

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

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

**January 8, 2020 at 11:30 a.m.**

---

<b>1.</b>	<b><u>19-22566-E-11</u></b> <b><u>AF-6</u></b>	<b>JUANITO COPERIO</b> <b>Arasto Farsad</b>	<b>CONFIRMATION OF PLAN OF REORGANIZATION FILED BY DEBTOR-IN-POSSESSION 8-8-19 <a href="#">[52]</a></b>
-----------	---	--	---

**Tentative Ruling:** The Chapter 11 Confirmation Hearing has been set on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

**Below is the court's tentative ruling.**

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 7, 2019. By the court's calculation, 43 days' notice was provided. 42 days' notice is required.

The Confirmation of Plan of Reorganization has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are

entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Confirmation of the Chapter 11 Plan is denied without prejudice.**

On October 1, 2019, the court filed its order approving the Disclosure Statement and setting the schedule for service of pleadings, filing of opposition and voting, and filing of evidence. These dates and deadlines are:

**October 7, 2019** Plan, Disclosure Statement, Disclosure Statement Order, and Ballot Mailed

**November 15, 2019** Last Day for Submitting Completed Ballot Accepting or Rejecting the Plan

**November 15, 2019** Last Day to File Objections to Confirmation

**December 6, 2019** Last Day to File Replies to Objections, Evidence in Support of Confirmation, Tabulation of Ballots, Proof of Service

Order Approving Disclosure Statement, Dckt. 70.

**DEBTOR IN POSSESSION TABULATION OF BALLOTS**  
**Dckt. 89**

CLASS	ACCEPT	REJECT	ACCEPTANCE PERCENTAGE
<b><u>Class 1A is the secured claim of Mercedes Benz Financial Services LLC</u></b> regarding the Debtor's 2014 Mercedes Benz GL Class Utility 4D GL550 (Vote obtained).	1	0	100%
<b><u>Class 1B is the secured claim of Ocwen Loan Servicing</u></b> regarding the Debtor's primary and sole mortgage attached to the Debtor's real property located at 115 Michael Ct. Vallejo, CA 94591.	0	0	N/A
<b><u>Class 1C is the secured claim of the Internal Revenue Service</u></b> regarding a lien on all of the Debtor's personal property pursuant to 26 U.S.C. section 6321.	0	0	N/A

<b><u>Class 1D is the secured claim of Ocwen Loan Servicing</u></b> regarding the Debtor's primary and sole mortgage attached to the Debtor's real property located at 103 Michael Ct. Vallejo, CA 94591.	1	0	100%
<b><u>Class 1E is the secured claim of Ally Bank</u></b> regarding the Debtor's 2014 Mercedes Benz E Class E350.	0	0	N/A
<b><u>Class 2.</u></b> IRS (Claim No. 1) (for the general unsecured portion of their claim.)	0	0	N/A
<b><u>Class 2.</u></b> Navy Federal Credit Union (Claim No. 4)	0	0	N/A
<b><u>Class 2.</u></b> Travis Credit Union	0	0	N/A
<b><u>Class 2.</u></b> Capital One Bank	0	0	N/A
<b><u>Class 2.</u></b> EDD (Claim No. 8)	0	0	N/A
<b><u>Class 2.</u></b> American Enterprises International	0	0	N/A
<b><u>Class 2.</u></b> Capital One	0	0	N/A
<b><u>Class 2.</u></b> Discover Financial	0	0	N/A
<b><u>Class 2.</u></b> Grant and Weber, Inc.	0	0	N/A
<b><u>Class 2.</u></b> Pacific Credit Service	0	0	N/A
<b><u>Class 2.</u></b> American Eagle	0	0	N/A

Only two Classes of Creditors having voted in support of confirmation. The first is Class 1A, whose claim is unimpaired and the collateral surrendered. The second is Class 1D, who has agreed to the Plan treatment. No other ballots have been presented by creditors.

## REVIEW OF PLAN

Creditor/Class	Treatment	
Class 1A: Mercedes Benz Financial Services LLC	<b>Claim Amount</b>	
	<b>Impairment</b>	None
	NOTE: satisfied by surrender of collateral	
Class 1B: Ocwen Loan Servicing, LLC	<b>Claim Amount</b>	\$229,605.25
	<b>Impairment</b>	None - Approved Loan Modification, Order, Dckt. 60.  Monthly principal and interest payments of \$946.06 and escrow payment currently computed to be \$670.73 for seventeen years and then a balloon payment stated to be \$164,098.68.
Class 1C: IRS	<b>Claim Amount</b>	\$123,496.79
	<b>Impairment</b>	Arrearages paid in 60 equal payments; Creditors in these class may not repossess or dispose of their collateral so long as Debtor is not in material default under the Plan
Class 1D:, Deutsche Bank National Trust Company, as Trustee for GSAMP Trust 2005-WMC-1)	<b>Claim Amount</b>	\$427,918.45
	<b>Impairment</b>	None - Stipulation for Treatment Filed November 13, 2019. Dckt. 83.  Secured Claim to be amortized over 360 months, 6% interest, with monthly payments of \$2,565.59, plus monthly escrow, currently computed to be \$662.03.
Class 1E: Ally Bank	<b>Claim Amount</b>	\$26,654.77
	<b>Impairment</b>	

	Claim paid in 60 equal payments; may not repossess or dispose of their collateral so long as Debtor is not in material default under the Plan.	
Class 2: Unsecured Claims	<b>Claim Amount</b>	\$63,809.69
	<b>Impairment</b>	Creditors will receive a pro-rata share of a fund totaling \$1,914.29, created by Debtor's payment of \$159.56 per month for a period of 12 months; creditors in this class may not take any collection action against Debtor so long as Debtor is not in material default under the Plan
Class 3a: Professional Fees	<b>Claim Amount</b>	\$15,000.00
	<b>Impairment</b>	Paid upon effective date of Plan.
Class 3b: Other Administrative Claims	<b>Claim Amount</b>	\$650.00
	<b>Impairment</b>	Paid upon effective date of Plan, except expenses incurred in the ordinary course of Debtor's business or financial affairs, which shall be paid when normally due and payable.
Class 3c: Tax Claims	<b>Claim Amount</b>	\$188,968.60
	<b>Impairment</b>	Paid in full with interest (at the non-bankruptcy statutory interest rate) by monthly payments commencing the effective date in accordance with 11 U.S.C. § 511; tax creditors may not take any collection action against Debtor so long as Debtor is not in material default under the Plan.

### COMPLIANCE WITH 11 U.S.C. § 1129(a) and (b)

The Debtor in Possession filed a Memorandum in Support of Confirmation. Dckt. 88. However, Debtor has not provided the court with any evidence for the court to make the necessary findings of fact and conclusions of law for the court to order confirmation of the Plan.

The only ballot voting for confirmation is from an unimpaired creditor for whom Debtor has surrendered his Mercedes Benz (the court having issued an order granting the creditor relief from the

stay). No creditor with an impaired claim has voted to confirm the Chapter 11 Plan.

For impaired creditors who do not vote to confirm a Chapter 11 Plan, 11 U.S.C. § 1129(b) imposes the following requirements (emphasis added):

(b)(1) Notwithstanding section 510(a) of this title, **if all of the applicable requirements of subsection (a) of this section other than paragraph (8)** [all classes voting for confirmation] **are met** with respect to a plan, the court, on request of the proponent of the plan, **shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable**, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims--

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests--

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

In his Confirmation Brief (Dckt. 88) the Debtor in Possession does not address the cram down requirements of 11 U.S.C. § 1129(b) or how the court can confirm this Plan for which no impaired classes have voted to confirm.

In the Confirmation Brief Debtor in Possession argues that Deutsche Bank National Trust Company, as Trustee, with an impaired claim has voted to confirm the Plan, as well as having filed a Stipulation for plan treatment of its claim. Brief, p. 4:19-24.5; Dckt. 88. The ballot of Deutsche Bank National Trust Company, as Trustee, has been provided in support of confirmation. Dckt. 89.

7. Each Class Who Has Voted has Accepted the Plan or is not Impaired.

In the instant case, one of the Debtor's primary creditors, Ocwen Loan Servicing, voted in favor of the Plan (as well as provided a Stipulation to Claim treatment, identified as docket number 83.)

The Debtor also received a vote from his secured creditor (Mercedes Benz) on his vehicle loan. All other creditors that may have been impaired did not object to the Plan and the proposed treatment(s) of their claims.

The ballot of Deutsche Bank National Trust Company, as Trustee, has been provided in support of confirmation. Dckt. 89. Debtor in Possession states, with emphasis, that there are two votes to confirm (one unimpaired class and one not impaired class) and other impaired class **did not** object.

The requirements for confirmation include 11 U.S.C. § 1129(a)(7) and (8), which state (emphasis added):

(7) With respect to **each impaired class** of claims or interests--

(A) **each holder of a claim or interest** of such class--

(i) **has accepted the plan**; or

(ii) **will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7** of this title on such date; or

(B) if section **1111(b)(2)** of this title applies to the claims of such class, each holder of a claim of such class **will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.**

(8) With respect to **each class of claims** or interests--

(A) **such class has accepted the plan**; or

(B) **such class is not impaired under the plan.**

The creditors with impaired claims, the Internal Revenue Service is provided for in Class 1C for a \$124,496 secured claim, \$84,740.18 Priority Unsecured, and Class 2 \$5,352.21 general unsecured claim, all of which are impaired. *See* October 29, 2019 Amended Proof of Claim 1-3 (which is consistent with prior versions filed).

No creditor holding a general unsecured claim has voted to confirm the Plan.

Not all classes of claims having voted to accept the Plan, the Debtor in Possession must satisfy the requirements of 11 U.S.C. § 1129(b). Debtor does not allege, and has not provided the court of any evidence to show satisfaction of the 11 U.S.C. § 1129(b), nor any evidence to show satisfaction of the requirements of 11 U.S.C. § 1129(a).

## **DENIAL OF CONFIRMATION WITHOUT PREJUDICE**

The Debtor in Possession having failed to comply with the requirements of 11 U.S.C. § 1129(a) for confirmation (and not having provided any evidence thereon), not having obtained the votes of all impaired classes for confirmation, and the Debtor in Possession not seeking confirmation by “cram down” pursuant to 11 U.S.C. § 1129(b), the confirmation is denied without prejudice.

It cases the court significant concern that the Debtor in Possession presents no evidence, but relies merely on arguments being made by counsel. As has been well established, a federal court does not grant relief merely because a party asks for it and no opposition is filed, but the federal court must be presented with evidence and determine that the relief is proper under the applicable law. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).



Additionally, it causes even greater concern for the court that counsel for the Debtor in Possession has argued that the provisions of 11 U.S.C. § 1129(a)(8) are satisfied by stating (subject to the certifications arising under Federal Rule of Bankruptcy Procedure 9011):

8. The ‘Best Interest of Creditors’ Test Has Been Met [1129(a)(8)].

The ‘Best Interests of Creditors’ Test has been met because all of the Debtor’s creditors would receive more than they would in a Chapter 7 liquidation analysis. In particular, the Debtor’s general unsecured creditors would receive 0% of their allowed claims and the Debtor is now offering 3% per the Plan.

Brief, p. 4:26-28, 5:1-2.

11 U.S.C. § 1129 is not a “best interests of creditor test, but a voting requirement for all impaired classes.

Confirmation of the Plan is denied without prejudice.

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

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

The hearing for confirmation of the proposed Chapter 11 Plan having been conducted by the court, and upon review of the pleadings, no evidence having been presented by the Debtor in Possession Plan proponent, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that confirmation of the Chapter 11 Plan is denied without prejudice.