to the Debtor under section 362(c)(3), the property of the estate reverted in the Debtor by the terms of the confirmed Plan and the Debtor is in default of their obligations under the confirmed Plan and their real property tax obligation.

### **DEBTOR OPPOSITION**

Debtor's written opposition, filed on March 29, 2021, asserts that the proposed modified plan will provide Mr. Kraft (presumably the fiduciary Provident Trust Group, IRA custodian) with the same result as under the current plan. Dckt. 133.

Additionally, Debtor requests that the court continue the hearing to early May 2021 so Debtor can document the "cure of the property tax issue."

The Opposition is supported by debtor Karen Gingold's declaration. Dckt. 134. She testifies that the loan was a "hard money loan" so that Debtor could purchase the house from their aunt, fix it up, and live in the house. Declaration, ¶ 2; Dckt. 134. Ms. Gingold references the court to a email thread between her and Mr. Kraft in September 2018. Exhibit 1, Dckt. 135.

In an email dated September 30, 2018, from Ms. Gingold to Mr. Kraft, Ms. Gingold states:

thank you Brian we do not plan on moving we plan on retiring here,  
question can we send a little each month like 200 to reduce principal so  
when the 5years [sic] comes up it is a little less to refinance and pay off.

Exhibit 1, p. 3; Dckt. 134. It appears that a September 30, 2018 email from Mr. Kraft to Ms. Gingold is in response to the above, in which he states that he does not accept occasional principal payments, but Ms. Gingold can deposit the money in an account and let the balance build up. *Id.* at 7.

In the Declaration, Ms. Gingold further testifies that while there has been a default in taxes, it

is being addressed through the modified plan, and further Mr. Gingold is a withdrawal from his 401k to pay the taxes due. Declaration, ¶ 6; Dckt. 134. She further testifies that when talking with Solano County, she has heard they say to her that Mr. Kraft has not actually paid the taxes.

#### **APRIL 20, 2021 HEARING**

As of the court's preparation of this pre-hearing disposition, no further documents have been filed.

At the hearing **xxxxxxx**



continued (rather than the court's usual practice of denying a motion to dismiss without prejudice when a debtor appears to be actively prosecuting a plan to address the basis of the motion to dismiss). The Trustee does not indicate why continuing this hearing in light of Debtor's prosecution of the Motion to Confirm a Modified the Plan is necessary.

The court notes that the Declaration provided by Debtor in support of the Motion to Confirm is rich in factual details (and not merely parroted legal opinions drafted by an attorney).

This time, presuming that the Trustee has a reason for a continuance, the court continues the hearing. It will be conducted in conjunction with the hearing on the Motion to Confirm. If the Motion to Confirm is not granted, the court will then further continue the hearing on this Motion to Dismiss, affording the Debtor, Trustee, and creditors to focus just on the confirmation issues, and not be distracted by the threat/opportunity of dismissal.

In the future, if the Trustee has a reason to continue the hearing on a motion to dismiss in light of the debtor having a plan on file, motion to confirm, and appropriate supporting declaration, the Trustee should identify those grounds, if he wants the court to continue the hearing rather than dismissing or denying the motion to dismiss without prejudice.

### **MARCH 3, 2021 HEARING**

The hearing on the Motion to Dismiss was continued to 2:00 p.m. on March 30, 2021, (specially set date and time) to be conducted in conjunction with the Debtor's Motion to Confirm the proposed modified plan.

If the proposed modified plan is not confirmed, the court will then set the Motion to Dismiss for hearing on a later date, so that the Debtor, Trustee, and creditors can focus on confirmation issues and not have a sword of Damocles threat of dismissing hanging over them.

### **MARCH 30, 2021 HEARING**

The Parties agreed to continue the hearing as Debtor proposes amendments to the Plan.

### **APRIL 20, 2021 HEARING**

As of the court's preparation of this pre-hearing disposition, no further documents have been filed.

At the hearing **xxxxxxx**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2021. By the court’s calculation, 43 days’ notice was provided. 28 days’ notice is required.

The Motion to Approve Loan Modification has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

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

The Motion to Approve Loan Modification filed by Robert Aurther DeCelle, III and Donna Marie DeCelle (“Debtor”) seeks court approval for Debtor to incur post-petition credit. Freedom Mortgage (“Creditor”), whose claim the Plan provides for in Class 1, has agreed to a trial loan modification where Debtor will make three payments in the amount of \$1,057.30 per month.

The modification will add any unpaid amounts to the outstanding principal balance, which will accrue interest based on the interest rate in effect under the loan modification. The interest rate and monthly Principal and Interest will be fixed for the life of the mortgage unless the initial modified interest rate is below current market rates.

The Motion is supported by the Declaration of Robert Aurther DeCelle, III and Donna Marie DeCelle. Dckt. 132. The Declaration affirms Debtor’s desire to obtain the post-petition financing and provides evidence of Debtor’s ability to pay this claim on the modified terms.

**Trustee’s Response**

Trustee filed a Response on march 30, 2021 stating non-opposition provided that Debtor addresses the conflict between the trial loan modification, which states that debtor will pay Creditor directly, and the confirmed plan, where Creditor is included as Class 1 to be paid through the plan and

disbursed by the Trustee.

## DISCUSSION

This post-petition financing is consistent with the Chapter 13 Plan in this case and with Debtor's ability to fund that Plan.

However, Debtor's agreement with Creditor conflicts with the confirmed plan. At the hearing Debtor ~~xxxxxxxx~~

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

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

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

~~————— The Motion to Approve Loan Modification filed by Robert Aurther DeCelle, III and Donna Marie DeCelle ("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 court authorizes Robert Aurther DeCelle, III and Donna Marie DeCelle to amend the terms of the loan with Freedom Mortgage ("Creditor"), which is secured by the real property commonly known as 6021 Hazel Avenue, Orangevale, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion (Dekt. 133).~~

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 2, 2021. By the court’s calculation, 49 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is granted.**

The debtor, Doris Lena Allen (“Debtor”) seeks confirmation of the Modified Plan to adjust her income to add SSI benefits and reflect her current salary. Declaration, Dckt. 101. The Modified Plan provides payments of \$2,136.00 for months 51 through 60, and a 2.32 percent dividend to unsecured claims totaling \$316,733.73. Modified Plan, Dckt. 104. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### **CHAPTER 13 TRUSTEE’S RESPONSE**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 5, 2021. Dckt. 110. Trustee opposes confirmation of the Plan on the basis that the Motion and the proposed Plan are inconsistent where Trustee argues the plan proposes payments in the amount of \$661.00 but Supplemental Schedules I and J support payments of up to \$2,136.10. Moreover, Trustee notes that the motion was filed on March 2, 2021 but it was signed March 1, 2021 and thus Trustee is uncertain if the plan changed after the motion was signed and the plan was apparently signed on March 1, 2021.

Trustee also notes that the table titled “Summary” on page 7 of the plan contains two errors: the case was not filed June 2017 and the 18 months remaining in the plan is also incorrect.

Trustee states that the plan may be confirmed provided that Debtor shall pay \$651.00 in March 2021, followed by \$2,136.00 per month in April 2021 for the remainder of the 60 month plan, with unsecured claims receiving no less than 2.32%.

## DISCUSSION

Debtor filed a Reply on April 13, 2021 stating that the motion and the plan are consistent in that both state the future plan payments will be \$2,136.00 and clarifying that both Debtor's declaration and the Plan were signed and dated on March 2, 2021 with the current proposed terms. Dckt. 113. Debtor notes that the table labeled "Summary" contained typos and that the table should have stated that the case was filed December 2016; that Month 1 was January 2017; and that there are 10 of 60 months remaining. March 2021 was month 51 of the case, which was listed correctly in the table. *Id.*

Additionally, Debtor does not oppose adding the following additional language in the Order Confirming Plan:

"Plan payments should be \$23,686.00 total through February 2021. Debtor shall pay \$651.00 in March 2021. Debtor shall pay \$2,136.00 per month in April 2021 for the remainder of the 60 month plan. Unsecured claims shall receive no less than 2.32%".

*Id.*

Debtor having addressed Trustee's concerns, the Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Doris Lena Allen ("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's Modified Chapter 13 Plan filed on March 2, 2021, as amended to state,

Plan payments should be \$23,686.00 total through February 2021. Debtor shall pay \$651.00 in March 2021. Debtor shall pay \$2,136.00 per month in April 2021 for the remainder of the 60 month plan. Unsecured claims shall receive no less than 2.32%.

is confirmed. Debtor's Counsel shall prepare an appropriate order, stating the above amendment, confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if

so approved, the Chapter 13 Trustee will submit the proposed order to the court.

20. [18-26130-E-13](#)     **PAUL/MICHELLE STANLEY**     **MOTION TO MODIFY PLAN**  
[MJD-9](#)                     **Matthew DeCaminada**                     **2-26-21 [126]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on February 26, 2021. By the court’s calculation, 53 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtor, Paul Anthony Stanley, Jr. and Michelle Debbie Stanley (“Debtor”) seek confirmation of the Modified Plan to add the monthly mortgage payments to the Plan and to reflect new income caused by the COVID-19 lockdown. Declaration, Dckt. 128. The Modified Plan provides \$6,100.00 (commencing March 25, 2021) to be paid for the remainder of the Plan and a 100 percent dividend to unsecured claims totaling \$25,985.69. Modified Plan, Dckt. 130. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

**CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 5, 2021. Dckt. 135. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent, and

- B. Debtor misstates post-petition arrears by combining them with the claim.

## **DISCUSSION**

Trustee's concerns are well-taken.

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$6,100.00 delinquent in plan payments, which represents one month of the \$6,100.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Post-Petition Arrearage**

Trustee asserts that due to Debtor's failure to make plan payments, Trustee has been unable to make class 1 creditor The Bank of New York Mellon installment payments for months November 2020, December 2020, January 2021 and February 2021.

Trustee's accounting shows that the amount due for the unpaid installments is \$4,997.40 (2 months, November and December 2018), \$17,923.50 (7 months, March through September 2020) and \$10,430.52 (4 months, November 2020 through February 2021). The proposed \$33,853.00 combines two different periods and overstates the amount by \$5,498.98 to the detriment of general unsecured creditors. Thus, Trustee is unable to fully comply with Section 3.07 of the Plan.

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Paul Anthony Stanley, Jr. and Michelle Debbie Stanley ("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 Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, and Office of the United States Trustee on January 29, 2021. By the court's calculation, 69 days' notice was provided. 28 days' notice is required.

The Objection to Trustee's Final Report has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Objection to Trustee's Final Report that Plan has been completed is sustained.**

Creditor Charles Evans ("Objector") objects to the Trustee's Final Report and Account ("Trustee") of Jerline Linda Wallace ("Debtor") on the basis that Debtor's Chapter 13 Plan calls for payment of 100% of all claims and the Trustee's report and account, if approved, would close the administration of the estate without the Trustee having paid 100% of Objector's claim.

## DISCUSSION

Trustee has not responded to the Objection, nor has the Debtor responded to the Objection.

In considering this Objection, the court wades back into the mire of these Chapter 13 proceedings which are an outgrowth of the Objector's and Debtor's divorce proceeding in State Court.

Debtor's Motion to Sell [PGM-5]

Related to the instant Objection is Debtor's Motion to Sell property of the estate filed August 18, 2020. Dckt. 145. Debtor's Motion was granted, and by agreement of Debtor and Objector the following language was to be included in the order:

The net proceeds of sale, after paying taxes and costs of sale, including commissions, escrow fees, the first mortgage lien, and the lien and recorded judgments of the Division of Labor Standards Enforcement, shall be split equally between Mr. Evans and this Chapter 13 bankruptcy estate and each shall receive his or its respective share of the sale proceeds directly through escrow.

*Id.*, at 2:2. And incorporated into the Courts order approving the Motion to Sell as:

After payment of taxes and costs of sale, the net proceeds of the sale shall be split equally between Creditor Charles Evans and the bankruptcy estate and each shall receive their respective shares through escrow.

Order, Dckt. 163, at ¶ C.

In the Objector's timely Conditional Opposition to the Debtor's Motion to Sell the Property filed on September 1, 2021, Objector states:

Mr. Evans does not object to the sale per se, but does assert that he is entitled to receive his one-half share of the seller's net proceeds of sale directly through escrow, and not through the debtor's chapter 13 plan. Mr. Evans will not object to the sale if the order allowing the sale makes it clear that Mr. Evans is entitled to his share of the seller's net proceeds of sale directly through escrow.

Conditional Opposition, p. 1:22-26; Dckt. 155. The Conditional Opposition concludes requesting the inclusion of the language to split the net proceeds as reviewed above. *Id.*, p. 2.

Objector's filed a "sur reply" to Debtor's Motion to Sell, filed September 14, 2020, Dckt. 160, the afternoon before the hearing. Such eve of hearing filings are not provided for in the law and motion rules of this Court. L.B.R. 9014-1. In this eve of hearing sur reply, Objector states a disagreement with Debtor's reply concerning Debtor's reduced claim of \$22,310.79 at issue in the instant Objection. *Id.*, at 2:10. Objector discusses the nature of the claim and that it arises from the Marital Separation Agreement's ("MSA") intention to require Debtor pay the "household bills" until the property was sold. *Id.* He asserts Debtor did not keep them current, and that his claim represents the amount that will be paid out of his share of the proceeds from sale to mortgage holder to complete the sale of the property. *Id.*

In the sur reply, Objector states that the confirmed Second Amended Plan (Dckt. 150) makes him a Class 4 creditor to be paid outside the plan by "Sale of Real Property." *Id.* Further, that the plan incorporates the MSA in any sale of real property, providing that "All creditors including attorney fees and Class 2 claims are to be paid in full a lump sum, upon funding of the sale of real property." *Id.*; see also Chapter 13 Plan, Dckt. 150, §3. Objector asserts his entitlement to be paid in full under the Second Confirmed Plan, "at least for debt relating to the sale of real property." *Id.*, at 3:11.

### Objector's Argument

Objector filed a Memorandum of Point and Authorities ("MPA") on March 22, 2021. Dckt. 178. As statutory support for his Objection to Trustee's Final Report Objector points the court to Bankruptcy Code Section 1302(b) incorporating Sections 704(a)(2) and 704(9) which prescribe duties

Trustee shall perform in the administration of a Chapter 13 case. *Id.*, at 1:24. Objector believes that Trustee failed to account for all property received, and failed to make a proper and final report and account as required under Sections 704(a)(2) and 704(a)(9). *Id.*

Objector also cites to *In re Avery*, in which Objector believes a similar error was made by that trustee that required vacation of debtor's discharge after trustee failed to discharge his fiduciary duties to creditors of the estate. *Id.*, at 2:1-16; Citing *In re Avery*, (2002 E.D. Cal.) 272 B.R. 718.

11 U.S.C. Section 1302(b) provides in relevant part:

(b) The trustee shall—

(1) perform the duties specified in sections **704(a)(2)**, 704(a)(3), 704(a)(4), 704(a)(5), 704(a)(6), 704(a)(7), and **704(a)(9)** of this title; (emphasis added)

(2) ...

incorporating by reference 11 U.S.C. Sections 704(a)(2) and 704(a)(9) :

(a)The trustee shall—

(1) ...

(2) be accountable for all property received;

(3) ...

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) ...

Objector contends that Trustee failed in his duties as Trustee by failing to account for all property received and that Trustee's Final Report fails to make a proper final report and account. MPA, Dckt. 178, at 1:24. Objector specifically argues that Trustee

### *In re Avery*

Objector cites *In re Avery* as an instance where Objector contends trustee made a similar error. *Id.*, at 2:1. There, creditor AIF filed a timely proof of claim against debtor that omitted the amount of the claim and the claim type, but the omitted details could be deduced from the attachments to the proof of claim. *In re Avery*, supra, at 723-24. Nonetheless, trustee listed AIF's claim as a demand for \$0.00. *Id.* Trustee's final report represented that creditors had been paid in full, despite AIF having been paid nothing and debtor's plan calling for 100 percent payment to all creditors. *Id.* The court approved trustee's final report and discharged trustee from his duties. *Id.* On review the Court held that debtor's discharge must be vacated because trustee had a fiduciary duty to hold debtor's property for the benefit of creditors. *Id.* at 734. Furthermore, the court clarified that the ambiguity regarding AIF's claim did not allow trustee to ignore and not pay it, rather trustee should have objected to it. *Id.*

Objector argues that all parties here understood Objector was claiming \$22,310.79 from the Estate over and above his one-half interest in the Dover Property. MPA, Dckt. 178, at 2:25. As in *Avery* neither Debtor nor Trustee objected to the claim. *Id.* Therefore, Trustee was required to pay Objector's claim, but did not and the Objection to Trustee's Final Report should be sustained. *Id.*, at 3:1.

In essence, Objector asserts that administration of the estate has not been completed, where his unsecured claim, to which no one has objected to, has not been paid and that there is sufficient monies paid into the plan for it to be paid. Debtor received a disbursement of \$42,000, according to Trustee's Final Report. Thus, Debtor should return \$22,310.79 to the Trustee to properly fund the plan so that Objector's claim can be paid or Debtor will not obtain her discharge.

As part of the Objection to the Final Report, Objector requests the following specific relief from the court for Debtor to perform the Chapter 13 Plan as confirmed in this case:

1. The court order Debtor to return \$22,310.79 from the \$42,488.76 refunded to Debtor as surplus plan funds to the Trustee for the purpose of paying Mr. Evans' general unsecured claim;
2. The court determine that administration of the bankruptcy estate is not complete because the Trustee failed to comply with 11 U.S.C. section 1302(b) by failing to account for all property received under 11 U.S.C. section 704(a)(2) and failed to make a proper final report and account pursuant to 11 U.S.C. section 704(a)(9);

On this point, it appears that the Trustee has accounted for the property, but that there remains a claim to be paid before the confirmed Plan can be completed.

3. The court determine that the terms of the 100% chapter 13 plan have not been met;
4. That Mr. Evans is entitled to payment of his claim in the sum of \$22,310.79;

On this point, a proof of claim has been filed and not objected to. An Objection to a Final Report is not a "declaration of rights" substitute for a contested matter or adversary proceeding to enforce rights; and

5. That the Debtor not be discharged until Mr. Evans' claim is paid;

### **Review of Proof of Claim and Motion to Sell Proceedings**

Objector provides some of the background relating to the Motion to Sell the Property and discussion of Objector's claim. As one will see, the "complexity" of the dissolution dispute colored the bankruptcy proceedings.

Objector filed his Second Amended Proof of Claim 12-3 on September 10, 2020. This coincided with the constructive discussions and resolutions worked out between Objector and Debtor to facilitate the proposed sale.

In Amended Proof of Claim 12-3, Objector reduced his general unsecured claim to

\$22,311.79. This was reduced from the prior First Amended Claim 12-2 which stated a general unsecured claim in the amount of \$532,891.44. Attachment 1 to Second Amended Proof of Claim 12-3 reviews the proceedings in this court, confirmation of the Debtor's Second Amended Plan, and the computation of the \$22,311.79. In light of the authorized sale of the Property as authorized by this court and payment of half the net proceeds to Objector, he computed his remaining claim to be \$22,311.79. Attachment 1, p. 3.

Objector includes as Exhibit 8 a copy of the Court Reporter's transcript from the September 15, 2020 hearing on the Motion to Authorize the Sale of Property from which Objector was to receive one-half of the net proceeds. Some portions of the Transcript relevant to the current Objection include the following:

THE COURT: This is a motion to sell property, . . . Trustee wanted clarifications to make sure the escrow was open with a title company it was aware of. The trustee puts a demand in to get the payment. And Mr. Evans, Mr. Bass' client, had said, let's go along with this, but understand I've got some rights under a marital settlement agreement. **Mr. Evans is to receive half the net sales proceeds** after the cost of sale. **And Mr. Evans has also said, hey, wait a minute. I still have a claim to go ahead and get paid** for some of the costs and expenses relating to the property under the marital settlement agreement. . .

Let me start with Mr. Enmark. With respect to how we interpreted the trustee's request and how we drafted the order for the sale, does that work for you? What do we need to potentially fix in the way we've addressed it in the tentative and the proposed form of the order?

MR. ENMARK [counsel for the Chapter 13 Trustee]: How the order is drafted does work for the trustee. We would note that based on the outstanding Charles Evans' claim, we're not sure there's sufficient funds to pay everyone the 100 percent as indicated in the motion. The sale makes sense. We're not opposed to it. We're not opposed to the people being paid from it to the extent funds are available. We just want to make sure, you know, that if we get any funds that aren't allocated to a creditor, we know whether to give them to the debtor or to Evans.

THE COURT: Okay. But do I understand it correctly that out of the sale escrow, you're going to pay the cost of sale, and then the proceeds get split at that point so that half drop into the estate and half into Mr. Evans pocket?

MR. MACALUSO [Debtor's counsel]: Yes.

THE COURT: I just want to make sure I understood that correctly. I'm just looking at Mr. Evans' reply filed yesterday. I just want to make sure I'm remembering this correctly. **And Mr. Evans says, look, my claim in bankruptcy is \$22,310.79.**

And, Mr. Bass, do I understand **Mr. Evans' position** correctly that I'll go along with the sale, **we split the proceeds, and I still have a claim in bankruptcy for \$22,310.79?** The rest of what I assert I'm owed, we'll slug it out in the family law court?

MR. BASS [Objector's counsel]: Well, basically, there's much more, but all of that much more will be in the family court, Your Honor. **And you're right; it's like \$22,311 will be the claim still in the bankruptcy court. . .**

THE COURT: Okay. I just want to make sure I understood how you saw the waterfall of money going, as well as what Mr. Evans was expecting the trustee would be paying him with the other stuff, which is much more, will be fought out in the family court.

Let me come back to Mr. Macaluso. Now, when you look at the tentative of the ruling, the order form, with **Mr. Evans saying, hey, I'm going to have my handout to get a \$22,000 in [and] change check from the trustee,** anything I need to clarify in the tentative or in the order from the debtor's perspective?

[Though Not Labeled, This Appears to be Mr. Macaluso's Response]

Just that his claim is still open for objection if, in fact -- I don't know how he went from \$532 to \$22,000. It would have been my understanding that it was a split 50/50, and he goes back to family court for anything else. **So I want to have the opportunity to review that claim and object to the \$22,000 if appropriate.** That doesn't stop the sale.

THE COURT: Yeah. I think Mr. Bass had noted, said, look, this isn't really before the Court. We want to make it clear what we're doing just so there's no contention later that somehow we said, you know, we were just walking away with our bankruptcy tails between our legs. And by approving the sale, I'm not determining that there's an allowable \$22,000 claim. You've got it on file. The burden will be on Mr. Macaluso. He has objectionable grounds to raise the objection, correct, Mr. Bass?

MR. BASS: Yes, Your Honor, I agree. Thank you.

Exhibit 8; Transcript of September 15, 2020 Hearing,(reference to transcript page number) p.3:16-p.5:16, p.5:24-7:2 (emphasis added).

Debtor's confirmed Second Amended Plan (Dckt. 118) provides for Class 4 direct payment secured claim treatment for Objectors "Marital Settlement Agreement" claim from the Sale of Real Property (Plan ¶3.10) and for a 100% dividend to Class 7 creditors holding general unsecured claims (Plan ¶ 3.14). The Second Amended Plan was confirmed by an order entered on August 28, 2020, which was approximately 18 days before the September 15, 2020 hearing on the Motion to Sell the property from which Objector would receive one-half of the net proceeds.

A review of the file in this case reflects that no objection was filed to Second Amended Proof of Claim No. 12-3. As discussed at the September 15, 2020 hearing, if Debtor had an objection to the \$22,310.79 unsecured claim, then Debtor and Debtor's counsel were to object to it.

It appears that inadvertently the \$22,310.79 was disbursed to the Debtor as surplus monies under the Plan. It is surprising that Debtor, who wants to complete her plan, did not immediately return the check to the Trustee or at least the \$22,310.79 that is to be paid so that there is the required 100% dividend on creditors with unsecured claim. It is the proof of claim filed, unless otherwise ordered by the court pursuant to an objection or other motion, that controls for the amount of the claim, not any amount stated in the plan. Second Amended Plan, ¶ 3.02; Dckt. 118.

At the hearing, **XXXXXXX**

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 Trustee's Final Report filed by Creditor Charles Evans ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to the Trustee's Final Report, Dckt. 173, is sustained and the proposed Final Report, Dckt. 167, is not approved.

**IT IS FURTHER ORDERED XXXXXXX**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 2, 2021. By the court’s calculation, 49 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Plan is denied.**

The debtor, Amy Mary McClellan (“Debtor”) seeks confirmation of the Chapter 13 Plan. The Plan provides for payments of \$1,100.00 for 60 months and a dividend of 5 percent to unsecured claims totaling approximately \$52,190.11. Plan, Dckt. 30. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 6, 2021. Dckt. 55. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor failed to submit recent tax returns.
- B. Debtor’s motion to value was denied.
- C. Debtor’s attorney’s fee exceeds applicable maximum fee.
- D. Plan may improperly modify a claim secured only by Debtor’s residence.

E. The Plan is overextended.

Debtor filed a Reply on April 13, 2021. Dckt. 58. The Reply is discussed below.

## **DISCUSSION**

### **Failure to Provide Tax Returns**

The Chapter 13 Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(i); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide the tax transcript. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

In the reply Debtor indicates having submitted her 2020 Federal Tax Return to the Chapter 13 Trustee. At the hearing **xxxxxxx**

### **Debtor's Reliance on Motion to Value Secured Claim**

A review of Debtor's Plan shows that it relies on the court valuing the secured claims of Hudson & Keyes LLC and Resurgence Financial LLC. Debtor's Motion to Value the Secured Claim of Hudson & Keyes LLC was heard on March 23, 2021, and was denied without prejudice. Though Debtor's motion was a Motion to Value Collateral, in reality Debtor's motion improperly sought to avoid the judicial liens of Hudson & Keyes LLC, and Resurgence Financial LLC. as part of a motion to value the secured claim of a third creditor. Civil Minutes, Dckt. 50. Without the court valuing the claim or avoiding the judicial liens, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Debtor asserts that she will be re-filing two (2) motions to value and setting them for hearing on April 27, 2021 at 2:00 p.m.

Debtor requests that this confirmation hearing be continued to that date.

### **"No Look" Fee**

Under Local Bankruptcy Rule 2016(a), compensation paid to attorneys for the representation of chapter 13 debtors is determined according to 2016-1(c), which provides for fixed fees approved in connection with plan confirmation. However, if a party in interest objects, such as the trustee, compensation is determined in accordance with 11 U.S.C. §§ 329 and 330.

In the Reply Debtor's counsel indicates having agreed to the Order Confirming Plan reflecting total approved fees of \$4,000. Thus, this objection is resolved in favor of Debtor.

### **Modification of an Obligation Secured Only by Principal Residence**

Trustee argues that Debtor's Plan was not filed in good faith and is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence. Creditor Wells Fargo has filed a Proof of Claim indicating a secured claim in the amount of \$85,500.21, secured by a first deed of trust against the property commonly known as 2132 Pine Street, Quincy,

California. Debtor's Schedules indicate that this is Debtor's primary residence. This modification violates 11 U.S.C. § 1322(b)(2), which prohibits the modification of an obligation secured only by Debtor's residence.

**Debtor asserts having submitted a loan modification request to creditor Wells Fargo Bank, N.A.. Adding that thus pursuant to the Ensminger Provisions, Debtor cannot modify the terms of the mortgage without obtaining the agreement of Wells Fargo Bank, N.A.**

The court notes that the loan modification request was not filed as an exhibit in support of this Reply.

In reviewing the Trustee's Opposition, this basis for denying the motion is stated as follows:

4. ENSMINGER PROVISION. The Plan's additional provisions may improperly try to alter the rights of a claim secured only by an interest in Debtor's principal residence, contrary to 11 U.S.C. §1322(b)(2).

Opposition, ¶ 4; Dckt. 55. In reading this stated Opposition, the court notes:

- The Trustee does not actually assert that is improper, but only "may improperly" modify the creditor's secured claim.
- The Trustee cannot state any basis by which imposing adequate protection as allowed by Congress in 11 U.S.C. § 361 and protecting the rights and interests of Debtor and the creditor is not proper.

In reviewing the proposed Plan, the Additional Provisions contain all of the adequate protection and relief from stay rights preserved and given to creditor as in the standard Ensminger provision that was worked out between consumer counsel and creditor counsel a number of years ago.

Though not identified by the Trustee, the court noted in reading through the Section 7 Additional Provisions, Debtor has made an addition that may be problematic. Rather than having the claim treated as provided in the Additional Provisions and not in the standard provisions of the Plan, Debtor has chosen to affirmatively stated that this claim is a "Class 3 Claim," which binds the Debtor to surrender the collateral to the creditor. The Plan expressly states that if a Debtor commits to Class 3 surrender treatment, then the automatic stay is terminated. Chapter 13 Plan, ¶ 3.11; Dckt. 30.

Then Debtor seeks to change the Class 3 treatment and provide that even though the property has been surrendered, and that the surrender is required to be made as part of the Plan being confirmed by the court, adding (emphasis added):

A. Wells Fargo's secured claim is a Class 3 Claim, with the added requirement that an order modifying the automatic stay must be obtained (which order documents that the denial of loan modification condition subsequent has occurred)

*Id.*, Additional Provision § 7, ¶ 7.02; Dckt. 30.

The court is unsure of, and it is unclear what remains for the Debtor after electing to surrender the property. Also, this strict limitation on relief from the stay is contrary to other required Ensminger provisions stating that the creditor's right to seek relief from the stay for any or all reasons, *Id.*; Plan ¶ 7.02.6, 2<sup>nd</sup> full paragraph. (termination of insurance, default on taxes, transfer of the property, and the like) or the Debtor not diligently prosecuting a modification would appear to be put in question by stating that relief may only be based on the denial of the loan modification.

Thus, it appears that Debtor may be going beyond "mere" adequate protection as provided for by Congress in 11 U.S.C. § 361 and has instead imposed a surrendered property but lifetime ban on eviction so long as Debtor disputes that there has been a proper denial. This would be "too cute" of a provision and indicative of bad faith by Debtor.

Possibly this is what defect the Trustee saw and generally referenced in the generic statement of an opposition. Hopefully it is not a signal that the Trustee is seeking to adopt an interpretation of the Bankruptcy Code that some judges and other trustee had advance, that "the consumer debtor forfeits a right to confirm a plan and seek a loan modification in Chapter 13, and must immediately pay the full amount of the monthly mortgage payment, striking the adequate protection provisions enacted by Congress, or forfeit their rights under Chapter 13 and lose their residence and any equity therein."

### **Failure to Complete Plan Within Allotted Time**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in 239 months due to claims being filed that exceed the amounts Debtor Scheduled. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Debtor contends that the Plan will only be overextended if the loan modification request is not approved and in that case, Debtor will file a First modified Plan to address the arrearage claimed by Wells Fargo.

### **Denial of Motion**

Given that Debtor's proposed plan expressly surrenders the property securing creditor's claim, but then states that the surrendered property remains with the Debtor, the Plan is unconfirmable. Even if Debtor should pursue a loan modification, Debtor has surrendered the property.

Additionally, Debtor does cause the court to question Debtor's good faith in slipping in restrictions of the relief from stay rights made to appear to be preserved as part of the adequate protection. Burying such in what is made to appear to be the "standard Ensminger provision" that was worked out with creditors and consumer counsel is not a good faith protection of the Debtor's interest in the property while complying with the adequate protection provisions of the Bankruptcy Code.

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

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

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Amy

Mary McClellan (“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 to Confirm the Plan is denied.

23. [19-20047-E-13](#) **JULIUS/CHRISTINA JARVIS** **MOTION TO MODIFY PLAN**  
[BLG-4](#) **Chad Johnson** **3-2-21 [86]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 2, 2021. By the court’s calculation, 49 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtors, Julius T. Jarvis and Christina M. Jarvis (“Debtor”) seek confirmation of the Modified Plan because Debtor’s monthly utility costs increased \$350.00 month due to Covid-19 stay at home requirements, and they had unexpected expenses for home maintenance, repairs, and medical costs. Declaration, Dckt. 88. The Modified Plan provides the following:

1. Payments of \$2,600.00 to be paid for months 26-31;
2. Followed by \$2,950.00 to be paid for months 32-34;
3. Then \$3,335.00 for months 35-75; and

4. a zero (0) percent dividend to unsecured claims totaling \$24,956.71.

Debtor cites Section 1113(b) of the CARES Act to support plan payment extensions to 75 months if a debtor is experiencing, or has experienced, a material financial hardship due, directly or indirectly, to the COVID-19 pandemic. Motion, Dckt. 86, at 3:17.

## **CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 5, 2021. Dckt. 97. Trustee opposes confirmation of the Plan on the basis that:

- A. Trustee is uncertain debtor can afford the Plan.
- B. Debtor's declaration and exhibits are insufficient to support extension of the plan payment term to 75 months under the CARES Act.

## **DISCUSSION**

### **Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has not filed supplemental Schedules I and J disclosing current income and expenses. The most recent Schedule J was filed July 24, 2019. Dckt. 52. The most recent Schedule I was filed January 5, 2019. Dckt. 1. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

### **Extension of Chapter 13 Plan to 75 Months**

Trustee states the CARES Act provision allowing for extension of Chapter 13 plans is not automatic and requires a party "plead and provide evidence of 'material financial hardship' that is 'directly or indirectly due to' the COVID-19 pandemic. Dckt. 97, ¶ 2. Trustee finds Debtor's Declaration does not sufficiently state how their financial hardship is related to the COVID-19 pandemic. *Id.* Furthermore, Trustee points the Court to Debtor's Exhibit in support of declared monthly utility cost increase of \$350.00, and that the exhibit only shows that Debtor's gas and electric charges average \$196.75 per month. *Id.*

Trustee's objections are well-taken.

The CARES Act modifies Section 1329 of the Bankruptcy Code to allow a Chapter 13 plan confirmed prior to enactment of the CARES Act to be modified upon debtor's request if debtor is experiencing a material financial hardship, directly or indirectly, due to the COVID-19 pandemic if the modification is approved after notice and hearing. 11 U.S.C. § 1329(d)(1). Thus, if debtor qualifies under the statute, a Chapter 13 plan payment period may extend to up to 84 months.

Debtor's Declaration and Exhibits in support of this Motion provide the following support for Debtor's contention that a material financial hardship related to the COVID-19 pandemic exists:

1. "Due to the restrictions of COVID-19, our children and us are home 24/7

and due to this, our utilities have increased by \$350/month, on average,” and points the court to Exhibit A, Dckt. 90, containing copies of Debtor’s recent PG&E bills. Declaration, Dckt. 88, at 2:11.

2. A review of Exhibit A shows two (2) PG&E monthly statements. The first, statement date January 21, 2021, shows a substantial balance due; however, a closer review shows current monthly charges totaling only \$201.54. Exhibit A, Dckt. 90, p. 3. In similar fashion, the second statement dated December 20, 2020, evidences current monthly charges of only \$191.05. *Id.*, at p. 4.

In looking at these statements, what appears is as follows:

- ◆ The November 2020 Gas and Electricity Bill was (\$346.12). However, the payment Debtor made on that bill was \$0.00.
- ◆ The December 2020 Gas and Electricity Bill was (\$191.95). When added to the unpaid prior amount, that would be a two month total of \$538.07.
- ◆ The January 2021 bill reflects that Debtor made a \$247.45 payment on the December statement total two month balance of (\$538.07). The January 2021 Gas and Electricity Bill was (\$201.54).

None of these demonstrate the statement under penalty of perjury that “Due to the restrictions of COVID-19, our children and us are home 24/7 and due to this, our utilities have increased by \$350/month, on average (See Exhibit A – A True & Correct Copy of Recent PG&E Bills).” Declaration, p. 2:11-13; Dckt. 88. At best, averaging the three months shows that the actual bill is (\$358) and not that the bill has increased over the prior amount, which on Supplemental Schedule J is stated to be (\$150) as of July 2019 (during the sweltering summer in Debtor’s Fairfield, California home) to (\$500) a month. Also, Debtor does not explain the large amounts of electricity that Debtor’s three year old child and eleven year old child will consume daily while the 11 year old child is not in school.

3. Debtor also encountered the following “unexpected expenses”:
  - a. Water Heater Replacement- \$1500
  - b. Fence Repair-\$800
  - c. Landscape Drain Replacement- \$500
  - d. Garbage Disposal Replacement- \$400
  - e. Garage Door Repair-\$340
  - f. Junk Hauling- \$200
  - g. Medical Expenses- \$500

While stating that these expenses were incurred, Debtor does not explain why they were necessary. Some appear obvious on their face, but some not so obvious.

The Court does not downplay the impacts of the pandemic and recognizes that COVID-19's

impact has presented substantial hardships for many persons. And that there have certainly been widespread financial impacts on American families. However, Debtor's contentions do not meet the required material financial hardship required by the CARES Act.

Further, the "numbers just don't add up." Either Debtor didn't read the declaration before signing it or did not care that Debtor was stating under penalty of perjury that the PG&E bill had increased by (not to) (\$350) a month.

In the now more than two years old 2019 financial information, Debtor's monthly gross income is \$8,878.48. Dckt. 1 at 38. No Supplemental Schedule I has been filed showing any changes/raises in income, if any, over the past two and one-half years. Debtor has filed several Supplemental Schedules J to show changes in expenses. According to Schedule I Debtor has at least \$7,183 a month in take-home income as of January 2019.

The evidence provided by Debtor does not support the Motion, confirming the Plan, or that Debtor in good faith is seeking the modification.

At the hearing xxxxxx

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Julius T. Jarvis and Christina M. Jarvis ("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 Modified Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 2, 2021. By the court’s calculation, 49 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtor, Rhonda DeJesus (“Debtor”) seeks confirmation of the Modified Plan after defaulting in plan payments because of loss of income due to testing positive for COVID-19 in November 2020 but she has now found new employment. Declaration, Dckt.88. The Modified Plan provides for payments of \$2,206.18 for 66 months, and a zero (0) percent dividend to unsecured claims totaling \$22,760.39. Modified Plan, Dckt. 93. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

#### **CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 5, 2021. Dckt. 95. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in plan payments.
- B. Trustee is uncertain Debtor can afford the Plan.
- C. Trustee is unsure of the Plan terms regarding the nonstandard provisions.

Debtor filed a Response on April 10, 2021. Dckt. 99. The Response is discussed below.

## DISCUSSION

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$875.47 delinquent in plan payments and had not paid the March 25, 2021 payment, which represents multiple months of the \$2,206.18 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor asserts having cured the delinquency noted. At the hearing ~~xxxxxxx~~

### Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Declaration states she lost her job in March 2020, but has found new employment; yet, Debtor has not filed Supplemental Schedules I and J reflecting current income and expenses. The most recent Schedules I and J were filed August 4, 2018. Dckt. 28. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Debtor filed Amended Schedules I and J providing for her current income and expenses. Dckt. 98. On Supplemental Schedule I Debtor states having monthly gross income of \$2,000 and her non-debtor spouse having monthly gross income of \$3,806.00. Dckt. 98 at 2. After modest deductions, Debtor's take home monthly income is \$4,816.18. *Id.* at 3. On Supplemental Schedule J Debtor states having (\$2,610) in monthly expenses (which do not include rent/mortgage/property taxes).

### Nonstandard Provisions

Trustee notes that Debtor's Plan checks the box at 1.02, indicating that nonstandard provisions are attached; however, none have been attached in the three latest plan revisions. *See* Dckts. 86, 91, & 93.

Although Debtor is not using the current plan form (it appears to be EDC 3-080(eff. 12-1-17)), the plan otherwise works if the delinquency is cured and supporting Schedules I and J are filed.

At the hearing Debtor's Counsel clarified ~~xxxxx~~

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

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

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

~~The Motion to Confirm the Modified Chapter 13 Plan filed by the~~



through 60, and a 38.98 percent dividend to unsecured claims totaling \$65,533.63. Modified Plan, Dckt. 44. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on March 12, 2021. Dckt. 51. Trustee opposes confirmation of the Plan on the basis that:

- A. Voluntary retirement contributions should no longer be paid as Debtor has reduced the percentage payments of unsecured creditors from 100% to 38.98%.
- B. Plan payments are incorrect under the modified plan and would need to show a total paid in through February (month 18) of \$24,835.00, then \$796.00 for months 19 - 60, as Debtor has actually paid a total of \$24,835.00. Trustee would have no objection to the Plan if Debtor corrected the Plan payments.

## DISCUSSION

### Unfair Discrimination Against Unsecured Claims: Retirement Contribution

The Chapter 13 Trustee opposes confirmation due to possible unfair discrimination to unsecured claims under 11 U.S.C. § 1322(b)(1). Debtor proposes to pay 38.98% to unsecured claims and reduce her plan payment by \$944.00; however, Debtor's prior Schedule I filed August 29, 2019 (DN 1, page 31) included a monthly voluntary retirement contribution of \$309.40, and her current Supplemental Schedule I reflects a \$145.36 monthly voluntary retirement contribution.

Debtor filed a Response on March 23, 2021. Dckt. 54. Debtor argues that the voluntary contribution is reasonable and proposed in good faith. Debtor points the court to *In Re Davis* (United States Court of Appeals, 6th Cir., 17-12965)<sup>FN.1</sup>.

Research conducted by the court's law clerk indicates that the case referred to by Debtor is actually *Davis v. Helbling (In re Davis)*, 960 F.3d 346 (6th Cir. 2020). Debtor argues that the court held that a debtor who was making 401(k) contributions before filing for bankruptcy relief may continue making contributions in the same amount by deducting the contributions from "disposable income". Debtor further argues that under the holding of this recent case, the "hanging" paragraph in 11 U.S.C. § 541(b)(7) is to be interpreted, applying "established canons of construction," as excluding post-petition 401(k) contributions from disposable income.

Thus, Debtor argues, she may continue making these contributions when taking into consideration, as the *In re Davis* court did, that Debtor's employer is currently withholding \$145.36 per month for her voluntary retirement contributions, which is \$164.04 less than when her case was filed on 08/29/2019. Additionally, Debtor has been making a contribution of \$309.40 for at least six (6) months prior to the filing of this case, and the general unsecured creditors are set to receive a 38.98% dividend from the total amount owed, which is a 28.98% increase compared to the *Davis* matter.

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FN.1. Debtor's Counsel failed to provide this court with the proper citation for this case. Indeed,

the bankruptcy case number stated is also incorrect. Additionally, Counsel refers to Exhibit A, but no such exhibit was filed with the court.

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As to the corrected plan payments to date, Debtor does not oppose adding the following language to the Order Confirming:

“Debtor has paid a total of \$24,835.00 through month 18. Debtor will pay \$796.00 per month for months 19-60.”

Response, at ¶ 2.

### Decision

While the court understands Debtor’s need to fund her retirement, as stated by Debtor herself, she is 44 years old. Debtor has approximately over 20 more years before potential retirement. If completely successfully, Debtor will complete this plan in three years.

Debtor is employed by Kaiser Permanente and has a Pension Plan (Schedule A/B, ¶ 21; Dckt. 1). The scope of these benefits are not explained by Debtor as part of her analysis why she should be allowed to divert income to additional retirement planning during the remaining three years of this Plan.

Debtor has income of \$8,134 a month in wages from Kaiser - a significant income for those seeking relief through Chapter 13. Supplemental Schedule I, Dckt. 45. On Supplemental Schedule J Debtor lists two dependents - a 21 year old child and a granddaughter. *Id.* On Supplemental Schedule I Debtor does not list any deductions for her pension plan, it appearing to be fully funded by her employer. Debtor does not list any income for living expense contribution from her adult child listed as a “dependent.”

On Supplemental Schedule J Debtor lists having (\$1,000) a month in Childcare and Children’s Education Expense for her adult child. *Id.*

With respect to the voluntary contribution amount being reasonable because it is less than Debtor was previously taking, the court considers the terms of the prior plan and the reductions in the proposed Modified Plan.

	<b>Original Plan</b>	<b>Percentage Change</b>	<b>Proposed Modified Plan</b>
Plan Payment	\$1,740.00	-54%	\$796.00
Unsecured Dividend	100%	-61.2%	38.98%
Change in Voluntary Retirement Contribution	\$309.40	-53%	\$145.36

When the situation is viewed in light of who is bearing the burden of the change, the creditors with unsecured claims are retaining a 61% reduction in their dividend notwithstanding there being a 54% reduction in the monthly plan payment.

### April 20, 2021 Hearing

On April 12, 2021 Trustee filed an Amended Response stating that he no longer opposes the plan on the basis that Debtor has provided the Trustee with a proposed order confirming which includes clarifying language stating the total paid in through month 18 is \$24,835.00, followed by one (1) payment of \$796.00 in month 19, then \$941.00 for months 20-60. Dckt. 57.

~~\_\_\_\_\_ The Modified Plan, as amended, 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 Modified Chapter 13 Plan filed by the debtor, Monica Del Rocio Perez ("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's Modified Chapter 13 Plan filed on February 19, 2021, as amended,~~

~~\_\_\_\_\_ stating the total paid in through month 18 is \$24,835.00, followed by one (1) payment of \$796.00 in month 19, then \$941.00 for months 20-60~~

~~\_\_\_\_\_ is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2021. By the court’s calculation, 50 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Plan is ~~XXXXX~~.**

The debtor, Kelly Faye Stevens (“Debtor”) seeks confirmation of the Chapter 13 Plan. The Plan provides monthly plan payments of \$400.00 for 60 months and a nine (9) percent dividend to unsecured claims totaling approximately \$150,250.00. Plan, Dckt. 35. Additional provisions of the plan include car payments of \$300.00 to Debtor’s brother in law and payments of \$445.00 to Matador Credit Union. *Id.*, at § 7.01. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### CHAPTER 13 TRUSTEE’S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 6, 2021. Dckt. 41. Trustee opposes confirmation of the Plan on the basis that:

- A. According to Proof of Claim 7, Debtor is delinquent on payments to creditor Matador Credit Union and the addition of nonstandard provisions to pay the long term debt of Claim 7 is reasonable only if Debtor is current.

## DISCUSSION

Trustee's concerns are well-taken.

Debtor seeks to make payments directly to creditor Matadors Community Credit Union as a Class 4 creditor. However, according to their Proof of Claim, Debtor has defaulted and thus this claim should be paid through the plan.

Debtor filed a Response on April 13, 2021 stating that Debtor was unaware that Creditor's claim was secured by solar equipment when the case was filed. Dckt. 43. Debtor notes that Debtor is \$1,334.79 delinquent and Debtor's Counsel has been negotiating with Creditor's Counsel for Creditor to place the delinquent payments at the end of the loan and will request Creditor to sign off approval to the proposed Order Confirming Plan. *Id.*

At the hearing ~~xxxxxx~~

~~The Plan complies / does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.~~

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

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

The Motion to Confirm the Chapter 13 Plan filed by the debtor, Kelly Faye Stevens ("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 to Confirm the Plan is ~~xxxxx~~.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 1, 2021. By the court’s calculation, 50 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtor, Michael Richard Dunlop and Robin Lee Dunlop (“Debtor”) seek confirmation of the Modified Plan because COVID-19 restrictions at work and work hours lost to illness caused Debtor to fall behind in Plan payments; now that Debtor is back to work full time, Debtor can resume Plan payments in full. Declaration, Dckt. 35. The Modified Plan provides the following:

1. Payments of \$2,845.00 for months 1-12;
2. Payments of \$0.00 for months 13-18;
3. Payments of \$2845.00 for months 19-66; and
4. A 100 percent dividend to unsecured claims totaling \$124,054.00.

Modified Plan, Dckt. 34. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## **CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 6, 2021. Dckt. 39. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan is not feasible.
- B. The Plan does not provide for the secured portion of the claim by the Internal Revenue Service.
- C. Debtor has not filed supplemental Schedules I and J.

### **DISCUSSION**

Trustee's concerns are well-taken.

#### **Failure to Complete Plan Within Allotted Time**

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Chapter 13 Trustee, the Plan will complete in more than 66 months, possibly taking 82 months because the Plan proposes to pay a total of \$136,560.00 over the remaining 48 months but \$171,534.89 is required, not including the secured portion of the Internal Revenue Service claim. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

#### **Failure to Provide for a Secured Claim**

Debtor's proposed Plan does not provide for the secured portion of the Internal Revenue Service claim filed as Proof of Claim 2. While this is not required, Trustee is uncertain if Debtor's budget allocates sufficient expenses to pay this secured claim directly.

When a secured claim is ignored and not provided for in the plan – whether by Class 1 cure, Class 2 modification, Class 3 surrender, or in an additional provisions (such as an Ensminger loan modification adequate protection provision) – it puts into doubt two things: first whether Debtor can provide for the secured claim and second, whether the plan is proposed and the case is being prosecuted in good faith.

#### **Cannot Comply with the Plan**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has not provided supplemental Schedules I and J in support of current income and expenses. The most recent Schedules were filed at the outset of the case, September 12, 2019. Prior schedules include details regarding adult children living at home and voluntary retirement plan contributions which may no longer be accurate. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Michael Richard Dunlop and Robin Lee Dunlop (“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 Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

28. [14-30877](#)-E-13 **TROY HARDIN** **MOTION FOR COMPENSATION FOR**  
[PGM-11](#) **Peter Macaluso** **PETER G. MACALUSO, DEBTORS**  
**ATTORNEY(S)**  
**3-10-21 [227]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 10, 2021. By the court’s calculation, 41 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion for Allowance of Professional Fees is granted.**

Peter G. Macaluso, the Attorney (“Applicant”) for Troy Armean Hardin, the Chapter 13 Debtor (“Client”), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period September 14, 2020, through November 2, 2020. Applicant requests fees in the amount of \$1,095.00 and costs in the amount of \$0.00.

### **Attorney Substitution**

Applicant was not the attorney of record at the time of the first Plan confirmation, February 2, 2015. Dckt. 30. The order substituting Applicant was entered on October 6, 2015. Dckt. 43.

### **TRUSTEE'S RESPONSE**

Trustee filed a Response on March 30, 2021. Dckt. 232. Trustee does not oppose the allowance of professional fees in the amount of \$1,095.00 and notes that it does not appear they will pay out over the life of the Debtor's plan at the rate of \$15.00 per month stated in Debtor's confirmed plan. *Id.*; Confirmed Plan, Dckt. 207, at §3.06.

### **APPLICABLE LAW**

#### **Statutory Basis For Professional Fees**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

### **Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney’s services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; see also *Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

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

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant’s work for the Estate includes preparing, filing and confirming a modified Plan due to COVID-19's financial impact on Debtor. The court finds the services were beneficial to Client and the Estate and were reasonable.

### **“No-Look” Fees**

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees.

Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 30. Applicant prepared the order confirming the Plan.

### **Lodestar Analysis**

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. *See In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### **FEES AND COSTS & EXPENSES REQUESTED**

#### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided,

which are described in the following main categories.

Motion to Confirm Modified Plan: Applicant spent 3.95 hours in this category. Applicant met with client to prepare new plan, prepared and filed motion and supporting pleadings, review and responded to opposition to motion, and appeared on clients behalf.

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

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Peter G. Macaluso	3.55	\$300.00	\$1,065.00
Peter G. Macaluso	0.4	\$75.00	\$30.00
<b>Total Fees for Period of Application</b>			\$1,095.00

**Costs and Expenses**

Applicant does not seek the allowance and recovery of costs and expenses in the amount of \$0.00 pursuant to this application.

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The unique facts surrounding the case, including preparing, filing and confirming a modified plan due to the unforeseeable financial hardships on Debtor due to the impacts of the COVID-19 global pandemic, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of \$1,095.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick (“the Chapter 13 Trustee”) from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

The court authorizes the Chapter 13 Trustee under the confirmed plan to pay 100% of the fees and costs allowed by the court.

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

Fees	\$1,095.00
Costs and Expenses	\$0.00

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

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

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

The Motion for Allowance of Fees and Expenses filed by G. Macaluso (“Applicant”), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Peter G. Macaluso is allowed the following fees and expenses as a professional of the Estate:

Peter G. Macaluso, Professional Employed by Troy Armean Hardin (“Debtor”)

Fees in the amount of \$1,095.00  
Expenses in the amount of \$0.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor.

**IT IS FURTHER ORDERED** that David Cusick (“the Chapter 13 Trustee”) is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.



## **DISCUSSION**

### **Unexplained Reductions in Expenses and Income**

Again, the Chapter 13 Trustee brings to the court's attention that Debtor's prior Schedules I and J, filed September 9, 2020, Dckt. 125, lists monthly disposable income of \$8,575.21, monthly expenses of \$7,279.33, and monthly net income of \$1,295.88.

The recent "Amended / Supplemental" Schedules I and J Debtor filed on January 18, 2021 indicate a reduced income of \$8,234.08 and reduced monthly expenses of \$7,266.00, which indicate a monthly net income of \$971.08. Dckt. 140. However, Schedule I does not indicate a change in Debtor Jason's employer.

Trustee has previously raised this objection in Debtor's prior Motion to Modify, and mentions that the Court also raised concern about Debtor's schedule being marked both amended and supplemental. Civil Minutes, Dckt. 132, pp. 2-3.

Trustee contends Debtor has not provided an explanation for the purported changes in income and expenses, or whether or not Debtor Jason has had a change in employment in this modification.

Debtor has been given opportunities to address these issues and yet has failed to do so.

### **Unlisted Class 4 Vehicle**

Trustee states that Debtor's proposed Modified Plan does not include a 2017 Toyota Camry SE in Class 4. Debtor's filed a Motion to Authorize Debtor to Incur Post-Petition Debt, Dckt.102, which was subsequently granted pursuant to order filed June 6, 2020. Dckt.118. Debtor's Supplemental Schedule J filed September 9, 2020, budgets a monthly car payment of \$413.33, where Schedule J filed January 18, 2021, budgets a car payment for \$400.00. Debtor's proposed modified Plan does not include this vehicle in Class 4. The Trustee has previously raised this objection.

### **Independent Review—Net Income Shortfall**

Debtor's Amended Schedule J, filed on January 18, 2021, lists a \$971.08 monthly net income, while the Modified Plan provides for a \$1,131.36 monthly payment. Taken together, they suggest that the Plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

Though neither the Chapter 13 Trustee, the U.S. Trustee, nor any creditor has raised the issue, the court has an independent duty to make certain that the requirements for confirmation have been met. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

At the hearing, Counsel for Debtor advised the court that Debtor is now on unemployment. The Trustee concurred with the request for a continuance to allow Debtor to document his new economic status.

## Debtor's Supplemental Declaration

Debtor filed a Declaration on April 8, 2021 testifying they have filed Supplemental Schedules I and J reflecting Debtor Jason's loss of employment and that they will notify Trustee as soon as Jason becomes employed again and file another amended Schedule I and J. Dckt. 152. Debtor further testifies that they can afford the terms of the plan and that they proposed amending our chapter 13 plan in the order confirming plan to reflect the Honda loan approved by this court as a class 4 claim. *Id.*

Debtor filed Amended/Supplemental Schedules I and J. Dckt. 53. Though the court has addressed this issue with various counsel a number of times, making a minor theatrical production of it, Debtor and counsel in this case have chosen to file a Janus face Amended (Dating all the way back to the filing of the case)/Supplement (effective only as of August 14, 2020) Amended/Supplemental Schedule I and Schedule J. They cannot be both. The court cannot fathom why both the amended and the supplemental boxes are checked and a supplemental effective date are checked by a debtor who is prosecuting a case in good faith and carefully reads schedules, whether original, amended, or supplemental, before signing them under penalty of perjury.

## Trustee's Supplemental Response

Trustee filed a Supplemental Response on April 13, 2021. Dckt. 155. Trustee first notes that Debtor has filed Schedules I and J again marked as both amended and supplemental. Trustee further notes that the Supplemental Declaration does not state what, if any, income Jason Rupchock is receiving at this time, but pursuant to information received by Debtor's Counsel at the hearing, Debtor is now receiving unemployment.

The current Schedules now reflect Debtor Jason receiving \$2,817.00 per month in Social Security payments, not unemployment. Moreover, Trustee notes that Schedules J reflects a number of unexplained adjustments, namely home maintenance, clothing, transportation, and charitable contributions. Trustee also notes that Debtor's supporting Declaration stating the proposed monthly plan payment is \$1,131.36, does not match the plan payments listed in the plan dated February 4, 2021 (DN 146) and the Trustee's records reflect Debtor made payments in February and March of \$985.00 and \$970.00, respectively.

Trustee further notes that Trustee is not convinced that the information provided really clarify the issues surrounding the Debtor's budget and the questions of feasibility.

Debtor's supporting Declaration proposes to add language to the order confirming include the Honda loan as a class 4 claim. Although, Trustee does not oppose this treatment, but no proposed order has been provided.

## April 20, 2021 Hearing

At the hearing **xxxxxxx**

30. [18-25581](#)-E-13  
[MET](#)-4

**DANIELLE DELGADO**  
Mary Ellen Terranella

**MOTION FOR COMPENSATION FOR**  
**MARY ELLEN TERRANELLA,**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 7, 2021. By the court's calculation, 44 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion for Allowance of Professional Fees is granted.**

Mary Ellen Terranella, the Attorney ("Applicant") for Danielle Nicole Delgado, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period February 5, 2019, through April 20, 2021. Applicant requests fees in the amount of \$10,062.50 and costs in the amount of \$38.64, for a total of \$10,101.14, discounted to \$7,500.00.

### **TRUSTEE'S OPPOSITION**

Trustee filed an Opposition on March 7, 2021. Dckt. 124. Trustee opposes the Motion for Allowance of Additional fees and brings the Courts attention the following issues:

1. Applicant was paid \$1,000 prior to the filing of the case, Dckt. 91, \$3.05, and has been paid \$1,050 post-petition.
2. Debtor is delinquent \$480.00 in plan payments.
3. Applicants submitted Professional Services Billing record does not include a full

accounting of Applicants work, instead referring to the Motion.

4. At Applicant's discounted rate the \$7,500.00 requested and the \$950.00 remaining to be paid by the plan would not be paid within the life of the plan at the \$35.00 monthly payment approved by the Plan.

## **DEBTOR'S REPLY**

Debtor filed a Reply on April 13, 2021 asserting that although Debtor's plan at the monthly rate would not pay the entire balance of the fees, Debtor points to the additional provisions of the plan which state that Debtor is to turn over to Trustee any tax refunds in excess of \$2,000 and any excess of the refund should be applied to administrative and secured claims. Dckt. 126. Thus, given the terms of the plan, the lower claims of allowed unsecured creditors and the continued contribution of excess tax refunds, applicant believes that te plan as modified will cover the requested additional fees. *Id.*

## **APPLICABLE LAW**

### **Statutory Basis For Professional Fees**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

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

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

### **Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney’s services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; see also *Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in

relation to the size of the estate and maximum probable recovery?

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

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

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant’s for the Estate includes preparing and filing of six oppositions to Dismiss Case and preparing and filing two motions to approve modified plans. The court finds the services were beneficial to Client and the Estate and were reasonable.

### **“No-Look” Fees**

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor’s attorney for all

preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 20. Applicant prepared the order confirming the Plan.

### **Lodestar Analysis**

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. *See In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### **FEES AND COSTS & EXPENSES REQUESTED**

#### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Motion to Dismiss and Motion to Confirm: Applicant spent 28.75 hours in this category. Applicant states having prepared and filed six oppositions to Motions to Dismiss this case. Additionally, Applicant prepared and filed two Modified Plans and Motions to Confirm modified plans.

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

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
Mary Ellen Terranella	28.75	\$350.00	\$10,062.50
<b>Total Fees for Period of Application</b>			\$10,062.50
<b>Discounted fees requested</b>			\$7,500.00

**Costs and Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$38.64 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage for 21 copies	\$0.92 each	\$38.64
		\$0.00
<b>Total Costs Requested in Application</b>		\$38.64

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The unique facts surrounding the case, including preparing and filing six responses to Motions to Dismiss and preparing and filing two Motions to Modify Plan due to Debtor’s unanticipated financial setbacks due to her children’s medical issues and unexpected vehicle repairs, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of \$7,500.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick (“the Chapter 13 Trustee”) from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

## Costs & Expenses

Costs in the amount of \$38.64 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes the Chapter 13 Trustee under the confirmed plan to pay 100% of the fees and costs allowed by the court.

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

Fees	\$7,500
Costs and Expenses	\$38.64

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

With respect to the under funding of these fees in the Plan, Debtor and Applicant are aware of it. If Debtor cannot fully fund the plan, the case may be dismissed and the years in this bankruptcy case flushed away. The court is confident that Debtor and Applicant, having had this highlighted for them by the diligent and constructive Chapter 13 Trustee, will promptly address the matter and make sure that the fees are properly funded.

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

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

The Motion for Allowance of Fees and Expenses filed by Mary Ellen Terranella (“Applicant”), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Mary Ellen Terranella is allowed the following fees and expenses as a professional of the Estate:

Mary Ellen Terranella Professional Employed by Danielle  
Nicole Delgado (“Debtor”)

Fees in the amount of \$7,500.00  
Expenses in the amount of \$38.64,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor.

**IT IS FURTHER ORDERED** that David Cusick (“the Chapter 13

Trustee”) is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

31. [18-21488-E-13](#)      **DANIEL/ALLISON BRENNAN**      **MOTION TO MODIFY PLAN**  
[CLH-10](#)                      **Charles Hastings**                      **3-4-21 [225]**  
**31 thru 32**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 4, 2021. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is denied.**

The debtors, Daniel Lawrence Brennan and Allison Lyn Brennan (“Debtor”) seek confirmation of the Modified Plan after having to account for a significant reduction in income and they are no longer able to afford a plan that will pay 100% to creditors with unsecured claims. Declaration, Dckt. 227. The Modified Plan provides for the following:

1.            \$1.00 to be paid through for one month, followed by \$5,000 for 13 months, then \$5,450.00 for another 13 months;
2.            \$436,225.00 for one month;
3.            then \$5,450.00 for another 3 months, \$1,000 for one month, \$2,500 for 3

months, and \$3,094.08 for 49 months; and

4. a zero (0) percent dividend to unsecured claims totaling \$7,74.73.

Modified Plan, Dckt. 224. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

### **CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 5, 2021. Dckt. 234. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in plan payments.
- B. The Plan exceeds the maximum amount of time allowed under the Bankruptcy Code.
- C. The proposed modified Plan misstates the lump payment resulting from the sale of Debtor's residence.
- D. The Plan fails to incorporate the step increases included under the confirmed plan.
- E. The monthly plan payment is insufficient to fund Trustee's fees and Class 2 monthly dividend to the IRS.
- F. Debtor provides conflicting percentage to unsecured creditors.

### **DISCUSSION**

Debtor filed a Reply on April 12, 2021 acknowledging Trustee's Opposition and states that they will file a new plan and request the court vacate the hearing on April 20, 2021. Dckt. 237.

As of the court's drafting of this pre-hearing disposition, Debtor has failed to file a new plan. At the hearing **xxxxxxx**

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtors, Daniel Lawrence Brennan and Allison Lyn Brennan ("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 Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

32. [18-21488-E-13](#)      **DANIEL/ALLISON BRENNAN**      **MOTION TO EXTEND TIME**  
[CLH-11](#)                      **Charles Hastings**                      **3-15-21 [229]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 15, 2021. By the court’s calculation, 36 days’ notice was provided. 28 days’ notice is required.

The Motion for Entry to Extend the Repayment Period has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion for Entry to Extend the Repayment Period is ~~XXXXX~~.**

The debtors, Daniel Lawrence Brennan and Allison Lyn Brennan (“Debtor”) request the court allow Debtor to extend the repayment period with respect to the Sixth Amended Chapter 13 Plan pursuant to the CARES Act, 11 U.S.C. 1129(d) which permits debtors to modify plans provided debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, due to the COVID-19 pandemic.

Debtor seeks to the extend the terms of the Plan from 60 months to 84 months. Debtor argues they were directly affected by COVID-19 impacted their industry as there was a wide reduction in the sales of books, such as what Debtor writes for income.

**DISCUSSION**

Debtor has acknowledged problems with the Sixth Amended Plan and requested the court vacate the hearing on the Motion to Confirm.

The court notes that debtor does not need to file a separate motion requesting extension of the

plan pursuant to the CARES Act. Such request may be done in the Motion to Confirm the proposed Plan.

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

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

The Motion for Entry to Extend the Repayment Period filed by the debtors, Daniel Lawrence Brennan and Allison Lyn Brennan (“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 for Entry to Extend the Repayment Period is **xxxxx**.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 2, 2021. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is granted.**

The debtors, Lane Christian Milde and Denise Rene Milde ("Debtor") seek confirmation of the Modified Plan to become current in plan payments after Debtor Denise suffered a heart attack and was off from work from August 2020 through December 2020 affecting their income. Declaration, Dckt. 68. The Modified Plan provides for the following:

1. \$4,189.21 per month for 13 months,
2. \$6,300.00 per month for 30 months,
3. \$6,602.00 per month for 17 months, and
4. a 3 percent dividend to unsecured claims totaling \$52,156.75.

Modified Plan, Dckt. 71. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on April 5, 2021. Dckt. 76. Trustee opposes confirmation of the Plan on the basis that Debtor has not filed Supplemental Schedules I and J in support of their current income and expenses.

### DISCUSSION

On April 13, 2021 Debtor filed Amended/Supplement (checking both boxes and giving a supplemental effective date) Schedules I and J reflecting Debtor Denise's income at \$7,540.26, which together with Debtor Lane's income at \$4,280.00, Debtor's income totals \$11,820.26. Dckt. 79. Schedule J reflects expenses totaling \$5,505, resulting in a monthly net income of \$6,315.26. *Id.*

Though the court has addressed this issue with various counsel a number of times, making a minor theatrical production of it, Debtor and counsel in this case have chosen to file a Janus face Amended (Dating all the way back to the filing of the case)/Supplement (effective only as of August 14, 2020) Amended/Supplemental Schedule I and Schedule J. They cannot be both. The court cannot fathom why both the amended and the supplemental boxes are checked and a supplemental effective date are checked by a debtor who is prosecuting a case in good faith and carefully reads schedules, whether original, amended, or supplemental, before signing them under penalty of perjury.

~~Debtor having addressed trustee's concerns, the Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.~~

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

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

~~The Motion to Confirm the Modified Chapter 13 Plan filed by the debtors, Lane Christian Milde and Denise Rene Milde ("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's Modified Chapter 13 Plan filed on March 1, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

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

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

Sufficient Notice Not Provided. No Certificate of Service was filed for the instant Motion. Thus, the court is unable to determine whether service was proper.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Amended Plan is ~~XXXXX~~.**

The debtor, Ricardo J. Cortez (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for monthly plan payments of \$2,015.00 for sixty (60) months, and a 0% dividend to unsecured claims totaling \$72,480.00. Amended Plan, Dckt. 27. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

### **Motion to Vacate the Dismissal**

Debtor filed a Motion to Vacate Dismissal on January 25, 2021, that was set for hearing on February 9, 2021. Dckt. 35. At the hearing, this court found that in order to avoid additional litigation, claims, disputes, and emergency hearing in the days following the hearing, the court granted the Motion - subject to the condition that counsel for the Debtor deposit \$2,000.00 of the \$4,000.00 paid pre-petition for his fees and not yet allowed, to the Chapter 13 Trustee to hold pending further order of the court. Civil Minutes, Dckt. 46.

### **CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on February 5, 2021. Dckt. 43. Trustee opposes confirmation of the Plan on the basis that:

- A. The case was previously dismissed and Trustee has filed an opposition to Debtor's Motion to Vacate the Dismissal.
- B. Debtor is delinquent in plan payments.
- C. The declaration was not signed by the Debtor.
- D. The Plan was not filed in good faith.

## **DISCUSSION**

### **Case Dismissed**

On January 7, 2021, this court entered an order dismissing this Chapter 13 case. Dckt. 32. On February 12, 2021, this court entered an order vacating the prior order dismissing the case. Dckt. 47. The order was granted subject to the condition that counsel for the Debtor deposit \$2,000.00 of the \$4,000.00 paid pre-petition for his fees and not yet allowed, to the Chapter 13 Trustee to hold pending further court order.

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$6,228.19 delinquent in plan payments, which represents multiple months of the \$2,015.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

At the hearing counsel for the Trustee reported that the Debtor is current on the required plan payments.

### **Declaration Not Signed By Debtor**

The Trustee notes in their objection that the Declaration in Support of Motion by the Debtor was filed with an electronic signature identified as "/S/ Ricardo J. Cortez." Dckt. 30. At the hearing on, on the Motion to Dismiss, held on January 7, 2021, Debtor's counsel admitted that the Declaration was filed without obtaining the Debtor's actual signature on the document.

On February 12, 2021, Debtor filed a second Declaration with his signature. Dckt. 49. Thus, this Objection is resolved in Debtor's favor.

### **Plan Not Filed In Good Faith**

The Trustee notes that Debtor has not explained why they are proposing to pay less than the originally proposed \$3,197.00. Dckt. 2. Debtor has not filed amended Schedules I & J and the current schedules still show that Debtor can still afford the higher plan payment. Dckt. 1.

In Debtor's Declaration, Debtor declares that the plan payment was changed to provide for the changes in the claims. Dckt. 49, ¶ B. Debtor refers to the amount of arrears of BSI Financial Services, which has been changed to Class 1 and to provide for the actual claim in the amount of \$26,333.05, and has also been changed to account for the actual post petition mortgage in the amount of

\$1,166.37. *Id.*

### **April 20, 2021 Hearing**

Trustee filed a Status report on April 6, 2021 informing the court that Debtor is delinquent \$1,005 in plan payments and noting that the Debtor has not filed any additional Declarations after February 12, 2021, to explain his motivation as to why he originally began with a \$3,197.00 Plan payment, and now proposes a Plan payment of \$2,015.00. Dckt. 56. Moreover, Debtor has failed to file amended or supplemental Schedules I and J. *Id.*

Debtor filed a Declaration on April 15, 2021 indicating that Debtor has now filed amended Schedules I and J reflecting current income now that he is no longer receiving his son's social security income, which results in net income of \$3,789.50, and with expenses in the amount of \$2,178.50, this leaves Debtor with \$163.50. *Id.*

At the hearing **xxxxxxx**

**Final Ruling:** No appearance at the April 20, 2021 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2021. By the court’s calculation, 43 days’ notice was provided. 28 days’ notice is required.

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

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

The Motion to Approve Loan Modification filed by Brian Mitchell Okamoto (“Debtor”) seeks court approval for Debtor to incur post-petition credit. Selene Finance LP (“Creditor”), whose claim the Plan provides for in Class 1, has agreed to a trial loan modification for Debtor to pay \$2,386.94 for months February 2021, March 2021, April 2021, and May 2021. Any difference between the amount of the trial period payments and the regular mortgage payments will be added to the balance of the loan along with any other past due amounts. Once the loan is modified, the interest rate and monthly P&I will be fixed for the life of the mortgage unless the initial modified interest rate is below current market interest rates.

The Motion is supported by the Declaration of Brian Mitchell Okamoto. Dckt. 209. The Declaration affirms Debtor’s desire to obtain the post-petition financing and provides evidence of Debtor’s ability to pay this claim on the modified terms.

### **Trustee’s Response**

Trustee filed a Response on March 30, 2021 noting that the Motion and Declaration state the

real property subject to the modification is 5249 Tucson Circle, Fair Oaks, California but the modification documents list 8905 Boreal Way, Elk Grove, California, which is the address of Debtor's residence. Dckt. 212. Trustee further notes that Creditor is included in Class 4 of Debtor's Modified Plan set to be heard the same day as the instant Motion. *Id.* Trustee does not oppose the Motion provided the clerical error is clarified.

Debtor filed a Reply explaining that the correct address of the property subject to the loan modification is 8905 Boreal Way, Elk Grove, California. Dckt. 217.

## **DISCUSSION**

This post-petition financing is consistent with the Chapter 13 Plan in this case and with Debtor's ability to fund that Plan. There being no objection from the Chapter 13 Trustee or other parties in interest, and the Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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

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

The Motion to Approve Loan Modification filed by Brian Mitchell Okamoto ("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 court authorizes Brian Mitchell Okamoto to amend the terms of the loan with Selene Finance LP ("Creditor"), which is secured by the real property commonly known as 8905 Boreal Way, Elk Grove, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion (Dckt. 210).

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2021. By the court’s calculation, 43 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Confirm the Modified Plan is ~~XXXXX~~.**

The debtor, Brian Mitchell Okamoto (“Debtor”) seeks confirmation of the Modified Plan to address default in plan payments after loss of income by 9.23% due to COVID-19 and increase in expenses. Declaration, Dckt. 204. The Modified Plan provides plan payments of \$1,400.00 per month will commence February 25, 2021 for 10 months, and a zero (0) percent dividend to unsecured claims totaling \$55,250.19. Modified Plan, Dckt. 203. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

**CHAPTER 13 TRUSTEE’S OPPOSITION**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on April 6, 2021. Dckt. 214. Trustee opposes confirmation of the Plan on the basis that:

- A. Plan relies on the Motion to Approve Loan Modification not yet granted.
- B. Plan may not be feasible due to the additional attorney’s fees stated in Section 7.01 of the proposed Plan.

## DISCUSSION

### Debtor's Reliance on Motion to Approve Loan Modification

A review of Debtor's Plan shows that it relies on the court approving the trial loan modification offered by Creditor Selene Finance LP. Debtor filed the Motion to Approve the Trial Modification and was set for hearing the same day as the instant motion. The court has granted Debtor's Motion, and the trial loan modification has been approved. Thus, this objection is solved in favor of Debtor.

### Feasibility

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to trustee, Debtor's plan will not be feasible with additional fees of \$3,000.00 and will take approximately 62 months to complete. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

Debtor filed a Reply on April 12, 2021 ensuring that the fees requested in any motion for additional fees will not overextend the Chapter 13 plan or effect the feasibility of the plan. Dckt. 219.

At the hearing **xxxxxxx**

The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Brian Mitchell Okamoto ("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's Modified Chapter 13 Plan filed on March 8, 2021, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

**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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Chapter 13 Trustee, and Office of the United States Trustee on March 26, 2021. By the court’s calculation, 25 days’ notice was provided. 21 days’ notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days’ notice).

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 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 offer 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. At the hearing, -----

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**The Motion to Sell Property is denied without prejudice.**

The Bankruptcy Code permits David S Fletcher, Chapter 13 Debtor, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 1641 Campos Drive, The Village, Florida (“Property”).

The proposed purchaser of the Property is not stated in the Motion; however the Closing Disclosure Statement filed with this motion shows the borrower of record as Joan M. Alderman, and the Property sale closed on February 16, 2021. Movant has not provided a purchase agreement and the following summary is based on the Closing Disclosure Statement and Movant’s Declaration:

- A. The sale of the Property closed on February 16, 2021 with a purchase price of \$199,000.00. Exhibit A, Dckt. 162.
- B. Total due to seller at closing was \$200,588,08. *Id.*
- C. From this amount seller paid \$157,653.78 in total to the following:  
closing costs, \$18,291.23; payoff of seller’s first mortgage, \$138,649.49;

seller's credit to buyer, \$500.00; and an adjustment to county taxes of \$213.06, leaving \$42,934.30 as proceeds to seller from the sale. *Id.*

- D. Broker's commissions of 6 percent, totaling \$11,490.00, were paid from the total closing costs of \$18,291.23.
- E. Seller has transmitted the proceeds of the sale \$42,934.30 to Trustee. Declaration, Dckt. 161.
- E. The sale was not approved by the Bankruptcy Court prior to closing with Debtor stating that "it did not occur to [him] that the sale of the property should not proceed. It just seemed like the right thing to do since by selling the property, the plan in the Chapter 13 bankruptcy would not have to include payments on that mortgage and there would be an immediate cash dividend sent to the trustee to make the plan payments." *See Id.*

Movant's Motion further states that "it did not occur to Debtor that the sale would be completed by the escrow company in Florida without the consent or approval of the bankruptcy court. Thus, he did not seek prior approval for the sale." Dckt. 159 at ¶ 5. Despite failing to receive approval, Debtor argues that this will not prejudice Debtor's creditors because they will receive a dividend as per the plan, and may receive a higher amount because the Florida property will not have to be paid through the plan. *Id.* at ¶ 7.

## **TRUSTEE'S RESPONSE**

Trustee filed a Response on April 5, 2021 asking the court consider the following:

- 1. Debtor is current on plan payments.
- 2. The Property is not provided for in the plan, but is listed in Schedule A/B.
- 3. Debtor proceeded without court approval but notes that Debtor proceeded with the sale because it "seemed like the right thing to do so as to not have to include the mortgage payments in his Chapter 13 plan and funds could be sent to the Trustee for plan payments.
- 4. Trustee received the sale proceeds of \$42,934.30 on March 26, 2021.

Dckt. 166.

## **DISCUSSION**

This Motion causes the court some concern for this Debtor who is represented by experienced bankruptcy counsel. The Motion explains that while this was a Chapter 7 case, the Chapter 7 Trustee had marketed the property for sale and had received an offer on the Property. Motion, ¶ 1; Dckt. 159. Then when the case was converted, "[t]he Debtor took it upon himself to complete the sale and pay off the secured Deed of Trust." *Id.*, ¶ 3. There are excess funds "paid for the property" in the amount of \$42,934.00. *Id.*, ¶ 4.

Debtor now wants to have the sale approved and pay the monies over to the Trustee as Debtor pursues confirmation of a Plan. *Id.* ¶ 6.

While appearing to seek retroactive approval for having violated Federal law, the Bankruptcy Code, Debtor does not identify the grounds stated with particularity in the motion and does not request with particularity (Fed. R. Bankr. P. 9013) retroactive relief from the court.

While Debtor testifies under penalty of perjury that the Chapter 7 Trustee was preparing to close escrow on the sale (Declaration, ¶3; Dckt. 161), such is not accurate. When Debtor testifies under penalty of perjury that “The court ordered the sale stopped and the property was not sold” (*Id.*, ¶ 4) when Debtor converted the case to one under Chapter 13 is not accurate.

A review of the court’s file is that the Chapter 7 Trustee never got an order authorizing the sale of the property, but the motion to sell filed by the Trustee was denied as moot. Order, Dckt. 71.

On March 26, 2021, the Chapter 13 Trustee has filed a motion to reconvert this case to one under Chapter 7. Dckt. 159. The grounds stated by the Trustee include:

- ◆ Debtor has not funded the Plan by the sale of the Property.
- ◆ Debtor has not confirmed a plan, and no plan has been pending since the March 12, 2021 sustaining the objection to confirmation.
- ◆ Debtor and Debtor’s counsel failed to appear at the February 11, 2021 first First Meeting of Creditors in the Chapter 13 case.
- ◆ The continued First Meeting of Creditors could not be conducted on March 11, 2021, because Debtor’s audio connection for the Zoom meeting failed.
- ◆ The 2019 tax records indicate that there were the sale of a number of assets by Debtor, which was within two years of the filing of the bankruptcy case, and none of those sales were disclosed on the Statement of Financial Affairs.
- ◆ Debtor has failed to commence making payments under the Chapter 13 Plan.
- ◆ Debtor may not be eligible for relief under Chapter 13, having liquidated non-contingent unsecured claim in the amount of (\$419,275). On the original schedules Debtor listed (\$445,649) in unsecured Debt, while on the Amended Schedule E/F lists (\$399,409) in general unsecured claims and (\$201,732) in priority unsecured claims.

Congress provides in 11 U.S.C. § 109(e) provides

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, **unsecured debts of less than \$419,275** and noncontingent, liquidated, secured debts of less than \$1,257,850 or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition,

noncontingent, liquidated, unsecured debts that aggregate less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850 may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e) (emphasis added). On the April 14, 2021 filed Amended Schedule E/F, Debtor states under penalty of perjury having \$369,334 in unsecured claims. Dckt. 172, see p. 27 for totals. This is less than the (\$445,649) on the earlier Schedule E/F.

Looking at the proofs of claim filed, the unsecured claims total \$484,032, which is consistent with the original Schedules filed by Debtor and grossly different than Debtor's Amended Schedule E/F which comes in just under the statutory maximum of (\$419,275) to qualify as a Chapter 13 debtor.

- ◆ The Trustee points to Debtor having transferred property to his non-debtor spouse just prior to filing.
- ◆ The Trustee notes the unauthorized sale of the Florida Property and that Debtor is retaining the monies, not turning them over to the Chapter 13 Trustee.

The present Motion to Sell was filed March 26, 2021, which was one week after the March 19, 2021 filing of the Motion to Reconvert the case to one under Chapter 7.

### **Denial of Motion and Sequestering of the Sales Proceeds**

The present Motion raises serious concerns. The Debtor, as the fiduciary of the bankruptcy estate, has purported to sell property of the bankruptcy estate without obtaining authority as required by 11 U.S.C. § 363(b) and § 1303. The Debtor was aware that the Chapter 7 Trustee had sought an order from the court to sell the property, and that Debtor thwarted such a sale by having the case converted.

The Motion and supporting Declaration do not provide the court with a good faith basis for Debtor having proceeded with the a sale of property without court authorization. Debtor's declaration does not address how, being involved in a federal judicial proceeding, clearly knowing that the bankruptcy estate owned the property, that the Chapter 7 Trustee sought authorization to sell the Property, and being represented by counsel, Debtor, as the fiduciary of the bankruptcy estate, just figured the "right thing to do" would be to go out and sell the Property.

It appears that the court will have to address some serious issues concerning whether this case continues as a Chapter 13 case or gets reconverted to Chapter 7 and the Chapter 7 trustee, as the fiduciary of the bankruptcy estate, properly administers the property of the bankruptcy estate.

In choosing to unilaterally sell the Property, not only has Debtor violated federal law, but removed the Property from the transparency of an in-court sale authorization process to a behind the scenes sale. The in-court process includes competitive bidding at the hearing. While most sales get approved with the buyer on the terms of the original contract, sometimes there becomes competitive bidding. A recent example is one in which there was a \$2.7MM contract price that the debtor in possession thought was a "good deal," but after the hearing was continued, a real estate broker hired, and the live in-court sale conducted, the price was bid up to \$8.3MM.

The court is also concerned that if the private purported sale conducted by the Debtor is approved and the case is converted to one under Chapter 7, then if the Chapter 7 trustee discovers any “sale shenanigans,” the wrongdoers might seek to use such an order as a shield to any action by the Chapter 7 trustee or U.S. Attorney.

Therefore, the Motion is denied without prejudice.

Debtor has notified the court that he is holding at least \$40,850.00 in monies of the bankruptcy estate from the unauthorized sale. Debtor having chosen to do what “seemed like the right thing” and sell the Property without complying with the law, it is necessary to have that money delivered immediately to the Chapter 13 Trustee to hold pending further order of the court. Debtor states in his Declaration under penalty of perjury that these proceeds are being sent to the Chapter 13 Trustee, who will have them before the April 20, 2021 hearing on this Motion.

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

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

The Motion to Sell Property filed by David S. Fletcher, Chapter 13 Debtor, (“Movant”) 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.

**IT IS FURTHER ORDERED** that David S. Fletcher, Chapter 13 Debtor, shall on or before noon on Friday April 23, 2021, deliver to the possession of the Chapter 13 Trustee the \$40,850.00, and any additional amounts thereto, in proceeds from the unauthorized purported sale of the Property commonly known as 1641 Campos Drive, The Village, Florida, which monies the Chapter 13 Trustee shall hold pending further order of this court.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 17, 2020. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

**The Motion to Confirm the Amended Plan is ~~XXXXX~~.**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Timothy Tobias Trocke ("Debtor") has provided evidence in support of confirmation.

### **February 2, 2021 Hearing**

At the February 2, 2021 hearing, the Parties requested that the hearing be continued in light of the Phase 2 hearings on the Debtor's Objections to the Claim of Roger Anderson, Trustee of the RWA Trust dated March 14, 2014 ("Creditor").

### **April 20, 2021 Hearing**

Debtor seeks confirmation of the Amended Plan. The Amended Plan provides for all net proceeds from the sale of property to be turned over directly to the Chapter 13 Trustee after usual broker fees, escrow costs and closing costs and 100% dividend to unsecured claim totaling \$0.00. Amended

Plan, Dckt. 151. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

On April 6, 2021 Trustee filed an Amended Response requesting the court take into consideration that Debtor has paid \$80,512.03, which \$72,297.03 was paid from Chicago Title Company from proceeds of sale of real property, into the Plan and ths Debtor is now current in plan payments. Dckt. 239. Trustee further adds that Debtor has filed a claim objection to Creditor RWA's Amended Claim 2 filed on January 26, 2021 where Creditor increased the claim from \$126,635.02 to \$180,264.76.

At the hearing xxxxxxxx

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 Amended Chapter 13 Plan filed by the debtor, Timothy Tobias Trocke ("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 xxxxx.

39. [20-21910-E-13](#) **TIMOTHY TROCKE**  
[FF-8](#) Gary Fraley

**CONTINUED OBJECTION TO CLAIM  
OF ROGER ANDERSON, TRUSTEE OF  
THE RWA TRUST, CLAIM NUMBER 2-1  
12-18-20 [170]**

**NO TENTATIVE RULING IS POSTED FOR THIS MATTER.**

## FINAL RULINGS

40. [16-22801-E-13](#) ANTHONY/VICKI BEAVER MOTION TO MODIFY PLAN  
[MJD-3](#) Matthew DeCaminada 2-25-21 [90]

**Final Ruling:** No appearance at the April 20, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 25, 2021. By the court’s calculation, 54 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

**The Motion to Confirm the Modified Plan is granted.**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Anthony Ray Beaver and Vicki Siphone Beaver (“Debtor”), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response indicating non-opposition on April 5, 2021. Dckt. 100. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Anthony Ray Beaver and Vicki Siphone Beaver (“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’s Modified Chapter 13 Plan filed on February 25, 2021, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick (“Trustee”), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

41. [18-22507-E-13](#)      **KENNETH LAWSON/ MARLO**      **MOTION TO MODIFY PLAN**  
[RJM-2](#)                      **RAMIREZ**                                      **3-2-21 [44]**  
                                    **Rick Morin**

**Final Ruling:** No appearance at the April 20, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on March 15, 2021. By the court’s calculation, 36 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

**The Motion to Confirm the Modified Plan is granted.**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Kenneth Eric Lawson and Marlo M. Lourdes Ramirez (“Debtor”), has filed evidence in support of confirmation.

The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response indicating non-opposition on April 5, 2021. Dckt. 54. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Kenneth Eric Lawson and Marlo M. Lourdes Ramirez (“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’s Modified Chapter 13 Plan filed on March 2, 2021, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick (“Trustee”), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

**Final Ruling:** No appearance at the April 20, 2021 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on March 3, 2021. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

**The Motion to Confirm the Amended Plan is granted.**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The debtor, Gurinder Bains ("Debtor") has provided evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on April 2, 2021. Dckt. 37. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

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

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

The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Gurinder Bains ("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's Amended Chapter 13 Plan filed on March 3, 2021, is confirmed. Debtor's Counsel shall



**Final Ruling:** No appearance at the April 20, 2021 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on March 15, 2021. By the court’s calculation, 36 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days’ notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days’ notice for written opposition).

The Motion to Confirm the Modified 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

**The Motion to Confirm the Modified Plan is granted.**

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Sean D. Fitzpatrick and Tiffanie D. Fitzpatrick (“Debtor”), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response indicating non-opposition on April 5, 2021. Dckt. 38. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Sean D. Fitzpatrick and Tiffanie D. Fitzpatrick (“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’s Modified Chapter 13 Plan filed on March 2, 2021, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick (“Trustee”), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

45. [21-20475-E-13](#)      **KEITH/BEVERLY HENRY**      **OBJECTION TO CONFIRMATION OF**  
[DPC-1](#)                      **Mark Briden**                      **PLAN BY DAVID P. CUSICK**  
45 thru 46    3-24-21 [19]

**Final Ruling:** No appearance at the April 20, 2021 hearing is required.  
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Local Rule 9014-1(f)(2) Objection—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, and Debtor’s Attorney on March 24, 2021. By the court’s calculation, 27 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of 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). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. 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 is sustained, and the proposed Chapter 13 Plan is not confirmed.**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Objection, Debtor filed an Amended Plan and corresponding Motion to Confirm on April 12, 2021. Dckts. 26, 23. Filing a new plan is a de facto withdrawal of the pending plan. 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 Confirmation the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick (“Trustee”), having been presented to the court, and



**Final Ruling:** No appearance at the April 20, 2021 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 9, 2021. By the court’s calculation, 42 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days’ notice for written opposition).

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

**The Motion for Allowance of Professional Fees is granted.**

John Downing, the Attorney (“Applicant”) for Brad Alan Hamilton and Cherise Cathleen Williams, the Chapter 13 Debtor (“Client”), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period July 31, 2020, through March 8, 2021. The order of the court approving employment of Applicant was entered on December 23, 2020. Dckt. 81. Applicant requests fees in the amount of \$5,730.00 and costs in the amount of \$0.00.

Trustee filed a Response on April 5, 2021 stating non-opposition to the fees requested and notes that according to the modified plan Applicant was paid \$1,000 prior to the filing of the case, leaving a balance of \$4,730.00 to be paid through the plan. Dckt. 99. Trustee also informs the court that Debtor is current in plan payments. *Id.*

## APPLICABLE LAW

### Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant’s services for the Estate include general case administration, Motion to Extend, and Plan preparation and confirmation. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 3.1 hours in this category. Applicant prepared petition and schedules; prepared and attended for 341 meeting; met with client regarding schedules; and prepared revised schedules.

Motion to Extend: Applicant spent 2.0 hours in this category. Applicant prepared Motion to Extend and the accompanying declaration.

Plan Preparation and Confirmation: Applicant spent 11.0 hours in this category. Applicant prepared Motion to Confirm, Chapter 13 Plan, and accompanying Declaration; prepared Motion to Confirm Amended Plan and the Amended Plan; prepared Reply brief; reviewed tentative ruling; emailed opposing counsel; attended court hearing; and prepared order confirming plan.

Fee Application: Applicant spent 3.0 hours in this category. Applicant prepared the instant fee application.

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

<b>Names of Professionals and Experience</b>	<b>Time</b>	<b>Hourly Rate</b>	<b>Total Fees Computed Based on Time and Hourly Rate</b>
John Downing	19.1	\$300.00	\$5,730.00
	0	\$0.00	<u>\$0.00</u>
<b>Total Fees for Period of Application</b>			\$5,730.00

**Costs & Expenses**

Applicant does not seek the allowance and recovery of costs and expenses through this application.

**FEES AND COSTS & EXPENSES ALLOWED**

**Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$5,730.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

The court authorizes the Chapter 13 Trustee to pay \$4,730 of the fees allowed by the court, after taking into account the \$1,000 paid pre-petition.

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

Fees	\$5,730.00
Costs and Expenses	\$0.00

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

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

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

The Motion for Allowance of Fees and Expenses filed by John Downing (“Applicant”), Attorney for Brad Alan Hamilton and Cherise Cathleen Williams, the Chapter 13 Debtor, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that John Downing is allowed the following fees and expenses as a professional of the Estate:

John Downing, Professional employed by the Chapter 13 Debtor

Fees in the amount of \$5,730.00  
Expenses in the amount of \$0.00,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330  
as counsel for the Chapter 13 Debtor.

**IT IS FURTHER ORDERED** that the Chapter 13 Trustee is authorized to pay \$4,730.00 the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan after taking into account of \$1,000 paid to Applicant pre-petition.

48. [21-20890-E-13](#) [MRL-1](#) **HAYDEN/MANDY COIT** **Mikalah Liviakis** **MOTION TO VALUE COLLATERAL OF HERITAGE COMMUNITY CREDIT UNION**  
**3-15-21 [11]**

**Final Ruling:** No appearance at the April 20, 2021 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, and Office of the United States Trustee on March 16, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

**The Motion to Value Collateral and Secured Claim of Heritage Community Credit Union ("Creditor") is \$11,500.00, and Creditor's secured claim is determined to have a value of \$11,500.00.**

The Motion filed by Hayden Scott Coit and Mandy Erin Coit (“Debtor”) to value the secured claim of Heritage Community Credit Union (“Creditor”) is accompanied by Debtor’s declaration. Declaration, Dckt. 13. Debtor is the owner of a 2015 Dodge Ram 1500 (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$11,500 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Trustee does not oppose the relief requested and notes that Creditor has not filed a claim, to date. Dckt. 17.

## **DISCUSSION**

The lien on the Vehicle’s title secures a purchase-money loan incurred on or about April 2016, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$16,500.00. Declaration, Dckt. 13. Therefore, Creditor’s claim secured by a lien on the asset’s title is under-collateralized. Creditor’s secured claim is determined to be in the amount of \$11,500.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion to Value Collateral and Secured Claim filed by Hayden Scott Coit and Mandy Erin Coit (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Heritage Community Credit Union (“Creditor”) secured by an asset described as 2015 Dodge Ram 1500 (“Vehicle”) is determined to be a secured claim in the amount of \$11,500.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$11,500.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.