

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 29, 2021 at 1:30 p.m.

1.	<u>17-25214-E-13</u> <u>DPC-1</u>	THURMAN JONES Ashley Amerio	CONTINUED MOTION TO DISMISS CASE 4-14-21 [20]
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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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 14, 2021. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is XXXXX.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that the debtor, Thurman Farris Jones ("Debtor"), is delinquent in plan payments.

DEBTOR'S OPPOSITIONS

Debtor personally filed three separate Oppositions on April 23, 2021, April 26, 2021, and April 27, 2021. Dckt. 24, 25, 26. Debtor disputes the amount owed as stated by Trustee, that he finished payment of his plan in full as of December 2020, and that Trustee is overcharging fees.

Debtor is represented by counsel, but Debtor's counsel has not filed any opposition for Debtor.

DISCUSSION

Delinquent

By the Trustee's calculation, Debtor is \$8,285.36 delinquent in plan payments, which represents 5.4 months of the \$1,526.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor's confirmed Chapter 13 Plan, Dckt. 5, requires Debtor to make monthly payments of \$1,528.00 for sixty (60) months. That totals \$91,680.00.

On December 18, 2018, a stipulated *Ex Parte* Motion was filed that modifies the Plan to provide that, from \$13,095.31 in insurance proceeds received when Debtor's 2013 Dodge Charger was totaled, \$9,122.84 would be paid into the Plan and used to pay off the remaining secured claim of Safe Credit Union and the Chapter 13 Trustee's fees relating to such lump sum payment, and the balance refunded to the Debtor. Motion and Order; Dckts. 17, 18. The Trustee's statement of payments received from the Debtor includes the \$13,095.31 payment. Dckt. 20 at 2.

With the above payment in December 2018, then there was no further payment to be made to Safe Credit Union on its Class 2 secured claim.

The Trustee's Motion states that Debtor has paid a total of \$70,427.95 through December 7, 2020, and the Trustee computes that \$78,713.31 is due. Motion, p. 1:20-22; Dckt. 20.

In his first Opposition filed on April 24, 2021, Debtor states that he protests the amount the Trustee states is due. He directs the court to a document filed on April 16, 2018 showing that his balance was \$69,493.45. Dckt. 24. The document referenced, and to which the sixth page of which is attached to the first Opposition, is the Trustee's Notice of Claims Filed report. The report states that there are \$25,071.79 in secured claims filed as of the April 2018 Report (which includes the Safe Credit Union Claim above that was paid from the insurance proceeds) and \$69,493.45 in general unsecured claims. That totals \$94,565.24 in claims, plus interest on the secured claims.

In his second Opposition filed on April 26, 2021, Dckt. 25, stating that in an October 1st letter from his lawyers, it clearly states that Debtor owed \$70,427.95, which he had paid in full on December 2020. The attorney-client communication that Debtor attached to the second Opposition includes the following:

- A. Counsel is following up on Debtor's request to dismiss his Chapter 13 case.
- B. The Chapter 13 Plan estimates the amount of unsecured (Class 7) claims, with that amount subject to increase or decrease based on the claims actually filed.
- C. In the Plan Debtor and Counsel estimated the unsecured claims to be \$55,822.13, but the actual amount of unsecured claims filed were \$70,427.95.

It appears that the dollar amount different from the Trustee's report is that Discover Bank filed Amended Proof of Claim 1-2 which included the judgment and an assertion that \$934.50 of the claim was secured,

and Counsel's computation may not have taken the \$934.50 as being secured into account. Proof of Claim No. 1-2 does not identify the collateral or the basis of perfecting a lien, other than to state that a judgment was obtained. Thus, the actual unsecured claim may be the higher amount as computed by Debtor's Counsel.

- D. The letter concludes that Debtor's Plan requires a 100% dividend on creditors with general unsecured claims, and therefore the \$70,427.95 must be paid to creditors with unsecured claims.

In his third Opposition filed on April 27, 2021, Debtor states that if one looks at the document filed on April 16th of 2018, one can see that his balance was \$69,493.45, and that the Trustee asserting a delinquency of \$8,285.36 is above the amount permitted by law for Trustee fees. Dckt. 26. Debtor asserts that the alleged default is "padding of [the Trustee's] bill." *Id.*

Looking at the Plan and taking into account the insurance payment made, the court's rudimentary accounting is as follows:

Claim to Be Paid		Total Payments Required	Total Amount Paid Through Plan
Class 2 IRS Secured Claim	(\$7,365.72) Proof of Claim 3-1	60 Payments with 4% interest	\$8,139.06
Class 2 Safe Credit Union Secured Claim	(\$17,7706.07) Proof of Claim 4-1	13 Payments with 4% Interest totaling \$9,499.56 and a Lump Sum Payment of \$9,122.84 in December 2018.	\$18,622.40
General Unsecured Claims	\$69,493.45 (Excluding the \$934.50 listed as secured on Proof of Claim No. 1-2)	\$69,493.45	\$69,493.45

	Required Distributions to Creditors		\$96,254.91
	Chapter 13 Trustee Fees of 10% For Each Plan Payment Made		\$9,624.50
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	Total Required Plan Payments		\$105,879.41

The first Plan payments having been made in October 2017, the sixtieth payment comes due in September 2022.

The Trustee's Motion states that as of December 7, 2020, Debtor has funded the Plan with \$70,427.95, and is delinquent \$8,285.23 in Plan payments (as noted above, this is 5.4 months) for the months of January, February, March, and April 2021. It appears that Debtor was short in monthly payments in October 2019 through March 2020 and September through December 2020, but paid some additional amounts in 2018.

With monthly plan payments of \$1,526.00 for 60 months, which total \$91,560, it appears that the Plan is underfunded by approximately (\$14,319.41).

At the hearing, the Parties agreed to a continuance to allow Debtor and his counsel to address the plan in this case.

Debtor's Memorandum Letter dated May 19, 2021 (Dckt. 29)

On May 24, 2021 Debtor filed a letter in *pro se* requesting that the means test be ran with his current income asserting that his attorney has failed to update such information, which should have been done annually.

With respect to Debtor's belief that there is to be an annual "means test" update, the provisions of 11 U.S.C. § 707(b), it appears that Debtor may be stating that his income and expenses should be reviewed for possible amendments to the Plan, including the term of the Plan, for post-petition changed in income and expenses. As specified in the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period, Official Form 122C-1, the relevant income information is that in the six months preceding the commencement of the bankruptcy case. Dckt. 1 at 41-42.

If Debtor's income or expenses have changed such that performing the 100% plan would not be required, modification of that plan could be sought. But it is not an annual "means testing" to be conducted.

Counsel for Debtor has not filed any documents as it relates to this motion to dismiss.

Debtor's Memorandum Letter dated May 19, 2021 (Dckt. 30)

On May 25, 2021 Debtor filed a second letter in *pro se* where Debtor argues that he has paid the IRS and Safe Credit claims in full.

The letter also seems to indicate that Debtor has filed a complaint with the bar against his bankruptcy counsel.

Trustee's Response

Trustee filed a Reply addressing Debtor's two letters. Trustee continues to assert that Debtor is delinquent where Debtor has only paid \$70,427.95 but a total of \$91,560.00 is required. Debtor's plan estimated \$55,822.13 in unsecured claims; however, filed unsecured claims total \$69,493.45. Insurance proceeds in the amount of \$9,122.84 from an automobile accident were paid into the plan and \$3,982.47

were refunded to Debtor.

Lastly, Trustee is not opposed to Debtor filing a motion to modify, served on all creditors, and set for hearing. If none is filed, and the delinquency remains, Trustee asks that the court dismiss the case.

June 16, 2021 Hearing

At the hearing, Debtor appeared but not Debtor's counsel.

It appears that there may be miscommunication occurring between Debtor and Counsel, and Debtor (a lay person), not understanding how he needs to complete this case, and not dismiss it, so that he does not "waste" the substantial time and monies invested in the Plan to date.

June 29, 2021 Hearing

At the hearing xxxxxxxx