

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

January 23, 2024 at 2:00 p.m.

1.	<u>23-23206-E-13</u> <u>DPC-1</u>	DENAE BENNETT Stephan Brown	OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE DAVID P. CUSICK 12-19-23 [60]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, parties requesting special notice, and Office of the United States Trustee on December 19, 2023. By the court’s calculation, 35 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 -----.

~~The Objection to Confirmation of Plan is sustained.~~

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

1. The Plan does not appear to be proposed in good faith because attorney's fees are \$7,000 in the case where the Plan only pays \$2,071.77 of other debt.
2. The Debtor has also not filed the required Rights and Responsibilities form.
3. The Disclosure of attorney's Compensation (Docket 13) does not match the Plan and shows the Attorney is charging "Billable at Standard Hourly Rates," with \$1,000.00 paid prior to filing and "Billable at Standard Hourly Rates" as the balance due.

Docket 60. Trustee submits the Declaration of Teryl Wegemer to authenticate the facts alleged in the Objection. Decl., Docket 62.

Debtor's Reply

On January 19, 2024, Debtor filed a Reply and supporting Declaration to Trustee's Objection. Dockets 70, 72. In her Reply, Debtor states:

1. The fees of \$7,000 are reasonable. Debtor's counsel initially believed the debt would be much greater than \$2,071.77 based on conversations with creditor Alliant Credit Union. Debtor's counsel initially believed that the collateral would sell for \$50,000, leaving a deficit of approximately \$66,437.64, which is why the fees are \$7,000.
2. Debtor is in Chapter 13, not Chapter 7, because she is on title and mortgage of the real property commonly known as 5792 Dolomite Drive, El Dorado, California ("Property"). Debtor wants to transfer all of her rights to her divorced ex-husband in the Property so he can keep the family home, and Debtor did not want a Chapter 7 Trustee to sell the home.

DISCUSSION

Documents Filed Post-Objection

On January 16, 2024, the Debtor filed an Amended Summary of Assets and Liabilities, and an Amended Schedule E/F. Dckt. 68. On the Amended Summary of Assets and Liabilities, the following information is provided and a comparison to what is stated on the Schedules.

For Assets, on the Amended Summary of Assets Debtor states having real estate with a value of \$0.00 and personal property with a value of \$60,191.26. Dckt. 68 at 2. This is the same amount as shown on the Original Summary of Assets and Liabilities (Dckt. 17 at 1).

However, on Schedules A/B (Dckt. 17 at 3) Debtor lists having a "potential" community property interest in real property on Dolomite Drive in El Dorado, California. While Debtor states a \$0.00 value and states her interest is "NONE," she further states:

Potential community property interest subject to property settlement agreement with ex-husband in pending divorce.

Dckt. 17 at 3. This discloses that there is a “pending divorce” and a property settlement agreement in that pending divorce. However, it is unclear what the “Potential community interest” is.

On Schedule D Debtor lists Select Portfolio Servicing, Inc. as having a (\$302,297.82) secured claim which encumbers the Dolomite Drive Property. *Id.* at 12. She further states that the value of the collateral supporting this Claim is \$0.00. The question asked is the value of the collateral securing the debt, not the value of the debtor’s interest in the value of the collateral.

Proof of Claim 3-1 Filed by Movant Creditor

Proof of Claim 3-1 has been filed for Athene Annuity and Life Company, for which Select Portfolio Servicing, Inc. is listed as the person to which Notices and payments are to be sent. The amount of the secured claim, for which the Property is the collateral, is stated to be \$302,836.84. This is consistent with the amount stated by Debtor on Schedule D.

Attached to Proof of Claim 3-1 is a copy of the Note upon which the secured claim is based. POC 3-1 at 11-13. The Borrowers on the Note are identified as the Debtor and Calvin Bennett. These two are identified as the Borrowers and Trustor (granters of the security interest to encumber the Property) on the Deed of Trust. POC 3-1 at 14 - 27.

On the Deed of Trust the Debtor and Calvin Bennett are identified as “Husband and Wife, as Joint Tenants.” *Id.* at 14. It may be that this “Joint Tenancy” may be sufficient to overcome the presumption that the Property is not community property. That is an analysis for which the deed would need to be reviewed and California community property law analyzed.

If Debtor and her husband Calvin Bennett are holding title as joint tenants, then Debtor, and now the Bankruptcy Estate, have that joint tenant interest as property of the Bankruptcy Estate. 11 U.S.C. § 541(a). If it turns out that title is actually held as community property or because of the payments on this loan having been made with community property, then as a matter of California law all or a portion thereof would be community property, as provided in 11 U.S.C. § 541(a)(2).

It is unclear as to why Debtor would list having no interest in property for which she had “at least” a joint tenancy interest.

On Debtor’s Statement of Financial Affairs no dissolution action is listed by Debtor for which the Debtor currently, or in the last year was a party. Stmt Fin. Affairs, part 4, ¶ 1; Dckt. 17.

At the hearing, **XXXXXXX**

Attorney’s Fees

The 9th Circuit holds that, for a court to determine whether a Plan has been proposed in good faith, the court “must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner.” *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982). Rather than relying on a set of predetermined factors for what

constitutes good faith, “bankruptcy courts should determine a debtor’s good faith on a case-by-case basis, taking into account the particular features of each Chapter 13 plan.” *Id.*

This District has had a “no-look” fee which a Chapter 13 debtor’s counsel may elect to receive rather than having to file an application for approval of fees. This bankruptcy case was filed on September 14, 2023. Local Bankruptcy Rule 2016-1, which was amended in August 2023, provides that in a non-business Chapter 13 case debtor’s counsel may elect to receive a flat fee of not more than \$8,500, with no further approval of the court required. L.B.R. 2016-1(c). By this Local Rule the Bankruptcy Judges have determined that the not more than \$8,500 flat fee is reasonable. This fee is for the legal services throughout the case, including possible modifications of the Plan.

Local Bankruptcy Rules 2016-1(c)(1)(A)(iii) provides that this preset flat fee amount is subject to a review, reduction, and disgorgement as provided in 11 U.S.C. § 329(b).

Here, as to the substance of the amount of attorney’s fees to be paid Debtor’s counsel, the Trustee asserts that the amount of fees being charged, \$1,000 pre-petition and \$6,000 through the Plan, are grossly unreasonable given that Debtor is having the Plan address only (\$2,071.77) of projected deficiency debt following the surrender of the vehicle as provided in Class 3 in the Plan. The Trustee views this Plan as one in which it is really the attorney’s fees obligation that is to be funded through the Plan (plus the Trustee’s fees and costs), and that the Plan has no claims to be paid.

As stated in the NonStandard Provisions in Section 7 of the Plan, this deficiency amount was computed based on the Motion for Relief From the Stay filed by Alliant Credit Union. Dckt. 50 at 7. The Motion states that there is (\$110,721) owing on its secured claim and that the collateral (a 2013 Holiday Rambler) has a wholesale value of \$108,650 and a retail value of \$108,650. Motion ¶¶ 3-4, filed November 3, 2023, Dckt. 26.

In reviewing the Chapter 13 Plan (Dckt. 50), Debtor is to fund the Plan with \$400 a month for 23 months. Thus, the Plan payments total \$9,200. From this, the Chapter 13 Trustee’s fees and expenses (estimated at 8%) would total (\$736). For the projected (\$2,071.77) deficiency to be paid over 23 months, the Chapter 13 Trustee’s fees alone (not including \$6,000 in legal fees) equal a 32.5% interest rate.

The Chapter 13 Plan is clear that no other obligation is to, or need to be, paid through the Plan. It appears that in the universe of debt for which Debtor is being put to the rigors and expense of a Chapter 13 case is a mere (\$2,071.77).

Going to Schedules I and J, Debtor states under penalty on Schedule I having \$4,552.74 in monthly income (this includes \$2,000.00 a month from “dad” for living expenses). Dckt. 17 at 17-18. On Schedule J, Debtor states under penalty of perjury having monthly expenses of (\$3,909). *Id.* at 19-20.

Schedule J shows Debtor having \$643.74 in monthly net income after paying all her reasonable and necessary monthly expenses.

The monthly expenses on Schedule J include healthy, reasonable amounts for expenses. These monthly expenses include: [1] Food.....(\$700), [2] Transportation.....(\$500), [3] Clothing and personal care products/services.....(\$300), [4] Medical and dental.....(\$200), [5] Entertainment.....(\$500), and [6] Car payment.....(\$464). *Id.* at 20-21.

Projected Outside of Bankruptcy Payment
of the Sole Unsecured Claim

With a projected deficiency of (\$2,017.77) as Debtor's only debt, taking the \$643.74 monthly net income to pay of the deficiency outside of bankruptcy, it would be paid in full in three and one-tenths months.

If the debt is stretched out over 23 months with Trustee's fees and expenses of (\$736), the effective interest rate jumps to 231%. (This does not include the "interest" cost of also paying and additional \$6,000 to stretch the payments over 23 months).

Increasing Payment By Reducing Monthly
Expenses for Entertainment, Food, and
Personal Care Products

If Debtor were to take \$50 from clothing and personal care products, \$50 from food and housekeeping supplies, and \$50 from entertainment expenses a months, that would result in Debtor having \$793.74 in monthly net income to pay off her one debt of (\$2,017.77). With a \$1,193.74 monthly payment, the (\$2,017.77) debt would be paid off in one and sixth tenths of the second month.

With such outside of bankruptcy payments, the Debtor would save \$6,737 in attorneys' fees and Chapter 13 Expenses. Even if Debtor's counsel need to communicate with and "educate" the creditor that Debtor was working with them by surrendering the car and begin making the \$793.74 month payments in light of the anticipated deficiency, Debtor would still save, and keep in her pocket, \$5,737.

**Proof of Claim Filed by
Creditor Alliant Credit Union**

On January 6, 2024, creditor Alliant Credit Union filed Proof of Claim 2-1. This is approximately two months after the Motion for Relief was filed. Proof of Claim 2-1 states this creditor's claim as follows:

1. Amount of Claim.....(\$116,473.64)
2. Value of Collateral.....\$76,625.00
3. Unsecured Deficiency Unsecured Claim.....(\$39,812.64)

Proof of Claim 2-1, Part 2, § 9. Additionally, that the interest rate on this obligation is fixed a 6.49%.

If the deficiency is only the (\$2,071.77) projected by Debtor, repaying that with 6.49% interest by payments of \$643 a month (Debtor's monthly net income), the (\$2,071.77) deficiency will still be paid off in three and one-sixth months.

If the deficiency is (\$39,812.64), the rationale for a Chapter 13 Plan grows. However, with it being funded at \$400 a month, the debt could not be paid in full during the 60 month term of the Plan. With the \$400 a month payments, the Plan would cost the Debtor \$24,000. From this there would be (\$6,000)

in attorney's fees and (\$1,900) in Trustee fees, reducing the projected distribution to the creditor to "only" \$16,100.

The court will be interested to hear as to whether Debtor and her counsel approached this Creditor and tried to workout an outside of Bankruptcy Court resolution. With projected monthly net income outside of bankruptcy of \$1,193.74 (including what would have been the plan payment and \$150 from reduced expenses), if the full five year net recover of \$16,100 was paid, it would take only thirteen and one-half months.

In computing the above, it does not take into account the joint liability of Debtor's now separated spouse or his obligation for this debt.

Property of the Estate

When a debtor files bankruptcy, "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of the estate, including community property interests. 11 U.S.C. § 541(a)(1)&(2). Importantly, "all community property not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate." *In re Mantle*, 153 F.3d 1082, 1085 (9th Cir. 1998).

In this case, Debtor's divorce decree is not final, meaning her interest in the home and associated debts should be listed on her Schedules. Debtor cannot propose to transfer her interest in the Property while it is part of the bankruptcy estate. 11 U.S.C. § 594(a); *see In re Straightline Investments, Inc.*, 525 F.3d 870, 877 (holding "[a] transfer is broadly defined by the Code as every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property. . .") (internal quotations omitted).

At the hearing, **XXXXXXXXXX**

Plan Does Not Appear to be Reasonable and in Good Faith

Based on the above calculations, the significant downside financially for Debtor, the extensive costs for attorney's fees and costs of Chapter 13 Trustee fees, and stated monthly net income of Debtor after expenses, it appears that the Plan as written cannot be proposed in good faith.

The court notes that Debtor filed the required Rights and Responsibilities form and corrected Disclosure of Attorney's Compensation on December 20, 2023.

At the hearing, **XXXXXXXXXX**

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

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

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

~~IT IS ORDERED that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.~~

2. [23-22217-E-13](#) **WLODZIMIERZ LITWIN** **OBJECTION TO CLAIM OF MEB LOAN**
[PGM-1](#) **Peter Macaluso** **TRUST IV, U.S. BANK TRUST**
 NATIONAL ASSOCIATION, CLAIM
 NUMBER 25
 12-7-23 [68]

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 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 Chapter 13 Trustee, parties in interest, parties requesting special notice, attorneys of record who have appeared in the case, and Office of the United States Trustee on December 7, 2023. By the court’s calculation, 47 days’ notice was provided. 44 days’ notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days’ notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days’ notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 25-1 of MEB Loan Trust IV, U.S. Bank Trust National Association is sustained, and the Claim is disallowed in its entirety.

Wlodzimierz J. Litwin, the Chapter 13 Debtor, (“Objector,” “Debtor”) requests that the court disallow the claim of MEB Loan Trust IV, U.S. Bank Trust National Association (“Creditor”), Proof of Claim No. 25-1 (“Claim”), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of \$200,726.02. Objector asserts that Bank of America, who originally serviced the loan and subsequently transferred its rights in the loan to Creditor, released Debtor from the loan obligation after

receiving the “benefit of the government HAMP and Bailout programs.” Obj., Docket 68 p. 3:9-10. Objector argues that after releasing Debtor from the obligation, Bank of America filed a tax form 1099-C, Cancellation of Debt form, which further shows that Debtor is no longer liable for the Claim. *Id.* at p. 2:17-21. Objector has also submitted authenticated evidence to the court showing that on September 16, 2019, Bank of America sent Debtor a letter stating:

“We want to inform you that on September 27, 2019 we will release obligation from your home equity line of Credit.”

Exhibit 3, Docket 71.

Creditor’s Response

On January 9, 2024 Creditor filed its Response with the court, stating:

1. Pursuant to 11 U.S.C. § 3001(f), there exists a rebuttable presumption of *prima facie* validity of Creditor's Claim 25-1. Debtor has failed to present any evidence to rebut the presumption of validity created by Creditor’s timely filed Proof of Claim.
2. The lien has not been released by Bank of America or Creditor. Creditor has been in contact with Bank of America and is in the process of obtaining a signed declaration from a Bank of America employee regarding the “Release of Obligation” document provided by Debtor, who is familiar with the situation and investigation into these purported release documents.
3. Creditor asks for a continuation of this matter so it can obtain and file declarations from Bank of America employees.

Docket 73.

Debtor’s Reply to Creditor’s Response

On January 15, 2024, Debtor filed a Reply to Creditor’s Response. Docket 75. In his Reply, Debtor states:

1. Pursuant to Rule 3001(c), a creditor asserting a claim based upon a writing has the procedural burden of producing and attaching to the proof of claim the documentary proof to support the claim, while pursuant to 11 U.S.C. §502(b)(1) disallows claims against the debtor that would be unenforceable against the debtor under an agreement or applicable law at the time of the bankruptcy petition.
2. Here, the Defendant’s Secured Claim has been satisfied by agreement between Debtor and bank of America, and no obligation secured by the Second Deed of Trust remains. Therefore, Creditor has a duty to release the lien as they are in violation of Cal. Code Civ. P. § 2941(b)(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.

In Bank of America's 1099-C Form (Exhibit 3, Docket 71), it elected option "F" as the identifiable event code that prompted Bank of America filing the 1099-C. The Internal Revenue Services ("IRS") has stated as option "F:"

A discharge of indebtedness pursuant to an agreement between an applicable entity and a debtor to discharge indebtedness at less than full consideration.

26 CFR § 1.6050P-1(b)(2)(F).

In this case, Objector has presented the court with sufficient evidence to overcome the rebuttable presumption of the validity of Claim 25-1. Debtor's authenticated Exhibits show that the Claim has been forgiven by a discharge of indebtedness agreement between Bank of America and Debtor pursuant to 26 CFR § 1.6050P-1(b)(2)(F). Exhibit 3, Docket 71; Decl., Docket 70. Debtor has not only submitted an authenticated copy of Bank of America's 1099-C form, but Debtor has also shown Bank of America explicitly releasing Debtor from the Claim by agreement, effective September 27, 2019. Exhibit 3, Docket 71.

In the Opposition, Creditor asserts that the lien has not been released, and as such appears to asserting that until the lien securing the debt is released the debt still exists and cannot be discharged. However, this runs afoul of basic California Law that provides when there is no longer an obligation secured by the lien, then the lien becomes void. Thus, it is what happens with the debt that can result in a lien becoming void, even if the creditor refuses to release it. *See HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d 477 (9th Cir. 2015); *Freeman v. Nationstar Mortg. LLC (In re Freeman)*, 2019 LEXIS 338 (B.A.P. 9th Cir. 2019); *Luchini v. JPMorgan Chase Bank, N.A.*, 511 B.R. 664 (Bankr. E.D. Cal. 2014); *Martin v. CitiFinancial Servs. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013), and Miller and Starr 5 California Real Estate § 13.11(4th Edition), which provides the following discussion:

§ 13:11. Requirement of some debt or obligation

No lien without an underlying obligation. Because the security instrument is merely incident to and measured by the performance of the obligation,¹ there can be no lien of a mortgage or trust deed without an underlying and enforceable debt or obligation.² The lien does not attach prior to the creation of the underlying debt or

obligation,³ although the actual advance of funds by the creditor is not necessarily required.⁴

2 *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1235, 44 Cal. Rptr. 2d 352, 900 P.2d 601 (1995); *Goodfellow v. Goodfellow*, 219 Cal. 548, 554, 27 P.2d 898 (1933); *Western Loan & Building Co. v. Scheib*, 218 Cal. 386, 389–390, 23 P.2d 745 (1933); *Fleming v. Kagan*, 189 Cal. App. 2d 791, 796, 11 Cal. Rptr. 737 (2d Dist. 1961); *Turner v. Gosden*, 121 Cal. App. 20, 22, 8 P.2d 505 (1st Dist. 1932). See *Henley v. Hotaling*, 41 Cal. 22, 28, 1871 WL 1307 (1871) (“If there is no debt there is no mortgage.”).

Creditor has not submitted any evidence of its own to rebut Debtor’s, instead asking this court for another continuance. As both Creditor counsel and Debtor counsel know, contested matter proceeding include the right to conduct discovery. See, Fed. R. Bankr. P. 9014(c). Creditor states that it has been in contact with Bank of America to procure a declaration since at least September 22, 2023, when Creditor first reported it was seeking evidence to support its contention. Docket 40 p. 2:3-8.

At the hearing, ~~XXXXXXXXXX~~

~~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 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 Claim of MEB Loan Trust IV, U.S. Bank Trust National Association (“Creditor”), filed in this case by Wlodzimierz J. Litwin, 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 25-1 of Creditor is sustained, and the Claim is disallowed in its entirety.~~

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, parties requesting special notice, and Office of the United States Trustee on December 6, 2023. By the court’s calculation, 34 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 sustained and the Chapter 13 Plan is not confirmed.

January 23, 2024 Hearing

Chapter 13 Trustee, David Cusick (“Trustee”) filed his Report of the Meeting of Creditors on January 11, 2024. No Amended Plan or Motion to Confirm has been filed.

At the hearing, **XXXXXXXXXX**

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

REVIEW OF THE OBJECTION

Trustee opposes confirmation of the Plan on the basis that:

1. Debtor is delinquent in plan payments.
2. Not all tax returns have been filed.

Dckt. 26.

DISCUSSION

Trustee's objections are well taken.

Delinquency

Debtor is \$3,480 delinquent in plan payments, which represents one month of the plan payment. Before the hearing, another plan payment will be due. 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 File Tax Returns

Debtor admitted at the Meeting of Creditors that the federal income tax return for the 2021 tax year has not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

January 9, 2024 Hearing

At the hearing, Debtor's counsel requested a continuance until after the Meeting of Creditors. Trustee's counsel reported that there are now two \$3,480 plan payments in default, with another payment due. The Trustee concurred with the request for a continuance to allow Debtor the opportunity to get the tax returns filed and an Amended Plan and Motion to Confirm filed.

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

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

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

IT IS ORDERED that the Objection to Confirmation of Plan is sustained and the Chapter 13 Plan is not confirmed.

4 thru 6

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, attorneys of record, and Office of the United States Trustee on July 21, 2023. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The Objection to Notice of Mortgage Payment Change is **xxxx.**

January 17, 2024 Hearing

The court's review of the Docket on January 16, 2024 reveals no new documents have been uploaded, apart from a Motion to Substitute Attorney (Docket 253).

At the hearing, **xxxxxxxxxx**

REVIEW OF OBJECTION

Derek Wolf, the Debtor, filed an Objection to Notice of Mortgage Payment Change that has been filed by Creditor U.S. Bank, N.A. Obj.; Dckt. 183. The Objection focuses on whether Grants obtained by Debtor to be applied to arrearages on Creditor's loan have been properly applied, as well as post-petition payments made pursuant to the proposed Plan.

As the court has observed with the Parties at prior hearings on this and related matters, it does not appear that there is any significant factual dispute about the underlying debt, grants obtained and payments made, but arguing about prior statements, letters, notes, and computations by some predecessors in interest who have communicated directly with the Debtor.

Fortunately, it appears that Debtor, Creditor, and their counsel appreciate that rather than arguing about what others have said, done, and computed, the Parties and their counsel can prepare their joint accounting/application of the grants and payments, interest computation. By focusing on the actual facts and computation, these Parties can get these matters promptly resolved or the actual issues identified and those actual, material disputes litigated..

STIPULATION TO CONTINUE HEARING

On August 11, 2023, Derek L. Wolf (“Debtor”) and US Bank, National Association (“Creditor”) filed a Stipulation to continue the hearing on Debtor’s Objection to Mortgage Payment Change to October 3, 2023 at 2:00 p.m. The court construes the document to be an *Ex Parte Motion* (as required by Fed. R. Bankr. P. 9013) and Stipulation to continue the hearing.

Federal Rule of Bankruptcy Procedure 9013 requires the filing of a motion or application when requesting an order from the court. Once a matter is set to the court's calendar, it may be continued by the court, not unilaterally by the parties. See, 8 Moore's Federal Practice - Civil § 40.02[5], L.B.R. 9014-1(j).

At the August 22, 2023 hearing, counsel for the Debtor notified the court that Creditor filed a “Withdrawal” of the Notice of Mortgage Payment Change. It appears that Creditor believes that it can unilaterally dismiss contested matters pending before this court. It cannot. See Fed. R. Civ. P. 41(a) and Fed. R. Bankr. P. 7041, 9014 providing how matters before the federal court may be dismissed.

The court continues the hearing on the Objection to Notice of Mortgage Payment Change to 2:00 p.m. on October 3, 2023.

At the August 22, 2023 hearing, the Debtor and counsel reported that they had not yet been provided a clear accounting and computation of Creditor’s Claim. Reviewing the Original Proof of Claim 2-1 and the two Amended Claims filed by Creditor raise issues concerning the amounts stated. The court by separate order shall order an in-person Status Conference concerning Creditor’s Claim in this Case.

On September 26, 2022 Debtor submitted to the court a Reply to Creditor stating this matter is a continuation of another matter in this case, docket control number RHS-1. Debtor asserts RHS-1 should be resolved before this matter can be resolved.

October 3, 2023 Hearing

At the hearing, the Parties agreed to continue this hearing, to be conducted in conjunction with the Status Conference regarding Creditor’s claim, docket control number RHS-1.

NOVEMBER 7, 2023 HEARING

***Ex Parte Joint Motion to Continue* November 7, 2023 Hearing**

On November 2, 2023, Debtor Derek L. Wolf and Creditor Mr. Cooper filed an Ex Parte Motion requesting the court continue the hearing on the Objection to Notice of Mortgage Payment Change to December 5, 2023. The Motion does not state the reason for the requested continuance, but in light of the

efforts of the Parties and their counsel to address the issues between the Parties, obtain documentation from predecessors in interest, their focus on these matter, the court grants the *ex parte* request.

December 5, 2023 Hearing

On December 1, 2023, a Notice of Mortgage Payment Change was filed by Creditor U.S. Bank, N.A., Trustee, stating that the Debtor's monthly payment to Creditor is \$792.89. It states that the escrow payment amount is reduced to \$419.06.

Attached to the Notice of Mortgage Payment Change is a letter dated November 27, 2023. It states that Debtor's monthly mortgage payment to Creditor (principal, interest, escrow) is reduced from (\$1,274.20) to (\$792.89). Notice, p. 5.

At the hearing, counsel for the Debtor reported that a final set of financial terms has been reached, and need to get that documented, including an order thereof.

The Parties agreed to a further continuance as Debtor and Creditor work to get a stipulation documenting the resolution of the dispute.

The Hearing is continued to 2:00 p.m. on January 23, 2024.

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

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

The Objection to the Mortgage Payment Change filed by Derek L. Wolf ("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 Notice of Mortgage Payment Change is **xxxx**.

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 Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 27, 2023. By the court's calculation, 47 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is XXXX.

January 17, 2024 Hearing

The court's review of the Docket on January 16, 2024 reveals no new documents have been uploaded, apart from a Motion to Substitute Attorney (Docket 253).

At the hearing, XXXXXXXXXX

REVIEW OF MOTION

The debtor, Derek L Wolf ("Debtor") seeks confirmation of the Modified Plan; however, Debtor does not provide the court a reason or evidence to support why a Modified Plan is necessary. Declaration, Dckt. 189. The Motion itself states that circumstances have changed and Debtor is no longer able to complete the Plan as originally proposed, Dckt. 187, but there is not sufficient evidence in the form of personal knowledge testimony to support these changed circumstances.

The Motion states:

1. Debtor was approved for pre- and post-petition Mortgage Relief Grants which cured their pre-petition arrears and lowered the principal amount owed and ongoing monthly payment.
2. The remaining dispute is regarding the ongoing mortgage payment, which Debtor's Counsel has filed an Objection to Mortgage Payment Change, set for hearing on August 22, 2023.

The court notes, the hearing on the Objection to Mortgage Payment Change has been continued to October 3, 2023 at 2:00 p.m.

The Modified Plan provides for a thirty-six (36) month plan, with \$16,271.00 to be paid through June 2023, followed by \$900 per month for sixteen (16) months. Modified Plan, Dckt. 191. 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 25, 2023. Dckt. 206. Trustee opposes confirmation of the Plan on the basis that:

1. Debtor is delinquent in Plan payments.
2. Debtor's Motion relies on the Objection to Notice of Mortgage Payment Change.
3. Debtor's Schedule I does not appear accurate.

Dckt. 206.

DEBTOR'S REPLY TO TRUSTEE'S OPPOSITION

Debtor filed its Reply to Trustee's Opposition on September 5, 2023. Dckt. 217. In its Reply, Debtor states:

1. Debtor was only delinquent because the TFS takes time to process the \$900.00 monthly payment.
2. Debtor has paid a total of \$18,291.00 to the Trustee and all missed payments should be forgiven.
3. Debtor will make plan payments of \$900.00 monthly to begin July 21, 2023 for 40 months to complete the Plan within the maximum term allowed by law.

Dckt. 217.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is \$900.00 delinquent in plan payments, which represents one month of the \$900.00 plan payment. Debtor requests all missed payments be forgiven, appealing to the amount paid already, but not offering any law in support of its contention. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor's Reliance on Objection to Notice of Mortgage Payment Change

A review of Debtor's Plan shows that it relies on the court sustaining Debtor's Objection to Notice of Mortgage Payment Change. The court has not yet ruled on the Objection. Without the court ruling on the Objection, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Inaccuracies of Schedule I

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's Declaration indicates that Debtor receives rent from his daughter and friend, and earns \$100 per month in odd jobs. Declaration, Dckt. 189 ¶¶ 8, 9. Debtor's Schedule I indicates business income in the amount of \$2,100 and pension income in the amount of \$358.00. Dckt. 193. It is unclear whether Debtor's Schedule I accurately reflects the additional monthly income in rent and odd jobs. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

CONTINUANCE OF HEARING

This case has been plagued by a continuing dispute between Debtor and U.S. Bank, N.A., as Trustee, about the Bank's claim, payments made, and application of payments. The court has set a special, in person Status Conference on October 3, 2023, concerning the U.S. Bank, N.A., as Trustee, claim. Debtor has an Objection to the U.S. Bank, N.A., as Trustee, claim and Notice of Post-Petition Mortgage Payment Change.

The court continues the hearing on this Motion to be conducted in conjunction with the Status Conference.

October 3, 2023 Hearing

At the hearing, the Parties agreed to continue this hearing, to be conducted in conjunction with the Status Conference regarding Creditor's claim, docket control number RHS-1.

NOVEMBER 7, 2023 STATUS CONFERENCE

On November 2, 2023, Debtor Derek L. Wolf and Creditor Mr. Cooper filed an *Ex Parte* Motion requesting the court continue the hearing on the Objection to Notice of Mortgage Payment Change to December 5, 2023. The Motion does not state the reason for the requested continuance, but in light of the efforts of the Parties and their counsel to address the issues between the Parties, obtain documentation from predecessors in interest, their focus on these matter, the court grants the *ex parte* request.

DECEMBER 5, 2023 STATUS CONFERENCE

On December 1, 2023, a Notice of Mortgage Payment Change was filed by Creditor U.S. Bank, N.A., Trustee, stating that the Debtor’s monthly payment to Creditor is \$792.89. It states that the escrow payment amount is reduced to \$419.06.

Attached to the Notice of Mortgage Payment Change is a letter dated November 27, 2023. It states that Debtor’s monthly mortgage payment to Creditor (principal, interest, escrow) is reduced from (\$1,274.20) to (\$792.89). Ntc., p. 5.

At the hearing, counsel for the Debtor reported that a final set of financial terms has been reached, and need to get that documented, including an order thereof.

The Parties agreed to a further continuance as Debtor and Creditor work to get a stipulation documenting the resolution of the dispute.

The Status Conference is continued to 2:00 p.m. on January 23, 2024.

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, Derek L Wolf (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Modified Chapter 13 Plan is **xxxx**.

6. [21-23539-E-13](#) **DEREK WOLF**
[RHS-1](#)

**CONTINUED STATUS CONFERENCE RE:
COPY OF PROOF OF CLAIM #2 AND
AMENDMENTS
8-28-23 [212]**

Debtor’s Atty: Peter G. Macaluso

Notes:

Continued from 12/5/23 to be conducted in conjunction with the continued Motion to Modify Plan.

The Status Conference is xxxxxxxx

JANUARY 23, 2024 STATUS CONFERENCE

At the Status Conference, **XXXXXXX**

REVIEW OF CLAIM ISSUES

Debtor Derek L. Wolf commenced this Chapter 13 Case on October 12, 2021. This has not been the usual Chapter 13 proceeding, with some challenges thrown up by the Debtor and some by U.S. Bank, National Association as Legal Title Trustee for Truman 2015 SC6 Title Trust (“U.S. Bank, Trustee”).

On October 19, 2021, U.S. Bank, Trustee filed a Motion to Annul the Automatic Stay. Motion; Dckt. 11. The grounds stated in the Motion to Annul include:

1. A nonjudicial foreclosure sale was set on Debtor’s Residence for October 12, 2021.
2. The obligation owing by Debtor at the time of the October 12, 2021 nonjudicial foreclosure sale was no less than (\$163,476.40).
3. Debtor’s Chapter 13 case was filed at 9:00 a.m. on October 12, 2021, prior to the foreclosure sale set for that day.

The proceedings on the Motion to Annul concluded on May 25, 2023, pursuant to the Request (Dckt. 174) of U.S. Bank, Trustee. As addressed in the Civil Minutes (Dckt. 176) for the last scheduled hearing on the Motion to Annul, the issues and disputes between Debtor and U.S. Bank, Trustee, relate to the amount of the secured claim and the application of grant monies the Debtor obtained that were paid to U.S. Bank, Trustee.

As noted in the Civil Minutes, the court notes that U.S. Bank, Trustee asserted as of July 12, 2022, that its Claim had been reduced to \$100,746.66. Dckt. 176, bottom of p. 16 - top of p. 17.

U.S. Bank, N.A. filed a Status Report regarding its Claim and the application of grant monies received and post-petition payments. Dckt. 178. U.S. Bank, N.A. states: (1) All pre-petition arrearages have been cured, (2) All grant monies have been applied, (3) \$8,893.66 of the grant monies were returned to the State Grant Agencies due to overpayments due to U.S. Bank, Trustee overstating the amount of the reinstatement monies, (4) the total monies owing on U.S. Bank, Trustee’s Claim were no less than \$117,588.47, and (5) Debtor was current on post-petition payments through August 2023. *Id.* Attached to the Status Report is a very small font spreadsheet which U.S. Bank, Trustee states documents the post-petition payment history, including grant monies and payments during the Chapter 13 Case. It shows receipt of \$56,623.75 in HAFF Funds for Reinstatement. It appears that on August 17, 2022, the HAFF Funds were applied to payments due for May 1, 2020 through August 1, 2022. A lot of financial detail is provided, but it is not clear how this computes the U.S. Bank, Trustee Claim.

U.S. Bank, Trustee has filed an original proof of claim and two amended proofs of claim in this case. The financial information for the U.S. Bank, Trustee Claim stated in each of the proofs of claim is summarized as follows.

- A. Original Proof of Claim 2-1, Filed December 8, 2021.
- B. Amount of Secured Claim.....(\$164,860.13)
 - 1. Pre-petition arrearage to be cured.....(\$40,899.99)
- C. Interest Rate 4.125%
- D. Proof of Claim signed by employee of Rushmore Loan Management Services.
- E. Attachment to Proof of Claim
 - 1. Arrearage Computation.... (\$40,899.99)
 - a. Major Amounts in Arrearage
 - (1) Attorney's Fees.....(\$4,050.00)
 - (2) Mailing/Service/Sale.....(\$2,014.98)
 - (3) Bkcy Fees.....(\$7,100.00)
 - (4) Escrow Deficiency...(\$8,410.82)

II. Amended Proof of Claim 2-2, Filed August 8, 2022

- A. Amount of Secured Claim.....(\$164,860.13)
 - 1. Pre-petition arrearage to be cured.....(\$42,887.43)
 - a. (States that Proof of Claim was Amended to Add Two Post-Petition Defaults)
- B. Interest Rate 4.125%
- C. Proof of Claim signed by employee of Rushmore Loan Management Services.
- D. Attachment to Proof of Claim
 - 1. Arrearage Computation.... (\$42,887.43)
 - a. Major Amounts in Arrearage
 - (1) Attorney's Fees.....(\$4,050.00)
 - (2) Mailing/Service/Sale.....(\$2,014.98)
 - (3) Bkcy Fees.....(\$7,100.00)

(4) Escrow Deficiency.....(\$8,410.82)

III. Second Amended Proof of Claim 2-3, Filed September 9, 2022

- A. Amount of Secured Claim.....(\$164,860.13)
 - 1. Pre-petition arrearage to be cured.....(\$755.64)
 - a. (States that Proof of Claim was Amended for “Reinstatement From Borrower”)
- B. Interest Rate 4.125%
- C. Proof of Claim signed by employee of Rushmore Loan Management Services.

Looking at Original Proof of Claim 2-1, Amended Proof of Claim 2-2, and Second Amended Proof of Claim 2-3, each states that the outstanding amount of U.S. Bank, Trustee’s Claim is (\$164,860.13). Proofs of Claim 2-1 and 2-2 state that of the (\$164,860.13) total claim there is a (\$42,887.43) arrearage that must be cured.

However, when Second Amended Proof of Claim 2-2 is filed U.S. Bank, Trustee states that the (\$42,887.43) arrearage portion of the (\$164,860.13) claim no longer existed. It is not clear how the (\$42,887.43) having been addressed the total amount of the U.S. Bank, Trustee’s Claim has not been reduced.

Receipt of \$56,623.75 by U.S. Bank, Trustee
on August 17, 2022 For Its Claim

Additionally, U.S. Bank, Trustee states in its June 14, 2023 Status Report that on August 17, 2022 it received \$56,623.75 in Haff Funds for “Reinstatement.” Thus, it appears that the (\$42,887.43) arrearage was paid in August 2022, which was after Amended Proof of Claim 2-1 was filed on August 8, 2022, and the amount of the U.S. Bank, Trustee Claim was reduced to approximately (\$108,000.00), and that the (\$164,860.13) amount of the claim stated in Proof of Claim 2-2 is inaccurate.

**Court Determined Need for In Person Status Conference
Re U.S. Bank, Trustee Claim**

While it is clear to the court that counsel for Debtor and counsel for U.S. Bank, Trustee have been working to try and address the U.S. Bank, Trustee Claim, it appears that their respective clients, including Rushmore Loan Management Services as the loan servicer, are having trouble presenting the court with clear explanations of how the U.S. Bank, Trustee Claim is computed and how grant monies have been applied. It further appears that having counsel appear and clients not having to appear (though Debtor has appeared at most hearings) has caused the ability to constructively communicate, as is necessary in most bankruptcy cases, to wither away.

The court concludes that it is necessary to conduct in person status conferences with the parties and their counsel for this court to be able to move forward and have the secured claim of U.S. Bank, Trustee determined in this case.

DEBTOR'S STATUS CONFERENCE STATEMENT

Debtor has filed his Status Report, which includes a detailed discussion of how Debtor computes Creditor's Claim. The Status Report does not address what remaining points of dispute exist in doing this computation.

Debtor asserts that the amount of the Claim should be (\$93,916.56), with (\$36,400.00) of that amount being a non-interest bearing balance. Thus, the amount of the claim to be amortized over the remaining 20 years of the loan is (\$57,516.56), with an interest rate of 4.124%

CREDITOR'S REPLY TO DEBTOR'S STATUS CONFERENCE STATEMENT

Creditor has filed a Reply, which recounts "challenges" that Creditor sees in attempting to address this dispute. Creditor recounts the communication efforts made on this issue with Debtor.

Creditor computes the interest bearing principal balance on its Claim to be (\$97,037.00). It concurs that there is a deferred interest bearing additional principal balance of (\$36,400). Creditor computes its Claim as follows:

As of the September 2014 Loan Modification the total unpaid principal balance	(\$208,994.25)	
Non-Interest Bearing Deferred Principal Balance		(\$36,400.00)
Interest Bearing Principal Balance, Current Interest Rate of 4.125%	(\$172,594.24)	
May 2018 - HAFA Funds \$91,700		
\$61,131.14 Applied to Principal	\$61,131.14	
\$30,568.86 Applied to Arrearage		
Payments Made Applied to Interest Bearing Principal Balance	Amt not Stated	
May 2018 Interest Bearing Principal Balance	(\$100,743.66)	
2021 Proof of Claim		
Interest Bearing Principal Balance	(\$97,832.07)	

Non Interest Principal Balance		(\$36,400.00)
2022 HAFA Funds Received	“Accounting Provided on Various Occasions”	

Creditor states that Creditor and Debtor’s counsel communicated to further discuss these issues on September 25 and 26, 2023; including increased tax payments, erroneous return of \$1,800 to Debtor, and erroneous application of a 2% interest rate rather than the 2.125%.

Additionally, Creditor states that documentation of the claim has been provided to Debtor’s counsel, and that Creditor has requested that Debtor agree to allowing Zoom appearances so as to stop the further accrual of fees and expenses.

Review of Debtor’s Exhibits

Exhibit A filed by Debtor is an unrecorded 2018 Deed of Trust. Dckt. 222. In the upper right hand corner the words:

Keep Your Home Calif
\$91,700 Grant Principal Reduct...

The obligation secured by this Deed of Trust is stated to be (\$91,700.00), with the beneficiary of the Deed of Trust identified as CalHFA MAC.

Exhibit B is a Customer Account Activity Statement dated 11/22/21 for Debtor’s account. It states that the “Current Principal Balance,” for which the Date Payment Due is stated as 10-01-19 is (\$97,632.07) and there being an escrow balance of a negative (\$5,410.82) [the numbers on the exhibit are only partially legible and the court has made its best efforts to read them].

The Statement further states that there is a second mortgage that secured a principle balance of (\$36,400). From the face of the Statement, it appears to state that the (\$36,400) is in addition to (\$97,632.07) and (\$5,410.82).

Attached to the Statement is a Transaction Report that lists each specific advance and payment. The transactions are listed in reverse chronological order. The vast majority of entries are for advances, fees, and charges. There are some items that appear to be payments, but the Transaction Report is not the clearest in information provided, and the court will not try to guess at what is a payment by Debtor.

OCTOBER 3, 2023 STATUS CONFERENCE

At the Status Conference, counsel for the Creditor says they provided documentation and the issues. An issue appears to be the current amount of the payment in November 2023. An amount was provided that appears to be one the parties can agree too.

An extensive, and productive discussion occurred at the October 3, 2023. First, by the parties outside the courtroom, and then as part of the Status Conference conducted by the court.

It appears that a substantial part of the inability to agree results from the Parties trying to focus back on multiple documents, reports, and information provided by Creditor and by Debtor. This appears to be leading to arguing over what a number means on a report, when that number may actually be irrelevant to the bigger picture and actual computation of Creditor's claim.

There is also argument about Creditor recovering \$8,800.00 which was returned to Cal HAFA. Creditor reports that Cal HAFF confirmed that the refund is being reversed and the \$8,800.00 being returned to CAL HAFA.

Debtor seeks to have this applied to the principal portion of the obligation, which Creditor asserts that these fund are properly applicable only to arrearage amounts. Debtor's counsel states that he can document for Creditor that they can be applied to principal of an obligation.

Two points were made at the hearing. First, the Chapter 13 Trustee notes that the Debtor has approximately \$8,800.00 in arrearages to be paid, and that application of the monies would they allow Debtor to proceed with a confirmed Plan. The court also addressed whether an issue could exist as to there having been \$8,800.00 of other monies applied to arrearages that could have been applied to principal if the \$8,800.00 had been applied to arrearages rather than returned to Cal HAFA.

What appears to be at the heart of Debtor's and Creditors inability to agree to the amount of the Claim is that the parties get lost in prior statements, attachments to the Proof of Claim, letters sent from Creditor's loan servicer directly to the Debtor, and a multitude of "the documents already show" and "the number on page 4 of 14 is wrong" down the rabbit hole assertions.

The parties concurred that they could agree to the principle amount of the interest bearing portion of the Claim as of a date in 2019. The parties can then document the payments made, whether by the Debtor, the Cal HAFA grant(s), and payments through the Chapter 13 Trustee from that date going forward. Creditor can document - in a clear and simple statement, rather than a multi-year spread sheet showing other information and not clearly showing - the payments received, how they were applied, and what the interest bearing principle balance is at this time.

As the court stated several times, the parties need to provide a straight-forward computation of the principal balance going forward from the balance as of their agreed date. Stating that the information is in some other documents and letters only adds to the confusion and delay.

The Parties agreed to continue the Status Conference to 3:30 p.m. on November 7, 2023. Telephonic appearances are permitted for all parties, their representative, and their respective counsel for all further hearings and status conferences, except as may otherwise subsequently ordered by the court.

NOVEMBER 7, 2023 STATUS CONFERENCE

On November 2, 2023, Debtor Derek L. Wolf and Creditor Mr. Cooper filed an *Ex Parte* Motion requesting the court continue the hearing on the Objection to Notice of Mortgage Payment Change to December 5, 2023. The Motion does not state the reason for the requested continuance, but in light of the efforts of the Parties and their counsel to address the issues between the Parties, obtain documentation from predecessors in interest, their focus on these matter, the court grants the *ex parte* request.

DECEMBER 5, 2023 STATUS CONFERENCE

On December 1, 2023, a Notice of Mortgage Payment Change was filed by Creditor U.S. Bank, N.A., Trustee, stating that the Debtor's monthly payment to Creditor is \$792.89. It states that the escrow payment amount is reduced to \$419.06.

Attached to the Notice of Mortgage Payment Change is a letter dated November 27, 2023. It states that Debtor's monthly mortgage payment to Creditor (principal, interest, escrow) is reduced from (\$1,274.20) to (\$792.89). Ntc., p. 5.

At the hearing, counsel for the Debtor reported that a final set of financial terms has been reached, and need to get that documented, including an order thereof.

The Parties agreed to a further continuance as Debtor and Creditor work to get a stipulation documenting the resolution of the dispute.

The Status Conference is continued to 2:00 p.m. on January 23, 2024.

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 December 12, 2023. 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 ~~XXXXX~~.

The debtor, Dennis Frazier ("Debtor") seeks confirmation of the Modified Plan (Docket 132). Upon review of the Motion and supporting Declaration, the court notes Debtor does not explain why he is filing a Modified Plan after the court confirmed his First Amended Plan on January 11, 2023. Docket 115. The Modified Plan provides plan payments of \$3,200.00 starting January 25, 2024 to complete the Plan within the maximum term allowed by law, 35 months. Modified Plan, Dckt. 132 ¶ 7. 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

It appears all that Debtor is doing is increasing his Plan payments to be able to properly fund the Confirmed Chapter 13 Plan, and does not alter the treatment of creditor claims. Such increase in payment amendments are commonly accomplished by a joint ex parte motion filed by the debtor and the Chapter 13 Trustee.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick (“Trustee”), filed an Opposition on January 8, 2024. Dckt. 145. Trustee opposes confirmation of the Plan on the basis that:

1. Debtor’s Plan appears extremely over extended, taking up to either 117 months or 126 months to complete.
2. There is confusion regarding the claim of First Trust. POC 2-1. The Debtor has scheduled this debt as a Class 2A creditor in the amount of \$39,705.53; however, the creditor filed a proof of claim in the amount of \$130,220.47. There was an adversary proceeding filed and potentially a BDRP was completed regarding this creditor. However, the outcome of that hearing is uncertain and there is no mention of it in the plan or the motion to confirm.
3. Debtor’s Schedule I contains outdated or missing information. Schedule I does not show Debtor’s current employment details.

Docket 145.

CREDITOR’S OPPOSITION

U.S. Bank National Association (“Creditor”) holding a secured claim (POC 4-1) filed an Opposition on January 9, 2024. Dckt. 149. Creditor opposes confirmation of the Plan on the basis that:

1. Pursuant to 11 U.S.C. § 1325(a)(5)(A), a debtor cannot confirm its Plan if a creditor with an allowed claim does not accept the treatment of its claim. Here, because Creditor opposes the treatment of its claim (POC 4-1), the Modified Plan cannot be confirmed.
2. The Modified Plan depends on an Objection to Claim filed by Debtor (Docket 141) on December 30, 2023, that has not been granted. Creditor plans to oppose that Objection as well.

Docket 149.

DEBTOR’S RESPONSE

Debtor filed a Response to the two Oppositions on January 15, 2024. Dckt. 151. Debtor states:

1. Debtor’s Modified Plan actually is not overextended as proposed because First Trust, or Carl Dexter, paid \$37,000 directly to creditor Freedom Mortgage (POC 2-1) on March 17, 2020. That payment is not accounted for by Freedom Mortgage, and if it were applied, the Modified Plan would not be overextended.
2. Debtor has retired and has filed Amended schedules I and J accordingly.
3. Debtor disputes the amount of arrears regarding Creditor’s Claim 4-1.

DISCUSSION

Applicable Law: 11 U.S.C. § 1325(a)(5)(A)

Creditor asserts that “[p]art of § 1325 states that the court shall confirm a plan if, with respect to each allowed secured claim provided for by the plan, the holder of such claim has accepted the plan. . . the Debtor’s proposed second amended chapter 13 plan (“Amended Plan”) cannot be confirmed as proposed because Secured Creditor does not accept the Amended Plan with respect to the treatment of its claim.” Opposition, p. 2:11-18; Docket 149. This argument is without merit and is a misinterpretation of 11 U.S.C. § 1325(a)(5)(A). 11 U.S.C. § 1325(a)(5) outlines three ways for a secured claim to be properly provided for in a Plan, stating:

(5)with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)

(i) the plan provides that—

(I) the holder of such claim retain the lien securing such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; **or**

(C) the debtor surrenders the property securing such claim to such holder. . .

Creditor is missing the operative conjunction in this section of the Code: “or.” Nothing in the Code requires each creditor in a Chapter 13 Plan to accept the treatment of its secured claim as a requisite for plan’s confirmation. Such a reading of the Code would give any secured creditor what amounts to unbridled veto power in any Chapter 13 case. Rather, either 11 U.S.C. §§ 1325(a)(5)(A), (B), or (C) are each individual proper ways to deal with a secured claim in a plan, not unilaterally requiring a Creditor’s consent. Therefore, Creditor’s argument that the Plan must not be confirmed because it does not accept the treatment of its secured claim is without merit.

At the hearing, counsel for Creditor addressed this question, explaining to the court **XXXXXXX**

Debtor’s Reliance on Objection to Claim / Over Extension

Consistent with the Trustee and Creditor’s Oppositions, a review of Debtor’s Plan shows that he relies on the court modifying the secured claim of First Trust in Proof of Claim 2-1. Specifically, Debtor asserts that there was a payment of \$37,000 made to cure arrears, but that payment has improperly not been applied to Claim 2-1. The court has not had a chance to rule on Debtor’s Objection (to be heard on February 13, 2024, Docket 141 p. 7), but the Plan’s feasibility depends on this court’s ruling in that matter.

Trustee asserts that without the Objection to Claim being granted, the Plan will take 126 months to complete. But even if the Objection to Claim were to be granted, the Plan would still take 117 months to complete according to the Trustee’s calculations. 11 U.S.C. § 1322(d)(1)(C) states, “the plan may not provide for payments over a period that is longer than 5 years.” Failure to comply with the statutory length provided for a Plan is cause to sustain the objection. At the hearing, **XXXXXXXXXX**

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

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Dennis Frazier (“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).

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, parties requesting special notice, and Office of the United States Trustee on November 9, 2023. 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.

The Objection to Confirmation of Plan is XXXX.

January 23, 2024 Hearing

Chapter 13 Trustee, David Cusick (“Trustee”) filed a Status Report on January 8, 2024. Trustee states that “no Rights and Responsibilities have been filed to date, so attorney fees may not be approved in the Order Confirming unless remedied.” Docket 30. There is no Rights and Responsibilities form on the court’s Docket as of January 16, 2024. At the hearing, XXXXXXXXXX

REVIEW OF THE OBJECTION

Trustee opposes confirmation of the Plan on the basis that:

1. Debtor failed to appear at the meeting of creditor on November 2, 2023, which was continued to January 4, 2024.

2. Debtor did not file tax returns for 2020, 2021, and 2022.

Dckt. 20.

DISCUSSION

Trustee's objections are well-taken.

Failure to Appear at 341 Meeting

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Failure to File Tax Returns

Trustee asserts tax returns for the tax years 2020, 2021, and 2022 have not yet been filed. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1)

The Trustee reported that the First Meeting is continued to January 4, 2024. Additionally, copies of some tax returns for 2022 and 2021 were received by the Trustee, but they have not been signed.

Counsel for the Debtor stated that Debtor missed the 341 Meeting due to a death in the family, and that counsel has been advised that the tax returns have been filed.

The Trustee did not oppose the continuance requested by the Debtor.

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

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

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

IT IS ORDERED that the Objection to Confirmation of Plan is **XXXX**.

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, parties requesting special notice, and Office of the United States Trustee on December 7, 2023. By the court’s calculation, 47 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy 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 ~~XXXX~~.

The debtor, Melanie Johnson (“Debtor”), seeks confirmation of the Amended Plan (Docket 38). The Amended Plan provides for having paid \$2,129 through December 25, 2023, and payments of \$992 commencing on January 25, 2024, each month for the duration of the 60 month Plan. Amended Plan, Dckt. 38 ¶ 7. 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 January 9, 2024. Dckt. 46. Trustee opposes confirmation of the Plan on the basis that:

1. The Plan is overextended as proposed, resulting in a life of 104 months. Debtor has left out the arrearage of creditor Selene Finance, Proof of Claim 6-1, and the proposed monthly payment of \$992 will not cure that arrearage within the statutorily allotted time period.

DISCUSSION

Overextended Plan

As written, the Amended Plan will take 104 months to complete because the Amended Plan does not account for Selene Finance's claim (POC 6-1). 11 U.S.C. § 1322(d)(1)(C) states, "the plan may not provide for payments over a period that is longer than 5 years." Failure to comply with the statutory length provided for a Plan is cause to sustain the objection.

This problem arises because while Debtor stated that the arrearage on the Selene Finance claim was (\$2,560.00), this creditor has filed Proof of Claim 6-1, states the arrearage to be (\$16,131.55).

Debtor may need to increase plan payments to \$1,260.39, and by Trustee's calculations, can pay Selene Finance's claim within the 60 month time period.

At the hearing, **XXXXXXXXXX**

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

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

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

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

IT IS ORDERED that the Motion to Confirm the Amended Plan is **XXXX**.

10 thru 11

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on December 20, 2023. By the court's calculation, 34 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 -----.

The Objection to Confirmation of Plan is overruled.

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

1. The attorney fees must be made in equal monthly installments over the life of the Plan in accordance with Local Bankruptcy Rule 2016-1(c). Here, the fees are not made in equal monthly payments.
2. Creditor Regional Acceptance Corporation has filed an Objection to Confirmation seeking its interest rate be increased to 10.5% in accordance with the *Till* rate. The Plan payments will need to be increased if this Objection is sustained.

Docket 22. Trustee submits the Declaration of Teryl Wegemer to authenticate the facts alleged in the Objection. Decl., Docket 24.

Debtor's Response

Debtor filed a Response on January 9, 2024. Docket 26. In her Response, Debtor states:

1. Debtor's counsel requests that the payment dividend be lowered to \$100.00 per month in accordance with Local Bankruptcy Rule 2016-1(c).
2. Debtor's plan payment will need to be increased to \$770 to afford a 10.5% interest rate on Creditor Regional Acceptance Corporation's claim. Debtor has submitted an Amended Schedule J showing that Debtor can afford the plan payment increase.

Additionally, on January 16, 2024, Debtor and creditor Regional Acceptance Corporation filed their Stipulation to increase the interest rate to 10.5% and dismissing that creditor's Objection to Confirmation. Dckt. 35.

DISCUSSION

Debtor has addressed Trustee's concerns, assenting to the proper attorney's fees while also addressing Creditor Regional Acceptance Corporation's interest rate. Debtor has submitted documentation showing that she can afford the plan payment increase. Sched. J, Docket 34.

At the hearing, **XXXXXXXXXX**

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

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

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

IT IS ORDERED that the Objection to Confirmation of the Plan is overruled.

Final Ruling: No appearance at the January 23, 2024 Hearing is required.

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 December 6, 2023. By the court’s calculation, 48 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.

The Objection to Confirmation of Plan has been dismissed by the Stipulation of the parties (Dckt. 35), for which the court’s Order for such dismissal and vacating the hearing date was entered on January 17, 2024 (Docket 37).

Regional Acceptance Corporation (“Creditor”) holding a secured claim opposed confirmation of the Plan on the basis that:

1. Virginia Martinez’s (“Debtor”) Plan must properly account for interest payments on Creditor’s claim. The prime rate with a risk adjustment factor is 10.5%.

Regional Acceptance Corporation submits the Declaration of John Eng to authenticate the facts alleged in the Objection. Decl., Docket 19.

Debtor’s Response / Stipulation

Debtor filed a Response on January 9, 2024, informing the court that she agrees with Creditor about the interest rate on Creditor’s claim, stating 10.5% is proper. Docket 28. Debtor and Creditor then uploaded a Stipulation with the court (Docket 35) on January 16, 2024. In their Situation, the parties state:

1. Debtor and Creditor agree that Creditor shall have a secured claim in the amount of \$24,751.92 which shall be paid through the Chapter 13 Plan at 10.5% interest.

2. Creditor’s Objection to Confirmation is hereby resolved and deemed withdrawn upon entry of the Order approving this Stipulation, and the hearing on Creditor’s Objection to confirmation be vacated.

Docket 35.

12. [23-23959-E-13](#)
[DPC-1](#)

LASHUNDA PHILLIPS
Carl Gustafson

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID CUSICK**
12-20-23 [16]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 20, 2024. By the court’s calculation, 34 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 **xxxxxxxxxx**.

The Objection to Confirmation of Plan is sustained.

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

1. Debtor has failed to fully and accurately provide all information required by the Schedules and Statement of Financial Affairs. Docket 16, p. 1:23-24.
2. Debtor may have substantially more gross income than what is identified on Schedule I as \$37,462.00. *Id.* at 2:17-18. Debtor's Non Filing Spouse's ("NF-Spouse") pay advice from October 20, 2023 shows the year-to-date income of \$326,306.03. *Id.* at 2:20-21. Debtor's Schedule J shows the Debtor has a monthly surplus income of \$4,417.62. *Id.* at 2:23-24.
3. Debtor proposes to pay joint liability claims (priority taxes) in the amount of \$163,070.00 and 1% to unsecured creditors. *Id.* at 3:1-2. Debtor has allocated \$4,056.00 for the NF-Spouse's "CC" payments. *Id.* at 2-3.

Trustee is concerned that Debtor's NF-Spouse's creditors are receiving preferential treatment at the expense of Debtor's unsecured claims. *Id.* at 4-6. Debtor "appears to be paying themselves," including significantly higher than average expenses, significant deductions for retirement funds, paying significant amounts toward the NF-Spouse's credit card debt and even supporting an adult child, all at the expense of the Debtor's creditors. *Id.* at 3:6-9.

4. Debtor does not list community debts. *Id.* at 3:12. Debtor testified on December 14, 2023 that she has been married since 2006 and did not include her NF-Spouse's creditors on Scheduled E/F. *Id.* at 3:16-18.

Trustee is not certain if the Debtor has listed all the NF-Spouse's debts with balances. *Id.* at 3:19-20. Further, Trustee is not certain if all the NF-Spouse's unsecured creditors are listed in Schedule J as an expense, which currently shows the NF-Spouse has about \$4,056.00 per month in "CC payments." The Trustee is not clear if this amount paid is the minimum monthly payments to these creditors or a higher amount, what the balances owed to each creditor may be and just how many creditors are actually being paid monthly. *Id.* at 3:20-25. Trustee has requested a breakdown of all creditors and the monthly amounts paid, and still needs this information to determine if all community debts and disposable income are being paid into the plan. *Id.* at 24-28.

5. Debtor cannot make plan payments, does not appear to be able to comply with the Plan or to have the ability to make the Plan payments and has failed to carry her burden of showing that the Plan complies with 11 U.S.C. §1325(a)(6). *Id.* at 4:10-13.
6. Debtor has failed to disclose accurate information in the Plan and Schedules. *Id.* at 13-14. Despite listing the 2021 Audi Q7 55 TFSI, with a deficiency balance of \$19,000, listed in the Plan in Class 3, Debtor admitted at the First Meeting of Creditors that her NF-Spouse wants to keep the vehicle. *Id.* at 5:15-17. It is unclear to the trustee if the creditor, VW Credit Inc., is misclassified. *Id.* at 5:18. Debtor's Statement of Financial Affairs

shows that the Debtor and NF-Spouse had approximately \$238,201.00 remaining after their sale of real property located and use of a portion of the sale for a down payment of their current home. *Id.* at 19-23. These funds do not appear on Schedules A/B nor do they appear to have paid to anyone according to their Statement of Financial Affairs. *Id.* at 5:22-25. Trustee has not received a complete accounting of the funds realized from the proceeds of the sale of Debtor's real property and their disposition. *Id.* at 5:24-28.

The Chapter 13 Trustee, David Cusick ("Trustee"), submits the Declaration of Teryl Wegemer to authenticate the facts alleged in the Objection. Decl., Docket 18.

APPLICABLE LAW

Good Faith

Pursuant to 11 U.S.C. § 1325(a)(3), "the plan [must have] been proposed in good faith and not by any means forbidden by law." Good faith is neither defined by statute or explained in the legislative history. *In re Warren*, 89 B.R. 87, 90 (B.A.P. 9th Cir. 1988). Rather, "[a] bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner" to determine good faith. *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982). The court considers the good faith element of a Chapter 13 Plan under the assumption that "Chapter 13 was designed with an emphasis on debt repayment," but repayment is not the sole factor in this analysis. *Warren* 89 B.R. at 91. The Ninth Circuit recognizes at least the following 11 factors in determining whether a plan has been proposed in good faith:

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

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

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

Id. at 93. Importantly, “[o]nly if there has been a showing of serious debtor misconduct or abuse should a chapter 13 plan be found lacking in good faith.” 8 COLLIER ON BANKRUPTCY ¶ 1325.04[1].

DISCUSSION

The facts of this case lead the court to believe the Plan has not been filed in good faith. Debtor has listed on her Schedule I gross income of \$15,253 for herself, and \$22,209 for her NF-Spouse. But at the Meeting of Creditors, Trustee informs the court that Debtor’s NF-Spouse’s pay advice with a pay date of October 23, 2023, shows year-to-date income as \$326,306.03. Obj., Docket 16 p. 2:21-23. NF-Spouse’s pay advice is broken down as “Salary” of \$212,833.67, “Acc Oth Bonus” of \$11,014.50, “Bonus” of \$50,000.00, “Mgmt Bonus” of \$11,608.69, and “Stock In” amount of \$40,849.17. *Id.* On top of this income, Debtor reported for the year 2022 making \$124,314 in gambling income, and another \$29,708 in gambling income for 2021. Docket 1, p. 44. Such numbers are well above the gross income numbers listed in Schedule I, meaning Debtor may be misrepresenting facts to the court.

Additionally, looking at the Statement of Financial Affairs, Debtor states that her income for the the months of January through October 2023 totaled \$102,543.20. Stmt. Fin. Affairs, Part 2, § 4; Dckt. 1. This income is from wages. However, for 2022 Debtor lists having wage income of \$343,102.00 and for 2021 wage income of \$274,961.00. *Id.*

But for 2022 and 2021 Debtor lists several other sources of income. For 2022 Debtor had \$41,084.00 in S Corp Income and \$124,314.00 in Gambling Income. For 2021 Debtor had \$120,877.00 in S Corp Income and \$29,708.00 in Gambling Income. Stmt. Fin. Affairs, Part 2, § 5; Dckt. 1. No S Corp Income or Gambling Income is show on Schedule I. Dckt. 1 at 37-38.

On Schedule I Debtor lists wage income of \$15,253 for employment that commenced in August 2023. This employment income is substantially less than wages from employment in the two years prior to 2023.

As stated by the Trustee, on Schedule J there is a monthly expense of \$4,056 to pay the NF-Spouse’s credit card payments. Over the 60 months of the Plan there would be \$243,360 of the Debtor’s and NF-Spouse’s income being diverted to the NF-Spouse for these creditor payments.

Additionally, it is not clear if this \$4,056 is for existing debt, and the credit cards have been shredded, or whether this are for additional “expenses” beyond the (\$20,428) “reasonable and necessary” expenses for Debtor’s family. On Schedule E/F Debtor lists some credit card creditors, but nothing near \$243,360 that is to be diverted for the NF-Spouse’s monthly credit card payment of \$4,065 set forth in Schedule J.

Trustee also raises the fact that Debtor has a monthly surplus of \$4,417.62, further pointing toward the Plan not being proposed in good faith. This monthly surplus is computed even after providing for a “necessary and reasonable” \$4,065 expenses for the NF-Spouse’s credit card during the 60 months of the Plan.

The Chapter 13 Plan states the Debtor will fund it with only \$3,850 a month. Plan, ¶ 2.01; Dckt. 6. By Debtor’s calculation this will generate only a 1% dividend for creditors holding (\$495,000) in general unsecured claims. *Id.* *Id.*; ¶ 3/14. This will be only a \$4,940 distribution to creditors holding general unsecured claims. On Schedule E/F Debtor lists California tax claims in the amount of (\$59,741.56), consisting of (\$32,532.56) priority and (\$27,209.00) nonpriority. Debtor then lists the Internal Revenue Service having a priority tax claim for (\$122,538.00). Dckt. 1 at 22-23.

Debtor then lists (\$310,205.00) in student loan claims and (\$165,789.88) in other nonpriority unsecured claims, for a total of (\$475,994.88), meaning the student loan creditors would receive 65% of the low unsecured claim 1% dividend.

It is not clear to the court whether Debtor has sought student loan debt forgiveness for this otherwise nondischargeable debt. Additionally, Debtor has not explained whether she will or intends to have the court determine whether all or part of this debt creates an undue hardship on the Debtor/Family and such should be discharged. 11 U.S.C. § 523(a)(8).

The Chapter 13 Plan includes Carmax Auto Finance, with a secured claim in the amount of (\$29,071) which Debtor will pay through the Plan with a \$3,000 a month payment. This debt is secured by Debtor’s year old model 2022 Honda CRV. When the court computes the monthly payment for a (\$29,071) obligation over 5 years at 9% interest (using the Microsoft Excel Loan Calculator program), the monthly payment is only \$603.47 – only 20% of the \$3,000 a month Debtor seeks to have approved in the Chapter 13 Plan.

Such attempt to grossly front load payment of a secured debt could be perceived as something showing that the plan, and possibly the filing of the bankruptcy case itself, was not in good faith.

Looking at Schedule A/B Debtor lists owning four vehicles (with the values stated as the “Private Party Value per KBB,” and not the used car retail value or trade-in value):

1. 2021 Audi Q7 55 TFSI Prestige Sport Utility 4D\$45,927
2. 2022 Honda CR-V Sport Utility 4D.....\$28,352
3. 2021 Tesla Model 3 Performance Sedan 4D.....\$35,835
4. 2004 Honda CBR600R.....\$ 5,465

Dckt. 1 at 12. In the Plan, the claim secured by the 2021 Audi Q7 is to be surrendered to the creditor and a (\$19,000) general unsecured deficiency is projected.

An examination of the Plan and debtor’s Schedules also shows there appears to be preferential treatment of creditors. Debtor is allocating \$4,056 for NF-Spouse’s credit card payments, while other general unsecured creditors in the case are receiving only a 1% dividend. On top of this, Debtor’s budget includes significantly higher than average expenses, including:

- A. \$921 for telephone and cable, \$2,500 in food and housekeeping (while also supporting an adult child aged 22),

- B. \$1,760 in childcare and children's education costs, and
- C. \$805 in transportation, coming to a total of \$20,428.38 in monthly expenses.

Schedule J, Docket 1 p. 41 ¶¶ 6-22. The court finds it difficult to understand how the Plan can be proposed in good faith when unsecured creditors will be paid 1% while Debtor keeps over \$20,000 per month for expenses.

Debtor's Statement of Financial Affairs shows that Debtor sold real property located at 761 Grayson Road, Pleasant Hills, CA 94523 for \$1,427,000.00 and netted approximately \$569,201.00 from that sale. Of that amount, \$331,000.00 was used as a down payment for their current home on July 1, 2023, but Debtor has not informed the court what happened to the balance of approximately \$238,201. Docket 1, p. 44.

Trustee finally asserts that Debtor has likely not listed community debts and all creditors. Community debts must be listed as community debts are property of the estate. 11 U.S.C. § 541(a)(2), *In re Kimmel*, 378 B.R. 630, 637 (B.A.P. 9th Cir. 2007). Debtor filed an updated Schedule E/F with the court on January 9, 2024, showing a clearer picture of Debtor's unsecured creditors. Docket 21. At the hearing, **XXXXXXXXXX**

The court finds that the Plan was not proposed in good faith and does not comply with 11 U.S.C. §§ 1322 and 1325(a)(3). The Objection is sustained, and the Plan is not confirmed.

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

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

The 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.

13 thru 14

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 Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on December 20, 2023. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is XXXX.

The Chapter 13 Trustee, David P. Cusick ("Trustee") objects to Michael Mastromatteo's ("Debtor") claimed exemptions under California law. Specifically, Trustee states:

1. Debtor has claimed an exemption under Cal. Code Civ. P. § 704.730 in real property commonly known as 1109 Southbridge Circle, Lincoln, California ("Property"). Debtor does not reside at the Property; he resides at 1020 Adlar Court, Chico, California, where he is currently taking care of his elderly mother. Debtor otherwise listed his residence address as 1278 Margaret Avenue, South Lake Tahoe, California 96150 on his petition.
2. Debtor may not exempt this Property under Cal. Code Civ. P. § 704.730 because the Property is not his primary residence on the date the petition was filed, and it does not appear that Debtor intends to occupy the residence in the future as is required to claim a homestead exemption.
3. Debtor is self-employed as the owner of 2 Grand Productions, LLC. Debtor has a checking account ending in no. 9519 at BMO Bank with a value of

\$3,449.59. Debtor has claimed \$2,174 as exempt in the bank account under Cal. Code Civ. P. § 704.070. Cal. Code Civ. P. § 704.070 only allows an exemption in funds that are wages paid within 30 days prior to filing, so Debtor has improperly claimed this exemption in his bank account.

Docket 21.

Debtor's Response

On January 9, 2024, Debtor filed a Response to this Objection. Docket 25. In his Response, Debtor states:

1. Cal. Code Civ. P. § 704.720(d) can be interpreted to allow a debtor to claim a homestead exemption pursuant to Cal. Code Civ. P. § 704.730 even if the debtor's non-filing spouse, and not the debtor, resides in the homestead.

APPLICABLE LAW

A claimed exemption is presumptively valid. *In re Carter*, 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id.*

Pursuant to 11 U.S.C. § 522(b)(3)(A), Debtor has claimed the homestead exemption under Cal. Code Civ. P. § 704.730 in the Property. Cal. Code Civ. P. § 704.730 states:

(a) The amount of the homestead exemption is the greater of the following:

(1) The countywide median sale price for a single-family home in the calendar year prior to the calendar year in which the judgment debtor claims the exemption, not to exceed six hundred thousand dollars (\$600,000).

(2) Three hundred thousand dollars (\$300,000).

(b) The amounts specified in this section shall adjust annually for inflation, beginning on January 1, 2022, based on the change in the annual California Consumer Price Index for All Urban Consumers for the prior fiscal year, published by the Department of Industrial Relations.

Relevant to this case, Cal. Code Civ. P. § 704.720(d) states:

If a judgment debtor is not currently residing in the homestead, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, that judgment debtor continues to be entitled to an exemption

under this article until entry of judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or former spouse, or until a later time period as specified by court order. Nothing in this subdivision shall entitle the judgment debtor to more than one exempt homestead. Notwithstanding subdivision (d) of Section 704.710, for purposes of this article, “spouse” may include a separated or former spouse consistent with this subdivision.

Finally, regarding Debtor’s claimed exemption in wages, Cal. Code Civ. P. § 704.070 states:

(2) “Paid earnings” means earnings as defined in Section 706.011 that were paid to the employee during the 30-day period ending on the date of the levy. . .

...

(b) Paid earnings that can be traced into deposit accounts or in the form of cash or its equivalent as provided in Section 703.080 are exempt in the following amounts:

(1) All of the paid earnings are exempt if prior to payment to the employee they were subject to an earnings withholding order or an earnings assignment order for support.

(2) Disposable earnings that would otherwise not be subject to levy under Section 706.050 that are levied upon or otherwise sought to be subjected to the enforcement of a money judgment are exempt if prior to payment to the employee they were not subject to an earnings withholding order or an earnings assignment order for support.

See generally 8 WITKIN, CAL. P. ENFORCEMENT OF JUDGMENT § 248 (6th ed. 2023).

DISCUSSION

Here, Debtor has presented the court with an argument, but not evidence, for the legal proposition that Debtor, while not living in the Property, can still claim the homestead exemption in the Property. Cal. Code Civ. P. § 704.720(d), which appears in the Cal. Code Civ. P. just before the homestead exemption of § 704.730, states that a judgment debtor may claim a homestead exemption in a home in which the judgment debtor himself does not reside. To be eligible under this section, the judgment debtor’s “separated or former spouse continues to reside in or exercise control over possession of the homestead.” Cal. Code Civ. P. § 704.720(d). Only when there has been an “entry of judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or former spouse, or until a later time period as specified by court order,” may the judgment debtor no longer claim an exemption in the homestead. *Id.*

There is no evidence that Debtor in this case and his spouse have been subject to any judgment or other legally enforceable agreement dividing the community Property, nor is there evidence showing Debtor’s separated or former spouse no longer resides in the Property.

However, there is no evidence (such as a declaration by Debtor and a declaration by the non-debtor Spouse, utility and tax bills, and the like) that the property is being resided in and qualifies for the homestead exemption.

~~Therefore, Debtor may claim the homestead exemption in the Property pursuant to Cal. Code Civ. P. §§ 704.720(d) & 704.730, and this part of the Trustee's Objection is overruled.~~

However, Debtor may not claim an exemption of \$2,174 in his bank account pursuant to Cal. Code Civ. P. § 704.070. Debtor has not submitted evidence showing that the funds in that account are "paid earnings" within the meaning of Cal. Code Civ. P. § 704.070. Therefore, this part of the Trustee's Objection is sustained.

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

~~**IT IS ORDERED** that the Objection is overruled as to Debtor's claimed exemption in real property commonly known as 1109 Southbridge Circle, Lincoln, California ("Property"), and the claimed exemptions for the Property under California Code of Civil Procedure § 704.730 is allowed.~~

IT IS FURTHER ORDERED that the Objection is sustained as to Debtor's claimed exemption in the checking account ending in no. 9519 at BMO Bank, and the claimed exemption for this checking account under California Code of Civil Procedure § 704.070 is disallowed in its entirety.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, other parties in interest, and Office of the United States Trustee on December 19, 2023. By the court's calculation, 35 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 -----.

The Objection to Confirmation of Plan is XXXX.

Matrix Financial Services Corp ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

1. Creditor is a holder in due course of a promissory note executed by Michael Mastromatteo ("Debtor") and his spouse Susan Kingsbury, secured by a first priority deed of trust encumbering the real property commonly known as 1109 Southbridge Circle, Lincoln, California 95648 ("Property") and recorded on August 23, 2018 as Instrument No. 2018-0061235-00 of the Placer County Recorder.
2. The ongoing payment amount due on the note is estimated to be \$3,163.57. The total debt as of the petition date is estimated to be \$379,886.09, including \$8,371.42 in pre-petition arrears. Creditor is currently putting together its Proof of Claim.

3. Debtor's First Amended Plan (Docket 9) is not clear as to treatment of Creditor's claim. The Plan calls for the sale of the Property within one year, but also states that Creditor's claim is not modified by the Plan. Creditor wants to be sure that its claim be paid in full, either by making timely plan payments or by applying proceeds from the sale of the Property to the secured claim.

Docket 17.

Debtor's Response

Debtor filed a Response on January 9, 2024. Docket 27. In his Response, Debtor states:

1. Debtor plans to file his Second Amended Plan when Creditor has filed its Proof of Claim. Because Creditor has not yet filed its Proof of Claim, Debtor asks for a continuance of this Motion.

DISCUSSION

Creditor alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains unclear provisions for payment of Creditor's claim, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims (11 U.S.C. § 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), and maintain ongoing contract installment payments while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or

- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor's rehabilitation and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Here, counsel for Debtor has proposed a continuance to allow Creditor to file its Proof of Claim, thus giving Debtor the proper information to put together and propose a Second Amended Plan, and prosecute to confirmation a Motion to confirm the Second Amended Plan.

At the hearing, **XXXXXXXXXX**

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

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

The Objection to the Chapter 13 Plan filed by Matrix Financial Services Corp ("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 **XXXX**.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, parties requesting special notice, and Office of the United States Trustee on December 6, 2023. By the court’s calculation, 34 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 sustained.

January 23, 2024 Hearing

A review of the Docket on January 20,2024, discloses that no further pleadings have been filed. There is not a motion to value that has been filed by Debtor.

At the hearing, **XXXXXXXXXX**

REVIEW OF THE OBJECTION

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

1. Debtor's Plan relies on a Motion to Value the secured claim of Siskiyou County CU for \$21,113.00, reducing the secured claim substantially from \$32,078.00. However, debtor has not filed such Motion to date.
2. The Plan is underfunded as proposed. Without the Motion to Value on file and being granted, Trustee calculates a total of \$103,908.06 in plan payments, not the asserted \$90,600.
3. There are problems with Debtor's Schedules I and J. Specifically, Debtor lists income from employment and unemployment, lists income from rent or business but does not attach gross receipts, and has failed to properly provide for creditor PMGI Financial, LLC. Debtor also failed to disclose on her petition that she may be known by other names.
4. Trustee requests a continuance of this matter three weeks beyond the continued Meeting of Creditors to either dismiss the objection or amend it.

Dckt. 14.

DISCUSSION

Trustee's objections are well-taken.

Debtor's Reliance on Motion to Value Secured Claim

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Siskiyou County CU. Debtor has failed to file a Motion to Value the Secured Claim of Siskiyou County CU, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

Insufficient Plan Payments / Infeasible Plan

Trustee alleges that the Plan is underfunded as proposed. 11 U.S.C. § 1325(a)(1). The Plan proposes a total of \$90,600 in payments, (60 x \$1,510.00). Plan, Docket 8 ¶ 2.01. Trustee fees are at 7.2%, (\$6,523.20), attorney fees are \$8,000.00, Selene Finance is \$15,000.00 for the arrears and \$45,960.00 for the ongoing payments, the Trustee calculates Siskiyou County CU at \$25,988.97 with 8.5% interest, and unsecured are \$2,435.89 to be paid their 8.55% dividend. That totals \$103,908.06 which is more than the Plan proposes to pay. Thus, the Plan may not be confirmed.

Inaccurate or Missing Information

Debtor's Schedules I and J contain discrepancies or inaccurate information. It is unclear how Debtor can earn money from employment and unemployment. Further, Debtor lists income from businesses but provides no evidence of any business operations, whether is be gross receipts or rental agreements with any purported tenants. Without an accurate picture of debtor's financial reality, the court is unable to determine if the Plan is confirmable. *See* 11 U.S.C. § 1325(a)(6).

January 9, 2024 Hearing

The Trustee has requested a continuance beyond the continued Meeting of Creditors to amend or withdraw the objection. The Chapter 13 Trustee's November 30, 2023, Docket Entry Report states that the First Meeting of Creditors has been concluded.

At the hearing, counsel for the Trustee stated that the prayer in the Objection contains a clerical error. The First Meeting had been completed and the Objection should be sustained.

The court continues the hearing in light of the tentative ruling that was posted, indicating that the court would be continuing the hearing and repeating the clerical error in the prayer for relief stated in the Objection. If the Debtor does not oppose the Objection to Confirmation, Debtor's counsel need not appear at the continued hearing.

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

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

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

IT IS ORDERED that the Objection to Confirmation of Plan is sustained.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on November 7, 2023. By the court’s calculation, 15 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 XXXX.

January 23, 2024 Hearing

A review of the Docket on January 18, 2024 reveals that no new documents have been uploaded with the court. At the hearing, XXXXXXXXXX

REVIEW OF THE OBJECTION

New Residential Mortgage, LLC (“Creditor”) holding a secured claim opposes confirmation of the Plan on the basis that:

1. Creditor has a secured interest in Debtor’s real property commonly known as 3626 Indian Creek Rd, Placerville, California 95667-8923 (“Property”). Debtor is currently in an active forbearance under the terms of the mortgage beginning September 2023, which is expected to end on November, 2023, totaling approximately \$8,768.88 in deferred payments. Debtor proposes

to make payments under the forbearance agreement at the end of Debtor's mortgage loan. Plan, Dckt. 3 ¶ 7.01. Creditor objects to this provision of the Plan, arguing this modification is improper.

Dckt. 17.

DISCUSSION

Failure to Provide for a Secured Claim

Creditor asserts a claim of \$440,586.77 in this case. POC 4-1. Debtor's Schedule D estimates the amount of Creditor's claim as \$437,625.00 (Schedule D, Dckt. 1 p. 22) and indicates that it is secured by a deed of trust on Debtor's residence. The Plan provides for treatment of this as a Class 4 claim, but proposes to pay the Claim at the end of the mortgage loan, not during the life of the Plan.

Creditor alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it does not properly address repayment of the loan forbearance period of its Claim, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

Review of Specific Plan Terms for Creditor's Claim

The Chapter 13 Plan is funded by Debtor with monthly payments of \$200. Plan, ¶ 2.0-1; Dckt. 3. The Additional Provisions, Section 7 of the Plan, provide:

7.01 Valon Mortgage Inc, successor to Caliber Home Loans Secured Claim.

Class 4

Valon Mortgage Inc., successor to Caliber Home Loans secured claim shall be treated as a Class 4 Claim as Debtors are current with their mortgage payments pursuant to the terms of a forbearance agreement with Valon Mortgage Inc., successor to Caliber Home Loans.

Valon Mortgage Inc., successor to Caliber Home Loans claim is secured by a first deed of trust recorded against the real property commonly known as 3626 Indian Creek Road, Placerville, CA 95667 ("Collateral").

For the first month of Debtors Chapter 13 plan (November 2023), Debtors shall pay \$00.00 per month to Class 4 Creditor, Valon Mortgage Inc., successor to Caliber Home Loans, followed by Debtors' contractual mortgage payments of \$2,922.96 per

month, commencing in December 2023, and continuing for the remaining duration of the Debtors' Chapter 13 plan.

Debtors mortgage payments for September, October and November 2023 in the amount of \$2,922.96 are suspended pursuant to the terms of the forbearance agreement. The payments under the forbearance agreement shall be applied to the end of Debtors' mortgage loan.

Dckt. 3 at 7.

Creditor states that under the terms of the Forbearance Agreement, “[a]t the end of the forbearance, the arrears are due payable. Debtors have not been approved by New Residential to add the forbearance arrears to the end of the loan as such, the proposed cure is purely speculative.” Objection; p. 2:20-22; Dckt. 17. The Declaration of Monica Hargrove is provided, in which she testifies that the forbearance amounts are due at the end of the forbearance, not the end of the loan.

The court could not identify a copy of the Forbearance Agreement in the record. Under the terms of the Note upon which the claim is based, it states that the last payment is due on this claim in May of 2052. Exhibit 2; Dckt. 19.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims (11 U.S.C. § 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), and maintain ongoing contract installment payments while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or
- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not properly provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor's rehabilitation and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan properly provide for a secured claim, the fact that this Plan does not provide for Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

December 12, 2023 Hearing

At the hearing, the Parties agreed to continue the hearing in light of their efforts to get the amount of the claim clearly identified and provided for in the Plan.

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

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

The Objection to the Chapter 13 Plan filed by New Residential Mortgage, 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 Plan is **XXXX**.

17 thru 18

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).

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, persons having filed a Request for Notice, and Office of the United States Trustee on January 2, 2024. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss 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 opposition was presented.

The Motion to Dismiss is XXXX.

January 23, 2024 Hearing

At the hearing, XXXXXXXXXX

REVIEW OF THE MOTION

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. The debtor, Jose Garcia ("Debtor"), is \$5,400 delinquent in plan payments.

Docket 45. Trustee submits the Declaration of Neil Enmark to authenticate the facts alleged in the Motion. Decl., Docket 43.

DEBTOR'S RESPONSE

Debtor filed a Response on January 9, 2024. Dckt. 48. Debtor states the delinquency will be cured prior to the hearing date.

DISCUSSION

Delinquent

Debtor is \$5,400 delinquent in plan payments, which represents multiple months of the \$2,700 plan payment. Another plan payment will be due on January 25, 2024. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

In this case, Debtor promises to cure the delinquency before the Hearing. No evidence has been submitted of any payment. A promise to pay is not evidence that resolves the Motion.

January 17, 2024 Hearing

At the hearing, counsel for the Trustee reported that the Plan payments are delinquent one month, with a payment scheduled to cure the delinquency.

The Trustee agreed to continue the hearing to February 23, 2024, specially setting it to be heard in conjunction with the Trustee's Objection to Confirmation, to afford the Debtor the opportunity to cure the default and continue in the prosecution of this Bankruptcy Case.

The hearing on the Motion to Dismiss is continued to 2:00 p.m. on January 23, 2024, (Specially Set Day and Time) to be heard in conjunction with the hearing on the Trustee's Objection to Confirmation.

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

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

The Motion to Dismiss the Chapter 13 case 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 the Motion to Dismiss is **xxxx**.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on November 22, 2023. By the court's calculation, 20 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 XXXX.

January 23, 2024 Hearing

A review of the Docket on January 17, 2024 reveals that no new documents have been uploaded with the court under this Docket Control Number (DPC-1). Rather, the court heard Trustee's Motion to Dismiss on January 17, 2024 (DPC-2). Dckt. 50. The court continued that matter to be heard in conjunction with this Objection. At the hearing, XXXXXXXXXX

REVIEW OF THE OBJECTION

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

1. Trustee was unable to conduct the First Meeting of Creditors because Debtor never uploaded verification of both his Social Security number and his identification.
2. All tax returns may not have been filed, including for the years 2019, 2020, 2021, and 2022.

DISCUSSION

Trustee's objections are well-taken.

Inability to Conduct the 341 Meeting

Debtor did not submit the necessary documents to enable Trustee to conduct the Meeting of Creditors pursuant to 11 U.S.C. § 341. This meeting is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1). The meeting has been continued to January 4, 2023.

Failure to File Tax Returns

Trustee reports he was informed by the IRS and California FTB that the federal income tax returns for the 2019, 2020, 2021, and 2022 tax years have not been filed. Filing of these returns is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

December 12, 2023 Hearing

At the hearing, the Trustee reported that the information has been provided, and the First Meeting of Creditors has been continued to January 4, 2024. However, the Trustee states that the November payment has not been made. Additionally, there is not confirmation of the tax returns having been filed.

The Parties agreed to continue the hearing.

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

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

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

IT IS ORDERED that the Objection to Confirmation of Plan is **XXXX**.

DEBTOR DISMISSED: 11/01/23

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 Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 4, 2023. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is XXXX.

Gary Ray Fraley, the Attorney ("Applicant") for Binh Quoc Do, the Chapter 13 Debtor ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case. Applicant brings this Application pursuant to Chief Judge Clement's Order to Show Cause issued in the case. Dockets 19, 30.

Fees are requested for the period of October 3, 2023, when the petition was filed, through December 7, 2023. Exhibits A-C, Docket 29. Client's Chapter 13 bankruptcy case was dismissed on November 1, 2023 for failing to timely file Schedules. Docket 18. Applicant requests fees for postpetition work in the amount of \$3,683.64 and postpetition costs in the amount of \$44.64. Applicant was given a \$10,000 retainer fee by Client at the outset of the representation. Applicant has already withdrawn the sum of \$2,628 from the retainer for prepetition work that occurred on October 2, 2023, and Applicant is not seeking the court's approval for those prepetition fees.

Applicant has informed the court that he and Client entered into a fee arrangement where Applicant is paid at \$510 per hour, attorney Nedra Fraley is paid at \$330 per hour, and paralegals are paid

at \$180 per hour. However, Applicant has not uploaded a copy of this fee agreement with the court, nor has Applicant submitted a signed declaration from Client showing Client agreed to these terms.

Trustee's Opposition

On January 9, 2024 the Chapter 13 Trustee David Cusick ("Trustee") filed an Opposition. Docket 37. In his Opposition, Trustee states:

1. Chief Judge Clement issued an Order to Show Cause (Docket 19) on November 3, 2023, requiring Applicant to show cause, if any there be, why this court should not disgorge some or all of the retainer received, i.e., \$9,687 (the initial \$10,000 retainer less the \$313 filing fee).
2. Applicant is only asking for approval of postpetition fees, so this Application may not fully address the court's Order to Show Cause.
3. There is no evidence that Client, debtor in this case, agreed to the fee arrangement. There is no copy of the retainer agreement uploaded with the court, and there is no signed Declaration from the Client showing Client's agreement to the fees.

Docket 37.

APPLICABLE LAW

Reasonable Fees

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

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

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

Lodestar Analysis

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

Reasonable Billing Judgment

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

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

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

11 U.S.C. § 329 gives bankruptcy courts the power to disgorge attorneys of prepetition fees, depending on whether the court finds the fees were reasonable. 11 U.S.C. § 329 states:

- (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred—

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

Nothing in that section requires attorneys to seek approval for prepetition fees, however, so long as proper disclosures of prepetition payments have been made.

When determining reasonable value of such services, “[w]hat constitutes reasonableness is a question of fact to be determined by the particular circumstances of each case. The requested compensation may be reduced if the court finds that the work done was excessive or of poor quality.” 3 COLLIER ON BANKRUPTCY ¶ 329.04.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 2 hours in this category, and paralegals spent 7 hours in this category. Applicant communicated with the Chapter 13 Trustee, reviewed Proofs of Claims, reviewed Client information, communicated with Client regarding strategies, researched Client’s information and background.

Response to Order to Show Cause Regarding Fees: Applicant spent .4 hours in this category, and paralegals spent 1.5 hours in this category. Applicant reviewed and revised responsive pleadings.

Motion for Attorney’s Fees: Applicant spent .5 hours in this category, and paralegals spent 2.8 hours in this category. Applicant reviewed and revised this Application.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Paralegals	12	\$180.00	\$2,160.00

Gary Fraley, Attorney	2.9	\$510.00	\$1,479.00
Total Fees for Period of Application			\$3,639.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$44.64 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage and Copying	-----	\$44.64
Total Costs Requested in Application		\$44.64

FEES AND COSTS & EXPENSES ALLOWED

Fees

Hourly Fees

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The record shows that although the fees are high when considering the success of the case, the case presented unique challenges suggesting time spent on the case was necessary. A review of the attorney’s work shows that prosecuting the case on a last minute basis, filing a skeleton Petition, with the completed Schedules and Statement of Financial Affairs to be filled in later, and researching Client’s information were all reasonable and beneficial to Client and the Estate. The record does not suggest that Applicant’s work was either excessive or of poor quality, especially when considering the unique facts surrounding this Debtor.

Applicant also properly disclosed the breakdown of prepetition payments made pursuant to Fed. R. Bankr. P. 2016(b), and the court finds these prepetition payments to have been reasonable. Applicant testifies that he met with Client on October 2, 2023, into the evening, discussing strategies and assets. Decl., Docket 28 ¶ 8. Applicant further testifies that the initial consultation lasted for more than three hours. *Id.* These facts support a finding that the prepetition fees incurred on October 2, 2023 were reasonable.

However, Applicant has not shown the court that Client explicitly assented to the fee arrangement. \$510 per hour is on the higher side of attorneys’ rates, especially in connection to a consumer-debtor case that was dismissed within a month of filing. The court requires evidence of the fee arrangement to find that Debtor did in fact agree to these rates. A review of Applicant’s evidence shows only the following language regarding the fee agreement in Applicant’s declaration:

The Agreement provides that compensation for services would be as follows: on an hourly basis at \$510.00 per hour for my work, \$330.00 per hour for the work of

Attorney Nedra Fraley, and \$180.00 per hour for paralegal services. Prior to filing, Debtor deposited \$10,000.00 into my Client Trust Account for hourly services (\$313 of which was used to pay the Court's Chapter 13 filing fee, leaving \$9,687.00 available for attorney's fees). Prior to filing, I earned, and withdrew from my Trust account, the sum of \$2,628.00, leaving \$7,059.00 available for distribution.

Id. at ¶ 4. Applicant's sworn testimony of what he says he read the fee arrangement document to say does not substitute for the best evidence of the fee arrangement document itself., or at the very least Debtor's sworn declaration showing he assented. *See* Fed. R. Evid. 1002.

At the hearing, ~~XXXXXXXXXX~~

~~First and Final Fees in the amount of \$3,639.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be withdrawn from the initial retainer fee in accordance with the fee arrangement agreed upon between Applicant and Client.~~

Costs & Expenses

~~First and Final Costs in the amount of \$44.64 are approved pursuant to 11 U.S.C. § 330 and authorized to be withdrawn from the initial retainer fee in accordance with the fee arrangement agreed upon between Applicant and Client.~~

~~Applicant is allowed, and is authorized to withdraw from the Client's initial retainer fee, the following amounts as compensation to this professional in this case:~~

_____ Fees _____	_____ \$3,639 _____
_____ Costs and Expenses _____	_____ \$44.64 _____

~~pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case. Applicant must refund Client with any amount in excess of these fees and costs paid.~~

~~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.~~

~~_____ Gary Ray Fraley, the Attorney ("Applicant") for Binh Quoc Do, the Chapter 13 Debtor ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing;~~

~~_____ **IT IS ORDERED** that Gary Ray Fraley is allowed the following fees and expenses as a professional of the Estate:~~

~~_____ Gary Ray Fraley, Professional employed by the Chapter 13 Debtor,~~

_____ Fees in the amount of \$3,639 _____
_____ Expenses in the amount of \$44.64, _____

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