

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

Honorable Ronald H. Sargis  
Chief Bankruptcy Judge  
Sacramento, California

November 24, 2020 at 2:00 p.m.

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1. [20-24311-E-13](#) JASON DIVEN **OBJECTION TO CONFIRMATION OF**  
[DPC-1](#) Daniel Griffin **PLAN BY DAVID CUSICK**  
10-29-20 [29]

**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).**

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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 October 29, 2020. 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 sustained.**

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

- A. Debtor is delinquent in plan payments.
- B. Debtor failed to provide proof of his Social Security Number.
- C. Debtor's plan may not be properly served.
- D. Debtor's Plan fails the liquidation test.
- E. Debtor may not be able to comply with the Plan.
- F. Debtor failed to provide business documents.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Delinquency**

Debtor is \$1,000.00 delinquent in plan payments, which represents one month of the \$1,000.00 plan payment. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Failure to Provide Social Security Number**

Debtor did not provide proof of his Social Security Number at the First Meeting of Creditors. Debtor is required to provide evidence of his social security number at the meeting of creditors. *See* FED. R. BANKR. P. 4002(b)(1).

### **Improper Service**

Debtor served the Schedules and the Plan on all creditors. Trustee is concerned that the Plan served on creditors may not comply with applicable law and/or may not be filed in good faith because creditors will have to review forty-three pages of documents, prior to reaching the Plan. *See* 11 U.S.C. §§ 1325(a)(1); 1325(a)(3).

### **Debtor Fails Liquidation Analysis**

Debtor's plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Debtor valued the real property located at 13839 Main Street, EagleVille, California ("Property") at \$90,000.00. Schedule A/B, Dckt 18. Trustee believes the Property value may be understated. Debtor also identified a lawsuit filed by a contracting party and listed the value as unknown. *Id.* However, in the description, it then identifies a claim that is equivalent to a final payment in the amount of \$33,500.00. *Id.* This value has not been exempted and is not included in the liquidation analysis.

## **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 failed to list business equipment, tools of trade, farm implements, and accounts receivable on Schedule B. Additionally, Debtor admitted at the First Meeting of Creditors that he has a cattle business and commercial rental property, which rent is collected but the farm related property is not listed. Debtor also identifies a homeowner expense in Schedule J but, neither Schedule D, nor the plan identify any mortgages owed for the Debtor's residence. Yet Proofs of Claims have been filed by creditors indicating that there are creditors holding purchase money security interests over the residence. Debtor has failed to file a Statement of Rights and Responsibilities. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

## **Failure to File Documents Related to Business**

Debtor has failed to timely provide Trustee with business documents including:

- A. Questionnaire,
- B. Two years of tax returns,
- C. Six months of profit and loss statements,
- D. Six months of bank account statements, and
- E. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(i), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

## **Debtor's Response Declaration**

On November 20, 2020, Debtor filed a Declaration in response to the Objection to Confirmation. Dckt. 35. Debtor recounts the housing challenges and that their current home is uninhabitable, but that Debtor (who formerly was a contractor) is working on it.

The Declaration states that Debtor has prepared the documents as requested by the Trustee and they are being sent to the Trustee. The information provided by Debtor includes the following (identified by page: line number(s) of the Declaration, Dckt. 35):

- A. Debtor will have a reduction in expenses due to the future completion of the remodel of the Eagleville residence. 2:1–2.
- B. Debtor pays \$1,200 in rent on the Lake City house, which is close to his parents and where he has “landed the family.” 2:2–3.
- C. The Eagleville residence was purchased in 2008, and the basement has caved in and there are numerous electrical issues, as well as other problems. 2:5–7.
- D. Debtor has been “remodeling” the Eagleville residence for over ten years. 2:8.

- E. When Debtor's step-father was diagnosed with cancer, the remodeling was sidelined while Debtor turned his attention to taking over the step-father's and mother's ranch. 2:9–10.
- F. The status of the remodel does not have the septic or well hooked up, and there are no fixtures in the bathroom or kitchen. 2:12–13.
- G. Though not habitable, Debtor plans on moving into part of the Eagleville residence within the next 60 days, and then move the family in the Fall of 2021. Debtor is currently living in a construction trailer on the Eagleville property. 2:15–17.
- H. Debtor has amended the Schedules to estimate his claim against Cedarville to be \$95,000, which he states may be questionable as he does not know if or how to file a counterclaim against the Indian Tribe. 3:1–6.
- I. Debtor's plan does not include "credit" for the yearly interception of his Federal Tax Refund by the USDA Farm Service Agency, for a \$30,896 obligation, that is estimated to be \$7,700 per year. 3:8–10.

The Declaration does not explain why Debtor is so grossly overpaying his taxes that he is creating a \$7,700 tax refund that can then be diverted to the USDA Farm Service Agency. No proof of claim has been filed for such USDA Farm Service Agency claim.

- J. Debtor is only able to fund the plan with a \$545 payment due to the overpayment of taxes and having the refund diverted to the USDA Farm Service Agency obligation. 3:10–13.
- K. After the overpayment of tax refund has fully paid the USDA Farm Service Agency obligation, the overpayment of taxes will continue and the annual tax refund is to be paid into the plan. 3:15. Debtor believes that he may have even greater tax refunds going forward.

Looking at Schedule I and the Statement of Financial Affairs, it is unclear how Debtor is creating a \$7,700 a year tax refund.

Dckt. 35.

At the hearing, **XXXXXXX**

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

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

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

The Objection to the Chapter 13 Plan filed by the 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 to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

2. [20-22315-E-13](#) **HEIDI ADCOCK ARASOMWAN** **CONTINUED MOTION TO CONFIRM**  
[NUU-1](#) **Chinonye Ugorji** **PLAN**  
**9-7-20 [31]**

**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 September 7, 2020. By the court’s calculation, 43 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 denied.**

The debtor, Heidi Francis Adcock Arasomwan (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for monthly plan payments of \$2,772.00 for four (4) months and monthly plan payments of \$2,885.00 for 56 months and a 0 percent dividend to unsecured claims totaling \$123,688.00. Amended Plan, Dckt. 34. 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 October 6, 2020. Dckt. 50. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in plan payments.
- B. The Plan contains an improper modification of a claim secured by Debtor's primary residence.

## DISCUSSION

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$5,657.00 delinquent in plan payments, which represents multiple months of the \$2,772.00 plan payment. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. 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 Reply on October 14, 2020 asserting that a payment of \$2,772.00 was made to the Trustee and another payment of \$2,885.00 will be made on October 16, 2020 to cure the remaining delinquency. Dckt. 56.

At the October 20, 2020 hearing, the Trustee reported that the Debtor is still delinquent, with no payment in September 2020. The amount of the delinquency is computed to be \$5,657.00 (not including the October 2020 payment to come due).

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

Creditor argues that Debtor's Plan is an improper modification of a claim secured only by a security interest in real property that is Debtor's principal residence because the Ensminger Provisions have been altered.

Creditor has filed a Proof of Claim indicating a secured claim in the amount of \$473,397.61, secured by a deed of trust against the property commonly known as 170 Aviator Circle, Sacramento, 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.

In the Reply, Debtor requests the court to authorize the following "Ensminger Provisions" as proposed by the Trustee and to be inserted in the Order Confirming this Plan:

#### 7.02.1 Secured Claim Treatment

Confirmation of this plan provides for adequate protection of New Rez LLC dba Shellpoint Mortgage Servicing's interest in the collateral pending either the consensual modification of the Secured Claim or

termination of the automatic stay and surrender of the Collateral as provided in Section 7.02. Confirmation of the Plan does not modify the secured claim of New Rez dba Shellpoint Mortgage Servicing.

Upon denial of a loan modification and Debtor's failure to timely file and serve a proposed modified plan and motion to confirm as provided in this Section 7.02, the treatment of New Rez LLC dba Shellpoint Mortgage Servicing's secured claim is:

- A. New Rez LLC dba Shellpoint Mortgage Servicing'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);
- B. The Chapter 13 Trustee shall continue to make the adequate protection payments to Secured Creditor from the regular monthly plan payments made by Debtor under this Plan until terminated by:
  - 1. Debtor filing and serving a modified plan and motion to confirm which provides for other treatment of New Rez LLC dba Shellpoint Mortgage Servicing's secured claim.
  - 2. The Court enters an order modifying the automatic stay as provided in this Section 7.02 or
  - 3. Order further order of the court.

The proposed Plan provides in ¶ 7.03 for the payment of a monthly adequate protection payment of \$2,238.00.

At the hearing, the Trustee agreed to a continuance to afford Debtor the opportunity to become current, or the Counsel for Debtor to document for Trustee that Debtor is current.

### **November 17, 2020 Status Report**

Trustee filed a Status Report on November 17, 2020 informing the court that made payments toward curing the delinquency since the last hearing but that Debtor is still delinquent \$3,870.00 Dckt. 64.

### **November 24, 2020 Hearing**

At the hearing, xxxxxxxxxxxxxxxx

The proposed Amended Chapter 13 Plan does not comply with 11 U.S.C. § 1322 and § 1325;

the Motion is denied 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 Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Heidi Arasomwan (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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



**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).**

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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 Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 26, 2020. By the court's calculation, 46 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 overruled without prejudice.**

Deutsche Bank National Trust Company ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that the Plan does not accurately account for creditor's pre-petition arrears.

## DISCUSSION

Creditor's objection is based on the Plan proposing to cure a pre-petition arrearage of only \$43,984.65, while Creditor has clearly stated in Proof of Claim No. 2-2 that the arrearage is \$66,649.80. Objection, p.1:23-24, 2:1-2. Creditor then argues, as its only basis for objection, that the plan therefore fails to require the cure of the arrearage Creditor asserts to exist.

Creditor's Objection is overruled. The proposed Chapter 13 Plan clearly provides with respect to the computation of the amount of the arrearage that:

3.02. The proof of claim, not this plan or the schedules, shall determine the

amount and classification of a claim unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of the claim.

Chapter 13 Plan, ¶ 3.02; Dckt. 2.

Creditor's sole basis for Objection is contradicted by the plain language of the Plan. <sup>FN. 1.</sup>

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FN. 1. It may be that Creditor's actual objection is that the plan is not adequately funded to cure the arrearage. Creditor does not provide the court with such objection or any economic analysis upon which any such objection would be based. The court declines the opportunity to provide such legal services in stating and then supporting such as objection for creditor.

Overruling this Objection may be but a Pyrrhic victory for the Debtor. If this asserted creditor is correct and an unprovided for arrearage exists, the court can envision shortly seeing a motion for relief from the stay. At that point, the Debtors and counsel would have to prepare a modified plan, motion to confirm modified plan, evidence to support the modified plan, notice a hearing, and conduct a hearing on the proposed modified plan. Any such proceedings, because of the unprovided for cure of the arrearage, would be clearly anticipated work to be covered by the no-look fee and likely not be reasonable additional costs and expenses if counsel has chosen to opt out of the no-look fee.

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At the first hearing, Debtor requested that the court continue the hearing so that Debtor could address the financial issues relating to paying the larger amount. That issue has been raised by the Chapter 13 Trustee in his Objection.

The court continues the hearing on this Objection, the court construing it, after the hearing and the points being addressed by Debtor, as stating the financial feasibility issues of Debtor's ability to cure the arrearage through a plan.

### **November 24, 2020 Hearing**

As of the court's November 21, 2020 review of the Docket, Debtor has not filed any supplemental pleadings.

Though the court overrules the Objection, the court is denying confirmation pursuant to the objection of the Chapter 13 Trustee.

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 Confirmation filed by Deutsche Bank National Trust Company having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,



## **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). Schedule J indicates that Debtors' net monthly income is \$2,157.01. This amount provides insufficient funds for the proposed monthly payment of \$3,624.39 for 60 months. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

## **Debtor Fails Liquidation Analysis**

Debtor's plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Trustee states that the value of property is disputed, and that the unsecured creditors would receive a higher distribution in a Chapter 7 proceeding. According to Trustee preliminary investigation, the non-exempt property in the estate totals \$5,744.58, and Debtors are currently proposing a 0% dividend to unsecured creditors.

Trustee also notes that the Debtors' first Plan payment of \$3,624.39 was due on July 25, 2020, prior to the hearing on the instant objection.

At the hearing Debtor requested, and the Trustee did not oppose, continuance of the hearing to allow Debtor to file supplemental pleadings addressing the ability to perform the proposed Plan.

## **November 17, 2020 Status Report**

Trustee filed a Status Report on November 17, 2020 informing the court that Debtor failed to file supplemental pleadings addressing the ability to perform the plan or provide any additional documents to Trustee. Dckt. 39. Moreover, Debtor is delinquent \$235.60 in plan payments. *Id.*

## **November 24, 2020 Hearing**

As discussed in connection with the Objection to Confirmation filed by Deutsche Bank National Trust Company, Debtor's plan does not provide sufficient funding to pay the pre-petition arrearage. The (\$66,649.80) arrearage is stated in Amended Proof of Claim No. 2-2 filed in this case.

The Debtor has funded the plan with \$3,565.49 a month. Plan ¶ 2.01; Dckt. 2. This Plan provides for the current mortgage payment to Deutsche Bank National Trust Company of \$2,486.00, but provides for funding an arrearage of (\$43,984.65), which would be a \$733.08 payment. If the arrearage is (\$66,649.80) as stated in the Proof of Claim (which amount controls unless otherwise determined by the court, Plan ¶ 3.02), then the plan must have sufficient funding to pay \$1,110.83 a month for the arrearage. That arrearage cure payment of \$1,110.83 and the plan stated currently monthly payment of \$2,486.00 total \$3,596.83, which alone exceeds the monthly plan payment of \$3,565.49. This does not take into account the 10% Chapter 13 Trustee fees and the \$196.65 monthly Class 2 secured claim payment.

The proposed Chapter 13 Plan does not comply with 11 U.S.C. § 1322 and § 1325; the Motion is denied, 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 filed by David Cusick, the Chapter 13 Trustee, to the Chapter 13 Plan filed by the debtor, Dennis and Kim Campbell (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection to Confirmation is sustained, and Debtor’s Chapter 13 Plan is not confirmed.

5. [18-20735-E-13](#)      **JERI/JENIFER MCCORMICK**      **MOTION TO MODIFY PLAN**  
[MRL-1](#)                      **Mikalah Liviakis**                      **9-24-20 [19]**

**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—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 September 25, 2020. By the court’s calculation, 60 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 debtors, Jeri Lee Rose Covert McCormick and Jenifer Lee McCormick (“Debtors”), have filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response indicating non-

opposition on November 4, 2020. Dckt. 25.

Trustee notes that Debtors failed to state in Section 3.05 of the Plan that their attorney was paid \$1,425.00 prior to filing and, \$2,575.00 was to be paid through the plan. However, the Plan states that Debtor has been paid \$0.00 and has agreed to be paid \$0.00 through the Plan

At the hearing, **XXXXX**

~~The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed:~~

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

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

~~The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Jeri Lee Rose Covert McCormick and Jenifer Lee McCormick (“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 September 24, 2020, 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.~~

**TELEPHONIC APPEARANCE OF ARNOLD GRAFF, ESQ.  
COUNSEL FOR ARVEST CENTRAL MORTGAGE COMPANY  
REQUIRED FOR NOVEMBER 24, 2020 HEARING**

**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, parties requesting special notice, and Office of the United States Trustee on October 15, 2020. By the court’s calculation, 40 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 dismissed without prejudice, the court having approved the loan modification pursuant to a Motion of the Chapter 13 Trustee.**

The Motion to Approve Loan Modification filed by Arvest Central Mortgage Company (“Creditor”) seeks court approval for Roldan Biansat Sebedia (“Debtor”) to incur post-petition credit. Arvest Central Mortgage Company, whose claim the Plan provides for in Class 4, has agreed to a loan modification that will reduce Debtor’s mortgage payment from the current \$3,437.03 per month to \$2,450.95 per month, plus any escrow shortage.

The Motion is supported by the Declaration of Arnold L. Graff, Associate with the law firm Wright, Finlay & Zak, LLP, counsel for Arvest Central Mortgage Company. Dckt. 109. The Declaration states that the loan modification “will assist Debtor in being able to make the current payments due under the Deed of Trust, will cure the arrearage due thereunder and will allow Debtor to keep the

Property and continue with his Chapter 13 reorganization.” *Id.* Further, the Declaration provides that “specifically the loan cures all arrears previously accrued under the Note and Deed of Trust and allows Debtors to feasibly make payments at a fixed interest rate.” *Id.*

On November 10, 2020, the Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response to Creditor’s Motion to Approve Loan Modification. Dckt. 112. Trustee believes that Debtor already obtained an order authorizing what may be this loan modification, on April 6, 2020. Dckt. 80.

On February 18, 2020 Roldan Biansat Sebedia (“Debtor”) filed a Motion to Approve Loan Modification. Dckt 56. A review of the loan modification agreement filed as Exhibit A, has a proposed monthly payment of \$3,437.03 with a modified interest rate of 4.625%. Dckt. 59. The agreement is dated January 8, 2020.

Through the instant Motion, Creditor filed Exhibit 4. Dckt. 110. A review of the Loan Modification Agreement filed as Exhibit 4 has a proposed monthly payment of \$3,437.03, inclusive of escrow amounts, starting February 1, 2020 with a fixed interest rate of 4.6250%. The agreement is also dated January 8, 2020.

It appears that the two Loan Modification Agreements are identical. Exhibit A, Dckt. 59, (Debtor’s Motion exhibit), and Exhibit 4, Dckt. 110 (Lender’s Motion exhibit).

However, while dismissing this Motion without prejudice, the court has several concerns with what is being presented to the court. If it turns out that these are indeed two different agreements, it is unclear as to why Debtor is not the party jointly filing for the approval of this loan modification, why Debtor is nowhere to be seen regarding a declaration testifying as to the modification, or why Debtor’s counsel has not filed a statement in support of the Motion.

Second, the personal knowledge testimony provided in support of the instant Motion is given by Arnold Graff, Esq., an attorney with Wright, Finlay & Zak, LLP, the attorneys for Arvest Central Mortgage Company in this bankruptcy case. Declaration, Dckt. 109.

In his Declaration, Mr. Graff states under penalty of perjury that he has personal knowledge of all the facts stated in the Declaration. Dec. 2:2–4; *Id.* These “facts” of which he Graff states under penalty of perjury he has personal knowledge (not mere “second-hand” knowledge that he received because he heard someone else tell him of the “fact” or that he read the “fact” in document that someone gave him) include:

- A. Debtor has been working with Mr. Graff’s client on a loan modification. *Id.*, ¶ 3. Mr. Graff does not testify that he personally has worked on the loan modification.
- B. Debtor has reached an agreement with his client for a modification. *Id.*
  - 1. No person with personal knowledge authenticates this exhibit as required by Federal Rules of Evidence 901 et seq, and 601, 602.
- C. He repeats terms and information he reads in the Loan Modification Agreement that is filed as an exhibit. *Id.*



- D. Mr. Graff then states that he has no personal knowledge, but is merely “informed and believes” that the Loan Modification Agreement will assist the Debtor in making payments due to Mr. Graff’s client and to successfully prosecute the Chapter 13 case. He then states the term of the Loan Modification Agreement which provides for curing the arrearage. *Id.*, ¶ 4.
1. In addition to admitting that he has no personal knowledge of the “facts” he is testifying to, it appears that Mr. Graff and his firm are now representing the Debtor and advocating for the Debtor in this Chapter 13 case. Such would appear to be an irreconcilable conflict.
- E. Admitting that he has no personal knowledge, but only has been “informed and believes” that by getting the court to approve the Loan Modification for his client(s?), it will not have any adverse impact on the estate, the Trustee, or any other creditor in this case, or the discharge to be received by the Debtor. *Id.*, ¶ 5.
1. It appears by this statement Mr. Graff and his firm are providing a legal opinion, and obligating themselves professionally, for any damages and maladies that might be suffered by the various parties if this legal opinion issued as part of their practice turns out to be incorrect.

The court cannot identify any proper basis under the Federal Rules of Evidence by which a party may hire an attorney to provide information and belief, second hand, “somebody told me” testimony in lieu of there being an actual witness with personal knowledge. Fed. R. Evid. 601, 602.

Given that the State Bar reports that Mr. Graff has been a licensed attorney for ten years, it appears unlikely that the “information and belief,” second hand testimony was inadvertent. It is unclear why a licensed attorney would not have a client or other witness with personal knowledge testimony as required by the Federal Rules of Evidence adopted by the United States Supreme Court.

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 Motion to Approve Loan Modification filed by Arvest Central Mortgage Company (“Creditor”) 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 dismissed without prejudice, the court having issued an order authorizing the loan modification pursuant to a motion filed by Debtor.

**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—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 June 30, 2020. 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 denied.**

The debtor, Leanne Lynn Boger (“Debtor”) seeks confirmation of the Modified Plan to address actual claims filed and to cure default caused by a reduction in income and underestimated expenses. Declaration, Dckt. 48. The Modified Plan provides for monthly plan payments of \$670.00 for months 9 through 60, and a 0 (zero) percent dividend to unsecured claims totaling 38,952.60. Modified Plan, Dckt. 50. 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 August 7, 2020. Dckt. 58. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in plan payments.
- B. The Plan is not feasible.
- C. Debtor failed to explain two large payments made to Trustee in July.

## **DISCUSSION**

### **Delinquency**

The Chapter 13 Trustee asserts that Debtor is \$3,169.30 delinquent in plan payments, where the plan as proposed calls for \$17,670.00 to have been paid but Debtor has paid a total of \$14,500.70 to date. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **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). The plan may not be feasible. According to the Trustee's calculation, the plan will take 72 months to complete. The Trustee shows approximately \$41,943.08 remains to be paid through the plan. Thus, 63 months remain ( $\$41,943.08 / \$670.00 = 63$ ).

Moreover, §7.02 of the proposed plan states the Trustee is to pay the Post-Petition Monthly Payment through month 8 (June 2020) of the plan. The debtor will pay the payment directly beginning August 1, 2020. Thus, it appears that no payment will have been made for the month of July, which is contrary to the mortgage agreement which states that Debtor was to begin modification payments beginning April 1, 2020. *See* Dckt. 36, at 16.

### **Larger Payments**

Debtor paid, and Trustee received, two payments of \$1,566.90 each in the month of July, 2020. Trustee is uncertain how Debtor was able to afford such payments when Debtor's supplemental Schedules J filed on June 30, 2020 as Exhibit A, indicates Debtor has a monthly net income of \$670.00. *See* Dckt. 49, at 5. Debtor fails to explain the source of the funds whether it was savings, actual income, or Debtor liquidated an asset.

At the first hearing, the Trustee reported that there was still a plan delinquency to be addressed. The Trustee concurred in a continuance.

### **Debtor's Supplemental Pleading**

Debtor filed a Supplement to the Motion on September 22, 2020. Dckt. 63. Debtor also filed a Declaration in support of the Supplement. Dckt. 64.

Regarding Trustee's raised objections, Debtor first requests that the issue regarding delinquency be addressed at the hearing and further asserts that according to her calculations, the total paid out according to the plan is \$51,484.53, leaving a balance of \$555.47 to cover interest on the class 2 vehicle claim. Debtor would not oppose a minor modification of the plan payments to account for any plan shortage.

Debtor informs the court that she made direct mortgage payments to creditor Carrington Mortgage Services for November 2019, August 2020, and September 2020. Provided that Trustee has made eight payments to creditor as called for under the plan, there should not be any skipped payments. Debtor would consent to the following additional language to cover any remaining shortage:

“Section 7.02 is modified in that the Debtor will pay direct payments to Carrington Mortgage Services in the amount of \$1870.48 beginning July 1, 2020.”

Debtor explains that the additional payment made was a cashier’s check that was un-deposited and eventually returned that appears to not have been taken out of her account by the TFS system due to a technical problem, savings that she had accumulated, and a one-time bonus issued by her employer due to a Payroll Protection loan received by her employer. Dckt. 64, ¶¶ 5-9.

Lastly, Debtor states that the Supplemental Schedules I and J filed as exhibits to the motion are an accurate reflection of Debtor’s current monthly income and expenses. *Id.*, ¶ 10. Debtor testifies that she is about to start a new job and once she builds her commissions, she anticipates an increase in income. *Id.*, ¶ 11.

Debtor provides the following language in her prayer for relief for the Order modifying her Chapter 13 Plan:

Plan payments under the First Modified Chapter 13 Plan would be as follows: \$17,200.00 total paid in for Months 1 through 8, and \$670.00 per month for months 9 through 60 of the plan. The percentage paid to unsecured creditors would remain the same so that all allowed unsecured claims would be paid no less than zero (0) cents on the dollar, based upon the actual claims and anticipated claims filed.

### **September 29, 2020 Hearing**

At the hearing, the Trustee states that with ten months in, Debtor is in default on the payments for the claim to be moved to Class 4.

### **October 20, 2020 Hearing**

As of the court’s review of the docket at the time of drafting this tentative ruling, no further documents have been filed with the court.

At the hearing, counsel for the Debtor reported that Debtor is still delinquent, with a labor dispute pending with her former employer.

Counsel for the Trustee states that it appears that there may not be a delinquency and requests a continuance.

### **Trustee’s Status Report**

Chapter 13 Trustee, David Cusick, (“Trustee”) filed a status report to Debtor’s Motion to Modify Chapter 13 Plan on November 10, 2020. Dckt. 72.

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$4,709.30 delinquent in plan payments, where Debtor has paid a total of \$15,170.70 to date. Delinquency indicates that the Plan is not feasible and is

reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### 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). The plan may not be feasible. According to the Trustee's calculation the plan will **take 62 months to complete. The Trustee shows approximately \$33,004.29 remains to be paid through the plan.** Thus, 50 months remain ( $\$33,004.29 / \$670.00 = 63$ ).

### Mortgage Treatment

Debtor's supplemental Motion to Modify the Plan indicates that Debtor has made three direct monthly payments to Carrington Mortgage Services ("Creditor"). Dckt. 63.

### Not Best Effort

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Debtor states that she is changing employers. Declaration, Dckt. 64. Trustee asserts that Debtor has not provided the Trustee with any information regarding her new employment.

### **November 17, 2020 Status Report**

Trustee filed a Status Report on November 17, 2020 informing the court that Debtor is delinquent \$4,709.30 in plan payments; the plan is not feasible as it will take 62 months to complete instead of the 60 months proposed; and Trustee is uncertain that the proposed payment is Debtor's best effort as Debtor has failed to provide ant updates regarding her new employment. Dckt. 72.

### **November 24, 2020 Hearing**

No further or supplemental pleadings have been filed by Debtor since September 22, 2020. It appears that Debtor needs to clean the slate and start anew with what Plan she can prosecute in this case. The Motion was filed on June 30, 2020. The court has conducted three prior hearings.

The proposed Modified Chapter 13 Plan complies with 11 U.S.C. § 1322, § 1325, and § 1329; the Motion is denied 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 Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Leanne Boger (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied.

8. [20-25059-E-13](#) **CORY STURGIS** **MOTION TO VALUE COLLATERAL OF**  
[MOH-1](#) **Michael Hays** **ONEMAIN FINANCIAL GROUP, LLC**  
**11-6-20 [13]**

**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 13 Trustee, Creditor, and Office of the United States Trustee on November 6, 2020. By the court’s calculation, 18 days’ notice was provided. 14 days’ notice is required.

The Motion to Value Collateral and Secured Claim 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, -----.

**The Motion to Value Collateral and Secured Claim of OneMain Financial Group, LLC (“Creditor”) is granted, and Creditor’s secured claim is determined to have a value of \$7,043.00.**

The Motion filed by Cory Calvin Sturgis (“Debtor”) to value the secured claim of OneMain Financial Group, LLC (“Creditor”) is accompanied by Clancy Callahan, Office Manager of Debtor’s

Attorney, declaration. Declaration, Dckt. 15. Debtor is the owner of a 2002 Chevrolet Avalanche (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$7,043.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The Debtor mistakenly advised the attorney that the Vehicle was a 2003 Chevrolet Avalanche. Dckt. 13. The contract identifies the Vehicle as a 2002 Chevrolet Avalanche. Exhibit 1, Dckt. 22. Therefore, Debtor seeks to value the 2002 Chevrolet Avalanche at the replacement value of \$7,043.00. Dckt. 13.

## **TRUSTEE’S RESPONSE**

The Chapter 13 Trustee, David Cusick (“Trustee”), filed a Response on November 16, 2020 explaining that although Debtor’s motion states that evidence would be filed under Exhibits 1, 2, and 3; no such exhibits have been filed. Dckt. 19. Therefore, although Trustee does not oppose the valuation, Trustee asserts that there is insufficient information to adequately review the motion. *Id.*

Debtor filed a Reply (Dckt. 25) on November 18, 2020 acknowledged the error and subsequently filing the Exhibits on November 16, 2020. Dckt. 22.

## **DISCUSSION**

The lien on the Vehicle’s title secures a purchase-money loan incurred on October 30, 2019, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$9,904.00 Schedule D, Dckt. 1. 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 \$7,043.00, 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 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 Value Collateral and Secured Claim filed by Cory Calvin Sturgis (“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 OneMain Financial Group, LLC (“Creditor”) secured by an asset described as 2002 Chevrolet Avalanche (“Vehicle”) is determined to be a secured claim in the amount of \$7,043.00, 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 \$7,043.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**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 October 12, 2020. 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 denied.**

The debtor, Timothy Francis Schad (“Debtor”) seeks confirmation of the Modified Plan because of Debtor’s loss of income due to the COVID-19 pandemic. Declaration, Dckt. 184. The Modified Plan provides:

1. monthly plan payments of \$2,350.00 per month for months 1 through 12,
2. followed by monthly plan payments of \$13,000.00 per month for 27 months,
3. \$0.00 per month for 3 months, and
4. \$13,200.00 per month for 24 months,
5. With a 100 percent dividend to unsecured claims totaling \$6,000.00.

Modified Plan, Dckt. 186. 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 November 9, 2020. Dckt. 190. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan is not feasible.
- B. Debtor is delinquent \$3,668.26 in plan payments.
- C. Debtor has not filed supplemental schedules.

## DISCUSSION

### 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 73 months due to the proposed plan paying in the remaining 20 months a total of \$264,000.00 where \$291,550.76 is required. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### Delinquency

The Chapter 13 Trustee asserts that Debtor is \$3,668.26 delinquent in plan payments, which represents a fraction of the \$13,200.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### 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 in support of his current income and expenses. Debtor's last Schedules I and J were filed on January 31, 2018. Dckt. 113. 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 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, Timothy Francis Schad ("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.

10. [19-23073-E-13](#)      **ROBERT MCGUCKIN**      **MOTION TO MODIFY PLAN**  
[RJ-2](#)                      **Richard Jare**                      **10-13-20 [45]**

**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 October 13, 2020. By the court’s calculation, 42 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, Robert Ian McGuckin (“Debtor”) seeks confirmation of the Modified Plan because of a loss in income from Debtor losing work in his RV repair business. Declaration, Dckt. 48. The Modified Plan provides for monthly plan payments of \$1300.00 per month for ten (10) months, followed by monthly plan payments of \$1,660.00 for fifty-two (52) months. Modified Plan, Dckt. 47. 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 November 9, 2020. Dckt. 54. Trustee opposes confirmation of the Plan on the basis that:

- A. The Plan is not feasible.
- B. Debtor has not filed supplemental schedules.

## 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). Trustee asserts that Debtor has not filed Supplemental Schedules I and J in support of his current income and expenses.

Debtor filed a Reply on November 17, 2020 stating that a “new budget” has been filed which provides for a disposable income of approximately \$1,300.00. Dckt. 58. Upon review of the docket, Debtor filed supplemental Schedules I and J on November 17, 2020. Dckt. 57.

A review of the Supplemental Schedule I lists \$3,100 in net income from rental property and from operating a business, profession, or farm. Dckt. 77 at 2, Line 8a. It also includes a “Fiance contribution only as needed” in the amount of \$1,200. *Id.*, Line 11. Giving Debtor a combined monthly income of \$4,300.

Under Line 13, Debtor explains that “[i]t has been a difficult year requiring INCREASED fiance contribution.” *Id.* Debtor’s Supplemental Schedule J shows expenses in the total amount of \$3,000; leaving Debtor with a monthly net income of \$1,300. *Id.*, at 4, Line 23c.

In reviewing Supplemental Schedules I and J, several questions arise. It is stated that Debtor’s fiancé contributes \$1,200.00 a month for the Debtor to have \$4,300.00 take-home gross income. Dckt. 57 at 2. However, no declaration of Debtor’s fiancé has been provided.

On Supplemental Schedule J Debtor provides for \$200 a month in self-employment taxes. However, Debtor makes no provision for the payment of any State or Federal Taxes.

For self-employment taxes, the Internal Revenue Service states that it is 15.3% of the first \$137,000 of income. <sup>Fn.1.</sup> On \$3,100 in monthly net business income, that would compute to be \$474.30, more than double the amount listed on Supplemental Schedule J.

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FN. 1.

<https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes>.  
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### 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 81 months due to \$92,432.86 being available to pay creditors, while \$93,541.77 is required. Trustee asserts that the proposed plan would need to increase to \$1,630.00 each month for the remaining 61 months in order for the plan to be feasible. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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

confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Robert Ian McGuckin (“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.

**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).**

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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 October 28, 2020. 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. 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 sustained.**

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

- A. The First Meeting of Creditors was continued.
- B. Debtor failed to provide business documents.
- C. Debtor may not be able to comply with the Plan.

## DISCUSSION

Trustee’s objections are well-taken.

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

Debtor appeared at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Although Debtor appeared at the Meeting of Creditors, Trustee asserts that it was very difficult to hear her and as a result, the meeting was continued to November 5, 2020. Dckt. 19. 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). This is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Continued Meeting of Creditors was held on November 5, 2020, and Trustee's Report indicates that Debtor did not appear. The Meeting of Creditors has been continued to December 3, 2020.

### **Failure to File Documents Related to Business**

Debtor has failed to timely provide Trustee with business documents including:

- A. Two years of tax returns,
- B. Proof of license and insurance or written statement that no such documentation exists.

11 U.S.C. §§ 521(e)(2)(A)(i), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3). Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

### **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 admitted at the First Meeting of Creditors that she has not filed all of her business tax returns and has only filed her personal tax returns in the last four years prior to filing. Dckt. 19. Trustee is unsure if the current tax liability is accurate. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

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

The Objection to the Chapter 13 Plan filed by the 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 to Confirmation of the Plan is sustained, 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.

**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).**

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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, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 29, 2020. 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 sustained.**

Silver Lantern, LLC ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. The Plan improperly modifies Creditor's claim.
- B. The Plan is not feasible because Debtor does not have sufficient income.
- C. The Plan is not feasible because it is unlikely Debtor will be able to operate a care home on the Property.
- D. The Plan does not address delinquent property taxes.

## **DISCUSSION**

Creditor's objections are well-taken.

### **Modification of Creditor's Claim**

Debtor's Plan improperly provides for Creditor's Claim under Section 3.07(c). Dckt. 13. Class 1 includes all delinquent secured claims that mature after the completion of this plan, including those secured by Debtor's principal residence. Creditor's claim matures on February 22, 2021. Proof of Claim, No. 5. Therefore, since Creditor's claim matures before the completion of this Plan, Creditor's claim should be treated as Class 2.

### **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 asserts that Debtor's disposable income is likely lower than what is listed in Schedule J. Schedule J provides that Debtor is paying \$0.00 in insurance, taxes, and utilities. Dckt. 12

Creditor alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Creditor asserts that Debtor is \$3,861.36 delinquent in property taxes. The Plan does not address the delinquent taxes. Dckt 13.

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

### **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 asserts that due to significant maintenance issues on the property, it is unlikely that Debtor will be able to continue to operate a care home on the property. Dckt 23. Creditor provides the Residential Broker Price Opinion explaining repairs needed to bring property from its present "as-is" condition to average marketable condition. Exhibit 1, Dckt. 25.

Unfortunately, the Broker who seeks to testify and provide expert testimony, Fed. R. Evid. 702 does not provide any testimony. Megan Lynch, an employee of Carrington Company, the agent for Creditor, does provide her testimony under penalty of perjury. Dckt. 24.

In the Declaration she testifies that she is "familiar" with how the Creditor maintains its books and records, what the employees of the Creditor does, and that records are made. Dec., ¶3; Dckt. 24. Ms. Lynch does not state how she would have such personal knowledge (Fed. R. Evid. 601, 602), and whether it is merely that someone has told her what Creditor does. While this appears to be testimony to authenticate business records, the witness has not provided the court with a basis for having such personal knowledge of how the Creditor maintains its books and records.

As decided under Trustee's Objection, Debtor's Plan is not confirmed.

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



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

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

The Objection to the Chapter 13 Plan filed by Silver Lantern, LLC (“Creditor”) holding a secured claim 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 Confirmation of the Plan is sustained, 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 October 26, 2020. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

The Motion to Appoint a Next Friend 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 Appoint a Next Friend is XXXXX.**

The Chapter 13 debtor, Juanethel Alexander (“Debtor”) requests the court appoint a Next Friend pursuant to Federal Rule of Bankruptcy Procedure 1004.1. Specifically, Debtor requests Lizabeth Griffin be appointed as a Next Friend. Though referring to this representative as a “Next Friend,” in federal court, this representative is referred to as a guardian ad litem.

Debtor informs the court that at the August 20, 2020 Meeting of Creditors, Trustee believed Debtor needed to have Next Friend appointed to assist Debtor at the meeting.

In support of the Motion, Debtor filed the Declaration of Lizabeth Griffin. Dckt. 33. Ms. Griffin testifies that she is Debtor’s cousin and has known her for over six decades. *Id.*, ¶ 2. Further, Ms. Griffin testifies that Debtor is 78 years old and is totally paralyzed on the right side of her body after suffering a stroke in 2003. *Id.* ¶ 3. Moreover, though Debtor is mentally competent, Debtor is having problems speaking and communicating. *Id.* Ms. Griffin notes that over the past few years she has noticed decline in Debtor’s memory and mental capacity and needs Ms. Griffin’s assistance as a result of the declining memory, communicating issues, and physical disability. *Id.* ¶ 4. Ms. Griffin also notes

that she does not have a power of attorney nor is she a duly appointed representative under state law and that Debtor's sister Juanita Blake also assists with Debtor's day to day affairs. *Id.* ¶ 5.

Notably, and relevant to the instant case, Ms. Griffin testifies that she has been assisting Debtor with her financial affairs since 2012 and is familiar with Debtor's finances and the bankruptcy case. *Id.* ¶ 6.

Ms. Griffin is a retiree and financially stable, and does not charge Debtor for any of her assistance. *Id.* ¶¶ 7-8.

## **APPLICABLE LAW**

Rule 1004.1 of the provides for a representative with the ability to file a petition for an Infant or Incompetent Person.

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

The application of Rule 1004.1 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 1004.1.03, which states:

The rule also authorizes the court to appoint a guardian ad litem if the court feels it is necessary in a case commenced by the debtor on his or her own behalf without a representative. *See In re Matthews*, 516 B.R. 99, 105–106 (Bankr. N.D. Tex. 2014); *In re Thompson*, 2010 Bankr. LEXIS 4969 (Bankr. D.S.C. Dec. 22, 2010); *In re Benson*, 2010 Bankr. LEXIS 1354 (Bankr. N.D. Ga. Apr. 30, 2010). Such an order may be necessary if the debtor is unable to comprehend the nature of the proceedings due to a disability. *See In re Benson*, 2010 Bankr. LEXIS 1354 (Bankr. N.D. Ga. Apr. 30, 2010) (although bankruptcy was filed at instance of debtor's daughter, who had a power of attorney, daughter did not have sufficient knowledge of debtor's affairs to act in a representative capacity, so court appointed guardian ad litem); *In re Whitehead*, 2005 Bankr. LEXIS 1467 (Bankr. M.D.N.C. July 22, 2005) (debtor's son appointed guardian ad litem for limited purpose of participating in sale of debtor's real estate); *In re Moss*, 249 B.R. 199 (Bankr. W.D. Mo. 2000) (removing previously appointed guardian ad litem). The court may extend deadlines to allow time for a state court to make a determination as to whether a debtor is incompetent and requires a guardian ad litem. *In re Petrano*, 2013 Bankr. LEXIS 5255, 12–13 (Bankr. N.D. Fla. Apr. 16, 2013). Bankruptcy courts may not be best suited to making a determination of competency. Some courts have attempted to fashion a less extreme option, such as the appointment of a "guardian advocate," authorized to provide a report to the court, in order to avoid making a finding of incompetence and appointing a

guardian. See *In re Bentley*, 2018 Bankr. LEXIS 770 (Bankr. M.D. Fla. Mar. 8, 2018).

9 Collier on Bankruptcy P 1004.1.03 (16th 2020).

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that “If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).”

## FEDERAL RULES CONCERNING COMPETENCY

As a basic requirement for a person to have his or her rights determined in federal court, that person must meet the basic requirements for legal competency. Moore's Federal Practice, Civil § 17.21, provides a good survey of the federal competency requirement:

§ 17.21 Capacity of Individual Litigant Acting on Its Own Behalf Determined by Law of Domicile

[1] Domicile Tested at Time of Filing

**The capacity of an individual engaged in litigation to enforce its own right, not acting as a representative of another, is determined by the law of the litigant's domicile...**

[3] Persons Lacking Legal Capacity Must Have Adequate Representation

[a] Court May Appoint Guardian

Although persons lacking legal capacity may not sue or be sued, Rule 17(c) provides that their interests may be represented in litigation in federal courts (see also § 17.10[3][c] (guardian's and guardian ad litem's real party in interest status); § 17.22 (capacity of representatives of persons lacking legal capacity)). If a minor or other incompetent person has a representative appointed by law, such as a guardian, committee, conservator, or other similar fiduciary, this representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent who has no duly appointed representative may sue by a next friend or by a guardian ad litem. If a minor or incompetent is sued and is not represented in the action, the court must appoint a guardian ad litem or make some other proper order to protect the minor or incompetent. Similarly, if a party becomes incompetent during the course of the litigation, the court must appoint a guardian ad litem or make some other proper order. The language of the rule is mandatory and requires the court to appoint a guardian ad litem or make some other provision once the court determines that the individual is incompetent. However, the rule does not place an affirmative obligation on the district court to inquire *sua sponte* into the individual's capacity unless evidence showing that the individual has been adjudged incompetent or other clear evidence of incompetence is brought to the district court's attention. Bizarre behavior alone is insufficient to

trigger a mandatory inquiry into a litigant's competency.

The function of the representative or guardian ad litem is to make decisions concerning the litigation on behalf of the minor or incompetent person, and not necessarily to represent the person as an attorney. [With limited parent child exceptions.]...

If a general guardian fails or refuses to sue or defend in a particular case, or if there is a conflict of interest between the minor or incompetent person and the guardian or next friend, federal courts may appoint a guardian or attorney ad litem to protect the interest of the represented party in the case.

To determine whether an individual is considered a minor or incompetent person, Rule 17(c) must be read in conjunction with Rule 17(b). Under Rule 17(b)(1), the capacity of an individual to sue or be sued is determined by the law of the individual's domicile. Once the court applies the law of the individual's domicile and determines that the individual is underage or is otherwise incompetent, the provisions of Rule 17(c) come into play. If the minor or incompetent already has a general guardian, conservator, or like fiduciary, that representative may sue or defend on behalf of the minor or incompetent. Whether an individual or entity is the type of fiduciary that has the legal authority to represent the minor or incompetent person is also determined according to state law. If the minor or incompetent has no such representative, the court must appoint a guardian ad litem or make some other provision for the protection of the individual. At this stage in the process, the court is not guided by state law but rather should be guided by the protection of the individual's interests. The court is not required to follow procedures set out by state law to determine incompetency, but may follow whatever procedures are appropriate within the bounds of due process.

#### [b] Protective Measures Implemented at Court's Discretion

The directive that courts protect the interests of persons lacking legal capacity is not tantamount to a requirement that courts appoint a representative. Rather, when the court finds that a litigant lacks legal capacity, the court may either appoint a guardian ad litem "or issue another appropriate order ... to protect a minor or incompetent person who is unrepresented in an action." The necessity of a guardian is determined at the court's discretion. The court need only inquire whether the incompetent's interests are adequately protected.

The Ninth Circuit Court of Appeals has looked at guardian ad litem appointees. In *Dacannay v. Mendoza*, the court found that

"It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests. The guardian ad litem is but an officer of the court. *Cole v. Superior Court*, 63 Cal. 86, 89 (1883); *Serway v. Galentine*, 75 Cal. App. 2d 86, 170 P.2d 32 (1940). While the infant sues or is defended by a guardian ad litem or next friend, every step in the proceeding occurs under the aegis of the court. See

generally Solender, Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard, 7 Tex.Tech.L.Rev. 619 (1976); Note, Guardians Ad Litem, 45 Iowa L. Rev. 376 (1960)."

*Dacannay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978). Thus, a guardian ad litem is an officer of the court and their actions are subject to review of the court.

## **STATE LAW**

California state law provides for due process procedures in order make competency determinations. Cal. Prob. Code § 810 *et seq* provides

### **§ 810. Legislative findings and declarations regarding legal capacity**

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

### **§ 811. Unsound mind or incapacity**

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

- (A) Short- and long-term memory, including immediate recall.
  - (B) Ability to understand or communicate with others, either verbally or otherwise.
  - (C) Recognition of familiar objects and familiar persons.
  - (D) Ability to understand and appreciate quantities.
  - (E) Ability to reason using abstract concepts.
  - (F) Ability to plan, organize, and carry out actions in one's own rational self-interest.
  - (G) Ability to reason logically.
- (3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:
- (A) Severely disorganized thinking.
  - (B) Hallucinations.
  - (C) Delusions.
  - (D) Uncontrollable, repetitive, or intrusive thoughts.
- (4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.
- (b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.
- (c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.
- (d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.
- (e) This part applies only to the evidence that is presented to, and the findings that

are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

### **§ 812. Capacity to make decision**

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

- (a) The rights, duties, and responsibilities created by, or affected by the decision.
- (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.
- (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The Due Process in Competence Determinations Act, Prob. Code, §§ 810 to 813, 1801, 1881, 3201, and 3204, offers a wide range of potential mental deficits that may support a determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act. *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 640 (Cal. App. 4th Dist. 2013).

### **DISCUSSION**

In this case, the Trustee advised Debtor that she may need a Next Friend in order for her to fully participate in the Meeting of Creditors. Debtor filed the instant motion seeking appointment of Ms. Griffin, who testifies to knowing Debtor for sixty years and assisting her with her finance since 2012.

Ms. Griffin testifies to Debtor's current mental capacity: since her stroke Debtor's capacity and ability to communicate have been impaired to the extent that Debtor needs the assistance of Ms. Griffin and Debtor's sister. Ms. Griffin testifies to not having conflicts of interest that may affect her service as a Next Friend for purposes of prosecuting the instant bankruptcy case.

California state law being the applicable law to determine competency and such state law requiring for due process protections to make such determinations, the court finds it necessary that an independent disinterested part not involved, such as a medical doctor providing a summary report and declaration educating the court as to Debtor's mental capacity.

At the hearing, XXXXXXXXXXXXXXXX





\$1,320.00 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

### **Prior Plan Denied, No New Plan**

Debtor did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on September 15, 2020. A review of the docket shows that Debtor has not yet filed a new plan or a motion to confirm a plan. Debtor offers no explanation for the delay in setting a plan for confirmation. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

### **Motion to Appoint a Personal Representative**

On October 26, 2020, Debtor filed a Motion to Appoint a Next Friend, namely Lizabeth Griffin as the Next Friend. Dckt. 31. At the Meeting of Creditors, Trustee believed Debtor needed to have Next Friend appointed to assist Debtor as she is 78 years old and after having suffered a stroke, Debtor is having problems with her memory and mental capacity. *Id.*, ¶ 2-3. Ms. Griffin is Debtor's cousin and has been assisting Debtor since 2012 and is familiar with Debtor's financial affairs. *Id.*, ¶ 5-6. The motion has been set for hearing at 9:00 a.m. on November 24, 2020.

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(f)(2)(C).**

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Local Rule 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Chapter 13 Trustee, and Office of the United States Trustee on October 22, 2020. By the court’s calculation, 33 days’ notice was provided. 30 days’ notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days’ notice); LOCAL BANKR. R. 3007-1(b)(2).

The Objection to Claim was properly set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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 Objection to Proof of Claim Number 9 of BH Financial Services, Inc. is sustained, and the claim is disallowed in its entirety.**

Jose V. Castro, the Chapter 13 Debtor, (“Objector”) requests that the court disallow the claim of BH Financial Services, Inc. (“Creditor”), Proof of Claim No. 9 (“Claim”), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of \$5,204.72. Objector argues that Creditor’s claim should be treated as an unsecured claim on the basis that the judgment was obtained in violation of 11 U.S.C. § 362 and therefore the abstract of judgment is void and unenforceable.

Debtor filed a prior Chapter 13 case on May 27, 2019. Case No. 19-23359, Dckt. 1. On June 13, 2019, a default judgment was entered against the Debtor and filed with the State Court on July 5, 2019. Declaration, Dckt. 59. The bankruptcy case was dismissed on December 19, 2019. Case No. 19-23359, Dckt. 60. On December 27, 2019, Creditor recorded an Abstract of Judgment. Declaration, Dckt. 59. This instant case was filed on February 24, 2020. Dckt. 1.

## DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Here, Debtor has objected to Creditor's proof of claim on the basis that the default judgment was obtained in violation of the automatic stay and that it is void and unenforceable. As evidence that the proof of claim is not valid, Debtor asserts that Creditor's default judgment was entered and filed while Debtor was under the protection of the automatic stay in a previous case, Case No. 19-23359. This prior case was filed on May 27, 2019, with the judgment entered in July 5, 2019.

### The Automatic Stay

Upon the filing of the bankruptcy petition, 11 U.S.C. § 362 expressly provides that an automatic stay goes into effect, which protects property of the bankruptcy estate. 11 U.S.C. § 362(a). The automatic stay imposes an affirmative duty of compliance on the non-debtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151-52 (9th Cir. 1996). A party who acts in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191-92 (9th Cir. 2003).

Subsection (a)(1) provides for a broad stay of legal proceedings against the debtor that were or could have been commenced prior to the commencement of the bankruptcy case, or that seek to recover a pre-petition claim against the debtor. *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997). It includes a stay against the commencement or continuation of administrative, judicial and other actions or proceedings against the debtor. *Borman v. Raymark Industries, Inc.*, 946 F.2d 1031, 25 C.B.C.2d 1169 (3d Cir. 1991) (citing *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 7 C.B.C.2d 137 (3d Cir. 1982)). The ordering of an entry of default judgment is of judicial character and thus subject to the stay. *In re Soares*, 107 F.3d at 975. The stay includes actions seeking injunctive or similar relief as well as actions seeking money judgments.

Creditor's Proof of Claim 9 includes the Judgment and the Abstract of the Judgment. On page five of the Proof of Claim is the first page to the Default Judgment, which states it was "Endorsed Filed" by the Clerk of the Court of the County of Solano on July 5, 2019. Proof of Claim 9-1. The Abstract of Judgment was issued on December 26, 2019. Debtor's prior case was filed on May 27, 2019. Thus, Creditor caused the state court to enter a default judgment during the pendency of Debtor's prior case. According to Debtor's Motion, Creditor was aware of the bankruptcy. In his Declaration, Debtor does not testify under penalty of perjury whether this is indeed the case.

Congress provides in 11 U.S.C. § 362(a) & (k) additional relief for violation of the automatic

stay, which may be requested by an individual debtor. The Ninth Circuit has held that actions taken in violation of the stay are void and without effect. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569 (9th Cir. 1992).

Creditor having requested the default judgment while Debtor and the property of the estate were under the protection of the automatic stay, Creditor violated the automatic stay. This violation renders the judgment void and unenforceable and may be disallowed in its entirety.

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

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

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

The Objection to Claim of BH Financial Services, Inc. ("Creditor"), filed in this case by Jose V. Castro, the Chapter 13 Debtor, ("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 Proof of Claim Number 9 of Creditor is sustained, and the claim is disallowed in its entirety.

Attorney's fees and costs, if any, shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014.

**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 October 27, 2020. By the court's calculation, 28 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 Allowed Three Direct Trial Mortgage Payments and Suspend the Class 1 On-going Mortgage Payments is granted.**

The Chapter 13 debtor, Lesley Marie Palo ("Debtor"), requests that she be allowed to make **three direct trial loan modification mortgage payments on November 1, 2020, December 1, 2020 and January 1, 2021**, and that the Trustee suspend making the Class 1 ongoing payments for the same three months on the basis that her mortgage lender has offered a trial modification plan. Moreover, Debtor requests that for the three months of the trial she be allowed to reduce her current Chapter 13 plan payment of \$3,082.96 by the \$1,399.09 so that Trustee does not file a Motion to Dismiss her case for not making her full plan payment.

## **DISCUSSION**

Debtor's mortgage lender, Wells Fargo Home Mortgage offered her an FHA Home Affordable Modification Program (HAMP) trial plan. The terms call for the Debtor to make trial payments of \$1,399.09 for November 2020, December 2020, and January 2021. According to the offer, only after she has made these 3 payments will she be given the final loan terms and payment.

Debtor argues that the loan modification will benefit her greatly by absorbing the pre-petition mortgage arrears and improving her budget.

Trustee filed a Response on November 10, 2020 stating that Trustee does not oppose a temporary bifurcation of the plan payment but already notes that Debtor is delinquent \$1,390.29 for October 2020 as Debtor has already stated making the reduced plan payment. Dckt. 38, at 2. Moreover, Trustee argues that Debtor should be required to modify the plan once the permanent loan modification is approved. *Id.* Trustee also seeks clarification that the temporary payment amount is \$1,683.87, which is derived from Debtor's plan payment of \$3,082.96 less the trial payment of \$1,399.09.

At the hearing, XXXXXXXXXXXXXXXXXX

This post-petition trial modification reducing Debtor's mortgage payment from \$1,548.79 to \$1,399.09 seems to be conducive to Debtor successfully completing her plan. Trustee does not oppose the trial loan modification. Based on the foregoing, the court grants the Motion and Debtor is allowed to pay three direct trial mortgage payments and reduce her chapter 13 plan payments for the months of November 2020, December 2020, and January 2021.

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 Allowed Three Direct Trial Mortgage Payments and Suspend the Class 1 On-going Mortgage Payments filed by Lesley Marie Palo ("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 Lesley Marie Palo to make three direct trial mortgage payments to Wells Fargo for the following months: November 2020, December 2020, and January 2021.

**IT IS FURTHER ORDERED** that the Class 1 payments for creditor Wells Fargo Home Mortgage made through the chapter 13 plan are suspended for the following months: November 2020, December 2020, and January 2021.

**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 October 5, 2020. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Debtor's Objection to Notice of Post-Petition Mortgage Fees, Expenses, and Charges of the Wolf Firm, A Law Corporation 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 hearing on Debtor's Objection to Notice of Post-Petition Mortgage Fees, Expenses, and Charges of the Wolf Firm, a Law Corporation has been continued to 2:00 p.m. on December 8, 2020 by prior order of the court.**

The Chapter 13 Debtor, Alfred Wayne Vegors and Laura Ann Vegors ("Debtor"), object to the fees claimed in the Notice of Post-Petition Mortgage Fees, Expenses, and Charges by The Wolf Firm, a Law Corporation ("Claimant"), on the basis that Claimant failed to provide billing analysis for the fees claimed for the preparation of the Notice of Post-Petition Mortgage Fees, Expenses, and Charges and the Proof of Claim. Debtor requests that Claimant provide the court with an accounting of these fees and in the event that the accounting is not made available, that Claimant's fees be denied.

Creditor Matrix Financial Services Corporation ("Creditor"), represented by Claimant filed an Opposition on November 10, 2020. Dckt. 36.

On November 20, 2020, Debtor filed a Request for Continuance of this Objection to December 8, 2020 at 2:00 p.m. informing the court that Debtor's Counsel was contacted by Claimant to request additional time to continue negotiations and to talk to Creditor about a settlement offer to reduce



Notice of Post-Petition Mortgage Fees, Expenses, and Charges to \$900.00. Dckt. 45. Additionally, Debtor requests that a tentative ruling not be issued for the November 24, 2020 hearing. *Id.*

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

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

The Objection to Notice of Post-Petition Mortgage Fees, Expenses, and Charges of the Wolf Firm, a Law Corporation filed in this case by Alfred Wayne Vegors and Laura Ann Vegors, the Chapter 13 Debtor (“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 hearing on the Objection is continued to 2:00 p.m. on December 8, 2020.

## FINAL RULINGS

18. [11-44540-E-13](#) **MERCEDES PEREZ** **CONTINUED MOTION TO VALUE**  
[PLC-13](#) **Peter Cianchetta** **COLLATERAL OF JOHN AND TESIBEL**  
**FREY, ELIZABETH KREUGER, AND**  
**LESLIE AND RUTH FREY**  
**9-30-20 [299]**

**Final Ruling:** No appearance at the November 24, 2020 hearing is required.

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

Sufficient Not Notice Provided. No Certificate of Service was filed. The court is unable to determine if proper parties were served.

**Pursuant to Order of the court (Dckt. 315), the Motion to Value Collateral and Secured Claim of John and Tesibel Frey, Elizabeth Kreuger, and Leslie & Ruth Frey (“Creditor”) has been granted, and the Matter is removed from the calendar.**

The debtor, Mercedes Perez (“Debtor”), filed this motion to value the secured claim of John and Tesibel Frey as Trustees of the Frey Family Trust; Elizabeth Kreuger as Trustee of the Elizabeth Kreuger Living Trust; and Leslie & Ruth Frey as Trustee of the Leslie Merl and Ruth Elizabeth Frey Revocable Trust (“Creditor”), which is accompanied by Debtor’s declaration. Declaration, Dckt. 302. Debtor is the owner of the subject real property commonly known as 6 Fourth Avenue, Isleton, California (“Property”). Debtor seeks to value the Property at a fair market value of \$150,000.00 as of the petition filing date.

This is Debtor’s second attempt to value this secured claim. The original Motion to Value the Secured Claim (PLC-6) was filed on July 24, 2020. Dckt. 253. Although that motion was granted, the existing order entered on September 23, 2020 may be void. Counsel for Debtor in a related matter indicated that the order was void because he needed to do service by publication. Counsel was supposed to file a Rule 60(b) Motion. However, no motion has been filed yet.

No certificate of service has been filed for this Contested Matter. The court continues the hearing to allow Counsel to document the sufficient service of this Motion.

Additionally, in light of the existing order of record which has not been vacated and the prior motion dismissed, the court cannot enter a second order purporting to duplicate the ruling thereon.

The court continues the hearing to allow counsel do proper service and file a motion for the order related to and for the dismissal of the PLC-6 motion.

On October 28, 2020, the court entered an order granting the motion after Debtor showed that sufficient service of the Motion was provided. Dckt. 315. The Property was valued at \$150,000 and encumbered by a senior lien in the amount of \$161,000, which exceeds the value of the Property that is subject to Creditor’s lien. *Id.* Creditor’s secured claim was determined to be a secured in the amount of \$0.00 and the balance of any allowable unsecured claim to be paid through confirmed bankruptcy plan.

19. [20-20157-E-13](#)      **JOSE/JEANNETTE**      **MOTION TO SELL**  
[MJD-5](#)                      **PAGTALUNAN**                      **11-3-20 [76]**  
   **Matthew DeCaminada**

**Final Ruling:** No appearance at the November 24, 2020 hearing is required.

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**The Motion to Sell was dismissed without prejudice, and the matter is removed from the calendar.**

Jose Mari Padilla Pagtalunan and Jeannette Rojas Pagtalunan (“Debtor”) having filed a Notice of Withdrawal, which the court takes to be a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Sell was dismissed without prejudice, and the matter is removed from the calendar.**

**Final Ruling:** No appearance at the November 24, 2020 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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 2, 2020. 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 hearing on the Motion to Confirm the Modified Plan is continued to 2:00 p.m. on January 26, 2021**

The debtors, Daniel Lawrence Brennan and Allison Lyn Brennan (“Debtors”) seek confirmation of the Modified Plan due to a significant reduction in income that requires them to reduce the dividend to creditors with unsecured claim to 4% and to reduce the plan payment to an amount they can afford. Declaration, Dckt. 205. The Modified Plan provides payments of \$1,000 for 29 months, and a 4 percent dividend to unsecured claims totaling \$462,762. Modified Plan, Dckt. 206. 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 October 8, 2020. Dckt. 209. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor is delinquent in plan payments.
- B. The plan is not feasible.

C. Plan misstates the collateral value of the Internal Revenue Service.

D. Attorney's fees remain due.

## **DISCUSSION**

### **Delinquency**

Debtor is \$99,902.06 delinquent in plan payments. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **Feasibility**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). The Plan will complete in 30 months instead of the 29 months proposed due to the \$423,644.95 IRS claim, \$13,063.24 in priority claims, \$1,917.22 in unsecured claims, and \$2,507.06 in attorney's fees.

Additionally, the confirmed plan called for a lump sum payment estimated at \$359,000 from the sale of Debtor's home. After the sale, Trustee received \$252,672.94, significantly less than the estimated amount. The proposed modified plan misstates the lump payment as \$336,225. Trustee argues that if corrected, Debtor would be delinquent under the proposed plan by \$16,350.00.

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

### **Internal Revenue Service Claim**

According to Trustee, the proposed plan misstates the collateral value of the Internal Revenue Service in Class 2 and proposes \$0.00 monthly dividend. The Trustee's records reflect that this claim is \$423,644.95.

### **Attorney's Fees**

The proposed plan provides for \$0.00 monthly payment for attorney's fees. Per Trustee's records, \$2,507.06 remain due.

Debtor filed a Reply on October 20, 2020 requesting the court continue the hearing to November 24, 2020 to allow for Debtor's counsel to continue discussions with counsel for the Trustee and the representative for the Internal Revenue Service to sort out the remaining claims held by the IRS and a consensual plan for payment. Dckt. 212. According to counsel for Debtor, the parties had agreed that Debtor would request the continuance for approximately 28 days so they may continue the discussions. *Id.*

At the hearing, counsel for the Debtor reported that there is an accounting issue to be addressed and requested a continuance.

## November 17, 2020 Status Report

Debtor filed a Status Report on November 17, 2020 requesting a continuance of the hearing until January 26, 2021 so that they may continue discussing the amount of status with the Internal Revenue Service after the IRS representative expressed an unwillingness to reach an agreement concerning their claim until he knows that Debtors are current on their 2020 tax liability. Dckt. 214. Debtor's counsel adds that based on the discussions with the IRS representative, an agreement is possible even if the total amount of the IRS claim will not be paid in full during the plan term. *Id.*, at 2.

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, 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 the hearing on the Motion to Confirm the Modified Plan is continued to 2:00 p.m. on January 26, 2021.

**Final Ruling:** No appearance at the November 24, 2020 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No 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 October 6, 2020. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien 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 Avoid Judicial Lien is granted.**

This Motion requests an order avoiding the judicial lien of MCKession Specialty Care Distribution Co. ("Creditor") against property of the debtor, Anne Price ("Debtor") commonly known as 2205 Trails Ct., Rancho Cordova, California ("Property").

Trustee filed a Response noting that Trustee is uncertain if Debtor has properly claimed an exemption in Debtor's real property, where the original Schedule C states \$0 as claimed, and the Schedule C filed as an Exhibit asserts an exemption of 100% of fair market value, up to any applicable statutory limit." Dckt. 27. Trustee further notes that in Debtor's declaration, Debtor states having claimed "an exemption on the Lien property in the amount of \$75,000," but does not provide any other details. *Id.*, at 2.

A judgment was entered against Debtor in favor of Creditor in the amount of \$43,500.00. Exhibit 1, Dckt. 21. An abstract of judgment was recorded with Sacramento County on May 18, 2020, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$382,786.00 as of the petition date. Dckt. 10. The unavoidable consensual liens that total \$351,464.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 10. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$0.00 on Schedule C. Dckt. 10.

In support of this Motion, Debtor filed exhibits using the Schedules A/B, C, and D Forms. Exhibit 1, Dckt. 21. These are copies of the Schedules filed in this case. There is no filing information of where the court would find these on the Docket.

As stated above, on Schedule C filed by Debtor on August 23, 2020, Debtor stated under penalty of perjury that the exemption in the Property was \$0.00. Dckt. 10 at 10. No Amended Schedule C has been filed by Debtor.

Attached as one of the exhibit document is a Schedule C form, in which no dollar amount of exemption has been claimed by the Debtor. This form, which has never been filed as an Amended Schedule C, fails to claim any dollar exemption and instead merely checks the box stating that whatever possible exemption should be claimed, Debtor claims "100%." Dckt. 21 at 10. The court has no idea of what dollar amount, if there was an Amended Schedule C filed with this incomplete information, is claimed. It is not for the court to provide legal services to investigate what the proper exemption amount would be and then expand the incomplete schedule for Debtor.

In her Declaration, Debtor states under penalty of perjury that, as of the time of making the Declaration, she has claimed an exemption on the Property in the amount of \$75,000. Dckt. 20, ¶ 5. As of the September 30, 2020 Declaration being signed under penalty of perjury by Debtor, no such exemption had been claimed.

At the hearing, counsel for the Debtor stated that an amended Schedule C would be filed to correct. When filed, the court will review and enter the order thereon without further hearing.

### **November 11, 2020 Amended Schedule C**

Debtor filed an Amended Schedule C claiming an exemption pursuant to C.C.P. § 704.730 in the amount of \$75,000. Dckt. 33.

Thus, after application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

### **ISSUANCE OF A COURT-DRAFTED ORDER**

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Anne Marie Price ("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 judgment lien of MCKession Specialty Care Distribution Co., California Superior Court for El Dorado County Case No.



PC20160244, recorded on May 18, 2020, Document No. 202005181141, with the Sacramento County Recorder, against the real property commonly known as 2205 Trails Ct., Rancho Cordova, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.