UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

January 24, 2023 at 2:00 p.m.

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1. 15-20002-E-13 FF-11 | **BRIAN SANCHEZ** **Gary Fraley** | **AMENDED MOTION FOR COMPENSATION BY THE LAW OFFICE OF FRALEY & FRALEY, PC FOR GARY RAY FRALEY, DEBTORS ATTORNEY(S) 12-20-22 [207]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on December 20, 2022. By the court's calculation, 35 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 Prevailing Party Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Prevailing Party Fees is granted.

Debtor, Brian Kenneth Sanchez ("Movant") filed this Amended Motion seeking prevailing party fees in the amount of $10,822.45 pursuant to 11 U.S.C. § 105(a). Debtor amended their prior motion and related documents to identify Debtor as the moving party. Motion, Dckt. 207 at ¶ 3. The court notes, Movant could have filed supplemental pleadings correcting errors in their original Motion. Dckt. 199. However, the court accepts and will rule on the merits of the Amended Motion. Dckt. 207.

In the Motion, Movant states with particularity (FED. R. BANKR. P. 9011) the following grounds in support of the Motion:

1. Debtor filed a Motion for Contempt against MGI Motors, MAMI Group, Inc., and Ahmed Mami, individually and jointly and severally ("Creditors"). Motion, Dckt. 207 ¶ 12.

2. The Court granted Debtor's motion for contempt. *Id.* at ¶ 13.

3. "As Debtor was the prevailing party, and the court found the Respondents to be in contempt of court through their intentional violation of this court's orders, violation of the Bankruptcy Discharge injunction, and other relevant bankruptcy laws, attorney's fees and costs are justified." *Id.* (citing the court's Contempt Order, Dckt. 198).

4. 11 U.S.C. § 105(a) gives the court inherent power to award attorney's fees if a party violates a court order or rule. *Id.* ¶ 25.

5. The court "essentially" determined Creditors acted in bad faith. *Id*. at 27 (citing the court's civil minutes, Dckt. 197).

6. An award of attorney's fees is more than reasonable given the time and effort that went into this matter, all at the fault of Creditors.

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APPLICABLE LAW

Congress provides in 28 U.S.C. § 1920 for costs that may be recovered in federal court litigation and Federal Rule of Civil Procedure 54(d), which is incorporated into Federal Rules of Bankruptcy Procedure 7054 and 9014(c), specifies that costs are allowed a prevailing party that obtains a judgement, with the term "judgment" defined in the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure to include "orders." Fed. R. Civ. P 54(a); Fed. R. Bankr. P. 7054, 9001(7), 9014(c).

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the Unites States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank P.* 7054(b)(1)

Statutory Basis - 11 U.S.C. § 105(a)

Under Section 105(a), "[t]he court may issue any order . . . necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) grants the court its inherent sanctioning power. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996).

Movant asserts that prevailing party fees under 11 U.S.C. § 105(a) are warranted.

In a Ninth Circuit Bankruptcy Appellate Panel (B.A.P.) decision, *In re Schwartz Tallard*, 473 B.R. 340 (B.A.P. 9th Cir. 2012), aff'd, 751 F.3d 966 (9th Cir. 2014), opinion withdrawn and superseded, 765 F.3d 1096 (9th Cir. 2014), on reh'g *en banc*, 803 F.3d 1095 (9th Cir. 2015), and aff'd, 765 F.3d 1096 (9th Cir. 2014), and on reh'g *en banc*, 803 F.3d 1095 (9th Cir. 2015), and aff'd, 803 F.3d 1095 (9th Cir. 2015), the Bankruptcy Appellate Panel discussed that a court "may award a prevailing party attorneys' fees when another party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 347 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 33 (1991)). This authority is granted under the court's inherent sanctioning power. *Chambers,* 501 U.S. at 33.

10 Moore's Federal Practice - Civil § 54.171 (2021) (citing *Chambers*, 501 U.S. at 43-51); *see also Alyeska Pipeline Serv. Co. V. Wilderness Society*, 421 U.S. 240, 258-59 (1975), discusses this principle of law, stating:

> When a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons," the court may employ its inherent equitable powers to award attorney's fees as sanctions. Such a fee award is permissible under the bad faith exception to the American Rule, and its purpose is to compensate the wronged party, punish the wrongdoer, and protect the integrity of the court.

This exception only applies to bad faith relating to conduct in the litigation. *Association of Flight Attendants v. Horizon Air Indus., Inc.*, 976 F.2d 541, 549 (9th Cir. 1992). However, the prevailing party's bad faith may also serve as a ground for denying costs or attorney's fees to which the prevailing party would be otherwise entitled.

Going to the Supreme Court decision upon which is principle is based, Chambers v. NASCO, Inc., 501 U.S. 32, 43, 45-46, 50 (1991), the exercise of this power to sanction is stated as:

> For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 19 U.S. 204, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821); see also *Ex parte Robinson*, 86 U.S. 505, 19 Wall. 505, 510, 22 L. Ed. 205 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962).
> . . .
> Because of their very potency, inherent powers must be exercised with restraint and discretion. *See Roadway Express*, *supra*, at 764. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. As we recognized in *Roadway Express*, outright dismissal of a lawsuit, which we had upheld in *Link*, is a particularly severe sanction,

yet is within the court's discretion. 447 U.S. at 765. Consequently, the "less severe sanction" of an assessment of attorney's fees is undoubtedly within a court's inherent power as well. *Ibid. See also Hutto v. Finney*, 437 U.S. 678, 689, n. 14, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978).

Indeed, "there are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," *Roadway Express, supra*, at 765, even though the so-called "American Rule" prohibits fee shifting in most cases. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). As we explained in *Alyeska*, these exceptions fall into three categories. The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction, *see Sprague v. Ticonic National Bank*, 307 U.S. 161, 164, 83 L. Ed. 1184, 59 S. Ct. 777 (1939), and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. *Alyeska*, 421 U.S. at 257-258. Second, a court may assess attorney's fees as a sanction for the "'willful disobedience of a court order.'" *Id.*, at 258 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 18 L. Ed. 2d 475, 87 S. Ct. 1404 (1967)). Thus, a court's discretion to determine "the degree of punishment for contempt" permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428, 67 L. Ed. 719, 43 S. Ct. 458 (1923).

Third, and most relevant here, a court may assess attorney's fees when a party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska, supra*, at 258-259 (quoting *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 40 L. Ed. 2d 703, 94 S. Ct. 2157 (1974)). *See also Hall v. Cole*, 412 U.S. 1, 5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 4, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968) (*per curiam*). In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party, *Universal Oil*, *supra*, at 580, as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order," *Hutto*, 437 U.S. at 689, n. 14. The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy." *Ibid.*

. . .

But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, *see Roadway Express, supra*, at 767. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed

discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

There is no quarrel that this federal court has such inherent powers, in addition to what may be construed under 11 U.S.C. § 105(a) to "that is necessary or appropriate to carry out the provisions of this title."

Factual and Legal Grounds for Fees

In reviewing the Movant's Amended Motion (Dckt. 207), Declaration (Dckt. 209), and Exhibits (Dckt. 210), Movant provides the following legal grounds and analyses for asserting that awarding sanctions pursuant to 11 U.S.C. § 105(a) and the inherent power of the court:

In asserting this claim pursuant to 11 U.S.C. § 105(a), Movant states with particularity the following grounds for relief:

Movant's Motion, Dckt. 207

1. Creditors refused to deliver title to a vehicle when the obligation secured by it was repaid in full with interest as provided for through the Chapter 13 Plan. Motion, Dckt. 207 ¶ 28;

2. Creditors demanded more money from Debtor on the discharged debt. *Id.* ¶ 28;

3. Since the entry of Discharge, Movant and Movant's Counsel have dedicated significant time and resources trying to get the Respondents to meet their legal obligation to deliver title to Movant. *Id.* ¶ 12;

4. After failure to deliver title, Movant's Counsel was forced to file a Motion for Contempt against all three Creditors. *Id.*

5. On October 4, 2022, the court determined all three Creditors were in contempt of court fo their actions in violating the stay. *Id.* ¶ 13;

6. Pursuant to the court's order, this Amended Motion is being heard pursuant to a noticed motion. *Id.*

7. Movant is only requesting fees relating to attempting to get Creditors to transfer title of the Movant's vehicle and the Motion for fees.

8. Movant notes due to the fact this is an Amended Motion, Movant is not increasing their billing time on this matter. *Id.* ¶ 5. The fees requested under the category "Motion for Fees" has not changed since the original Motion. *Id.*

Movant's Counsel's Declaration, Dckt. 209

1. Movant and Counsel agreed Counsel would represent Movant in attempting to obtain title to his vehicle from Creditors. Declaration, Dckt. 209 ¶ 4.

2. Movant and Counsel agreed the work performed in attempting to obtain title would be under the "extraordinary services" provisions in their 2014 retainer agreement. *Id.*

3. Counsel's fees are reasonable given the experience of himself and his staff. *Id.* ¶ 6.

Exhibits in Support of Amended Motion, Dckt. 210

Exhibit A Debtor's Attorney Billing Statement - Raw billing statements relating to attempts to deliver title.

Exhibit B Billing Statement Analysis - Task billing analysis broken down by (1) Services Prior to Receipt of Title; (2) Services After Receipt of Title; and (3) Motion for Fees.

Movant further asserts that the court has already found that Creditors' conduct was unlawful and in violation of the discharge order. Motion for Contempt Civil Minutes, Dckt. 197 at 7. In relevant part, the court found:

> Upon review of all of the evidence provided to the court, and in review of the Docket, the court finds there is no "objectively reasonable basis for concluding that [Respondent's] conduct might be lawful." [*Taggart*, 139 S. Ct. 1795, 1799 (2019)].
>
> 1. Debtor filed Respondent's Proof of Claim on September 24, 2015, after, months prior, Movant requested Respondent file their own claim. Motion, Dckt. 190 at ¶ 6, Proof of Claim 2-1.
>
> 2. Respondent was treated as a Class 2 Creditor throughout the life of the Plan. Amended Plan, Dckt. 141. Respondent did not oppose the confirmation of the Plan and was given notice on November 27, 2018. Certificate of Notice, Dckt. 156.
>
> 3. The provisions of the Plan bound Movant and Respondent, and vested the Property with Movant. 11 U.S.C. § 1327; Amended Plan, Dckt. 141.
>
> 4. Movant completed their Plan on April 30, 2020. Trustee's Final Report and Account, Dckt. 170. Respondent received Notice. Certificate of Service, Dckt. 173.

5. Movant received their discharge pursuant to 11 U.S.C. § 1328(a) on October 27, 2020. Dckt. 178. Respondent received Notice. Certificate of Service, Dckt. 179.

6. In addition, Movant made multiple attempts to communicate with Respondent and inform them of Movant's discharge to receive title back from Movant.

Upon Movant receiving their discharge, there is no evidence that Respondent could have reasonably been uncertain whether their debt was discharged. Pursuant to California law, Movant should have received title to the vehicle within fifteen (15) days after Respondent received their last Plan payment, not almost two years later. Under the totality of circumstances, it is clear to the court that for roughly two years, Respondent's actions were unlawful and in violation of the discharge order.

Therefore, pursuant to 11 U.S.C. § 105(a), the court finds Respondent in contempt for violating the discharge injunction arising under 11 U.S.C. § 524(a)(1).

Motion for Contempt, Civil Minutes, Dckt. 197.

It is clear, therefore, attorney fees are warranted relating to the "conduct of the litigation," the attempt to deliver title. *Association of Flight Attendants v. Horizon Air Indus., Inc.*, 976 F.2d 541, 549 (9th Cir. 1992).

From review of these exhibits, Movant is properly requesting only fees related to attempting to deliver proper title to Movant, the contempt proceeding, and the Motion for Fees. Therefore, under 11 U.S.C. § 105(a), fees are properly being requested relating only to the bad faith of Creditors.

Computation of Prevailing Party Attorney's Fees

In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An attorney's fee award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

DISCUSSION

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Services Provided Prior to Receipt of Title: Movant spent 24.3 hours in this category. Movant's Counsel made attempts since 2020 to deliver title to Movant.

Motion for Contempt: Movant spent 14.6 hours in this category.

Motion for Fees: Movant spent 14.6 hours in this category. Movant is not billing for the Amended Motion, only the time spent on the original Motion for Fees.

The fees requested are computed by Movant 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**
Gary Fraley, Attorney	14.7	$450.00	$6,615.00
Paralegal	28.6	$150.00	$4,290.00
Total Fees for Period of Application			$10,905.00

The court notes, Movant is only requesting $10,683.00 in fees.

Costs & Expenses

Movant also seeks the allowance and recovery of costs and expenses in the amount of $139.45 pursuant to this application.

The costs requested in this Motion are,

Description of Cost	**Cost**
Copy and Postage	$55.45
CourtCall	$54.00
Total Costs Requested in Application	$109.45

The court notes, Movant is requesting $139.45 in costs. From the court's review, Movant's exhibits only supports costs in the amount of $109.45. At the hearing, XXXXXXXXXX

Attempting to Recover Inappropriate Costs - CourtCall

Movant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as online access to bankruptcy and state laws and cases); phone, email, and facsimile; and secretarial support. The costs requested by Movant include CourtCall.

While Movant requested reimbursement for costs associated with making telephonic CourtCall Appearances, the court does not permit such reimbursements and therefore declines to award Movant CourtCall costs. The decision to attend hearings via CourtCall is at the cost of the attorney included in the hourly rate for the services.

Here, Movant could have appeared in person, but probably recognized how even with the associated costs it is more economically efficient to attend remotely. CourtCall is a very effective tool allowing attorneys to market their legal skills (and generate fees from a much larger client base).

Therefore, Movant is only entitled to receive costs in the amount of $55.45.

FEES AND COSTS & EXPENSES ALLOWED

The court having determined that Movant is the prevailing party and that 11 U.S.C. § 105(a) provides that the prevailing party shall be awarded attorneys' fees, the court determines that the requested $10,683.00 in attorneys' fees and $55.45 as costs are reasonable in this Contested Matter for services provided in litigating the Motion for Contempt.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Prevailing Party Fees filed by Debtor, Brian Kenneth Sanchez ("Movant"), in this Contested Matter and prevailing party having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.
>
> **IT IS ORDERED** that Movant, is awarded prevailing party attorney's fees against MGI Motors, MAMI Group, Inc., and Ahmed Mami, the Respondents, in the amount of $10,683.00 and costs in the amount of $55.45.

2. 22-22603-E-13 RYAN BREWER MOTION TO CONFIRM PLAN
OSG-1 Robert Gimblin 11-18-22 [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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2022. By the court's calculation, 67 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 xxxxxxx .

The debtor, Ryan Loren Brewer ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for payment of $70.00 per month for 36 months. Amended Plan, Dckt. 16. Debtor is proposing the Amended Plan to adjust plan treatment of the secured claims of creditors City of Yuba City and Wells Fargo. Motion, Dckt. 14 at 2. Debtor's initial Chapter 13 plan missclassified these claims as Class 1, leaving the plan underfunded. *Id.* 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, 2023. Dckt. 25. Trustee opposes confirmation of the Plan on the basis that:

A. The Plan is still not feasible because the stated expenses appear unreasonably low for a debtor during the term of the Plan.

DEBTOR'S DECLARATION

Debtor filed a Declaration on January 17, 2023. Dckt. 29. Debtor addresses Trustee's concerns and states:

1. Debtor's home is 750 square feet, thus, utility costs remain low.

2. Debtor's transportation expenses are non-existent because Debtor qualifies for and relies on free transportation.

3. Debtor states they do not have medical expenses, however, has applied to be placed on their parent's health plan are may be eligible for Medi-cal.

4. Debtor receives free haircuts.

5. Debtor does not have clothing expenses because Debtor receives sufficient clothing and necessities as gifts.

6. Debtor's parents assist when small expenses arise.

DISCUSSION

Failure to Afford Plan Payment

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor's expenses appear unfeasible for a debtor. In particular, Debtor states they have one Dependent son, two years old. Schedule J, Dckt. 1. Debtor lists the following as expenses:

Rental or Home Ownership Expenses.....$327.00

Home maintenance, repair, and upkeep expenses.....$50.00

Utilities:

Electricity, heat, natural gas.....$35.00

Water, sewer, garbage collection.....$68.00

Telephone, cell phone, Internet, satellite, and cable services.....$120.00

Food and housekeeping supplies.....$550.00

These expenses appear on their face to be unrealistic to support an individual and a dependent. If any additional costs were to arise, such as medical, clothing, or other necessities, Debtor would not be able to make their monthly Plan payment.

However, the information provided by Debtor in his Supplemental Declaration, Debtor is not alone but has the financial support of his family, as well as having very compact living expenses.

The Trustee properly raised the issue of the Debtor's expenses. The Debtor responded with testimony of himself and a family member to address those points. Here, the monthly Plan payment is modest. The Debtor and his counsel in clearly addressing these points also demonstrate Debtor's attention to these details and focus on performing the Plan.

Reason for Chapter 13 Plan

The Debtor's Chapter 13 Plan provides for a monthly plan payment of $70.00 for thirty-six (36) months, for total plan payments of $2.520.00. Amd. Plan; Dckt. 16. From the $70.00 a month the following obligations are to be paid:

A. Chapter 13 Trustee Fees (projected at 8%).....($5.60)

B. Balance of Debtor's Counsel's Fees ($2,175.00).....($60.41)

C. General Unsecured Claims ($46,092).....($ 3.99)

Thus, other than paying the Chapter 13 Trustee and Debtor's counsel, there would be only $143.64 to be paid to creditors holding ($46,092) in claims, a 0.3% (three-tenths of a percent) dividend.

Reviewing the Form 122C-1 Statement of Current Monthly Income, Debtor's monthly income for the six months preceding the bankruptcy cases was $980.30. Dckt. 1 at 44-46. This results in annual income of $11,763, which is well below the $87,355 median family income. *Id*. at 46. However, much of this appears to be Cal Fresh benefits.

It is unclear why Debtor is enduring a three year Chapter 13 plan rather than seeking relief pursuant to Chapter 7 of the Bankruptcy Code. Debtor was able to assemble $1,825.00 for a pre-petition payment to his counsel, which was funded by his parents. If they could not fund counsel's Chapter 7 fees, Local Bankruptcy Rule 2016-3 allows for bifurcation of such fees, doing away with a need to have a Chapter 13 case to finance attorney's fees for someone who otherwise could filed Chapter 7.

At the hearing, **xxxxxxx**

~~The Amended Plan does 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, Ryan Loren Brewer ("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 denied, and the proposed Chapter 13 Plan is not confirmed.~~

3.	**22-21515-E-13** **DPC-1**	**MICHAEL/SUSAN COFFMAN** **Julius Cherry**	**CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK**
	3 thru 4		**8-3-22 [13]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on August 3, 2022. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

The Objection to Confirmation of Plan is xxxxxxxxx

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

A. The debtor, Michael Allen Coffman ("Debtor") and Susan Carol Coffman ("Late Co-Debtor") failed to appear at 341 Meeting of Creditors.

DISCUSSION

Trustee's objections are well-taken.

Failure to Appear at 341 Meeting

The two debtors 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).

Counsel for the two debtors explained the issues facing the debtors and how Counsel and debtors were moving forward in the prosecution of this case. Counsel for the Chapter 13 Trustee concurred with the request to continued the hearing.

September 20, 2022 Status Report

On September 20, 2022, Trustee filed a Status Report indicating debtor did not appear at the continued meeting of creditors. Additionally, Debtor's Attorney informed Trustee that debtor the Late Co-Debtor Susan Carol Coffman has passed away.

September 27, 2022 Hearing

The Late Co-Debtor having passed away, the court was prepared to sustain the Objection to Confirmation. Debtor's counsel can canvas heirs and other possible representative to be appointed in this case to continue in prosecution, or the case may be dismissed.

At the hearing, the Trustee agreed to a continuance so a successor representative can be appointed and the case prosecuted.

Trustee's Status Report

Trustee filed a status report on December 19, 2022. Dckt. 30. Trustee still objects to confirmation of the Plan. Trustee states that the surviving Debtor admitted at Meeting of Creditors on December 15, 2022 that their tax returns are still being prepared, set to be filed end of December. The Meeting is continued to January 19, 2023 at 1:00 p.m.

January 10, 2022 Hearing

At the hearing, counsel for the Trustee reported that the Debtor was still working on the tax returns, and the hearing on the Motion to Substitute a person representative for the Late Co-Debtor set for January 24, 2023.

The Trustee requested the Objection be continued in light of Debtor's active prosecution of the case.

January 10, 2023 Hearing

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 Plan is **xxxxxxx**

4.	**22-22917-E-13 MET-1**	**JOHN DOUGHERTY Mary Ellen Terranella**	**MOTION TO AVOID LIEN OF CHERYL HENRY 1-3-23 [38]**

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, Chapter| 13Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on January 3, 2023. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is xxxxxxx.

This Motion requests an order avoiding the judicial lien of Cheryl Henry ("Creditor") against property of the debtor, John Scott Dougherty ("Debtor") commonly known as 1096 Vintage Court, Vacaville, California ("Property").

CREDITOR'S OPPOSITION

Creditor filed an opposition on January 10, 2023. Dckt. 49. Creditor states Debtor's Motion conceals that Creditor has a valid, enforceable, Deed of Trust in the third position against the Property.

From the court's review, Debtor is only trying to avoid a judicial lien. Debtor provides evidence of the judicial lien as Exhibit A, Dckt. 41. Creditor does not address how having a consensual lien renders a judicial lien immune to the avoidance of avoiding of that lien as provided in 11 U.S.C. § 522(f).

Creditor's Opposition is rich with judgmental, condemning language directed at Debtor. These include: (1) " Dougherty omits and conceals from this Court that Creditor Henry has a valid, enforceable,

Deed of Trust . . . ;" (2) "Dougherty essentially commits fraud on this Court by stating under penalty of perjury . . .;" (3) "Dougherty's entire argument in his Motion is premised on omitting the Henry Note and Deed of Trust . . ;" (4) "He intentionally and fraudulently omits Henry's third-position Note and Deed of Trust secured interest. . .;" (5) "Dougherty's indisputably perjurious representations in his Declaration belie his credibility . . .;" (6) a long recitation of how Creditor asserts Debtor failed to comply with orders of the State Court judge; and (7) "Dougherty is well aware that his perjurious statements are intentionally misleading . . . ." In reading this Opposition and all of the extraneous personal attacks, the court is reminded of that famous quote from William Shakespear's Hamlet:

> The lady doth protest too much, methinks.

In the opposition Creditor asserts both its judgment lien and the deed of trust. In this Motion Debtor only takes action against the judgment lien asserted by Creditor and not a deed of trust.

DEBTOR'S RESPONSE

Debtor filed a response on January 17, 2023. Dckt. 56. Debtor states that attached as exhibits to their Motion was an unsigned Promissory Note and unsigned Deed of Trust. The Abstract of Judgment was recorded on January 24, 2022, and was not a consensual lien. This was two-hundred and ninety (290) days before the commencement of this Bankruptcy Case.

Debtor argues that the deed of trust lien, which Debtor consented to and then refused to sign, is a "mere" judgment lien merely because the court appointed someone else to sign for Debtor the deed of trust which Debtor agreed to give pursuant to the settlement and then was ordered to be done in the State Court Judgment. A copy of the Judgment is provided as Exhibit A by Debtor (Dckt. 41 at 5-6). The State Court Judgment includes a mandatory injunction for Debtor to execute the promissory note and deed of trust which Debtor has agreed to under the Settlement Agreement. The Note and Deed of Trust are included as attachments to the State Court Judgement.

From what Debtor presents, Debtor agreed to and gave a security interest in the property in the form of a deed of trust. Merely because he later refused to comply with the Settlement Agreement or the State Court Judge's order, and someone had to be appointed to do the ministerial task of signing the note and deed of trust.

DISCUSSION

The State Court Judgment (Dckt. 41) makes reference to there being a tentative ruling and the State Court adopting that ruling. Here is what is ordered in the State Court Judgment:

A. Creditor is awarded a monetary judgment of $127,783.17 against Debtor.

B. Further, that within 30 days after the date of the State Court Judgment, Debtor will:

1. Execute and notarize a promissory note and deed of trust as described in the Settlement Agreement, with a copy of the note and deed of trust being attached to the State Court Judgment.

C. The note is in the principal sum of $100,000 and:

1. no interest accrues on the $100,000,

2. Monthly payments are specified, with a balloon payment to be paid on May 1, 2022.

3. Late fees of $50 apply.

D. The deed of trust secures the note (not the judgment).

Creditor provides the declaration of Creditor's Counsel to testify under penalty of perjury that the state court appointed an elisor on June 20, 2022 to sign the Deed of Trust. Declaration, Dckt. 50. Creditor's Counsel insists the Deed of Trust was recorded in Solano County on June 27, 2022. Creditor's Counsel has not provided the recorded Deed of Trust in the form of an exhibit to verify this information.

Upon review of Creditor's Proof of Claim 16-1, Creditor provides the following attachments as evidence of a valid Note and Deed of Trust:

Attachment 2 - Recorded Deed of Trust

Date:	November 1, 2020
Trustor:	Debtor, John Scott Dougherty
Beneficiary:	Creditor, Cheryl Henry
Trustee:	Horner Law Group, P.C.
Transferred Interest:	Debtor irrevocably grants, transfer, and assigns to Trustee in Trust with power of sale the property commonly described as 1096 Vintage Court, Vacaville ("Property").
Signature:	The Deed of Trust is signed by a "Robert Oliver," a Clerk of Court, in lieu of Debtor, on June 20,2022. The signature is notarized.

Recording Information:

Date:	June 27, 2022
County:	Solano County
Document Number:	202200043969

Attachment 3 - Promissory Note

Date: October __, 2020, whereas Debtor promises to pay Creditor the principal sum of $100,000.00.

Payment terms:

(1) November 1, 2020 - May 1, 2022 - Debtor to pay Trustee, Horner Law Group, P.C., monthly payments of at least $500.00.

(2) On or before the May 1, 2022 payment, Debtor is to pay the remaining $100,000.00

(3) Late payment - $50.00 late fee if not received by the 10th day of the month

(4) Acceleration Clause - If Debtor fails to make a payment after the 15th day of the monthly payment is due, all outstanding settlement proceeds will become due and payable immediately and Creditor may proceed with all of their legal rights and remedies, including foreclosure proceedings.

(5) Attorney's fees - Debtor promises to pay all reasonable costs and expenses incurred by Creditor in connection with the enforcement of the Note.

Signature: The Promissory Note is signed by a "Brian Taylor," a Clerk of Court, in lieu of Debtor, on June 9, 2022. The signature is notarized.

Creditor provides evidence that a Deed of Trust was recorded, securing their interest. This creates a consensual interest that would not be avoidable.

Debtor, however, provides evidence a judgment was entered against Debtor in favor of Creditor in the amount of $127,783.17. *Id.* An abstract of judgment was recorded with Solano County on January 24, 2022, which is prior to the date the Deed of Trust was recorded. *Id*. This would create a nonconsensual interest for Creditor on Debtor's Property.

Proof of Claim 16-1 filed by Creditor is in the amount ($258,379.68). POC 16-1, § 7. Creditor then states that the claim is fully secured by a deed of trust. *Id*., ¶ 9.

Attachment 1 to Proof of Claim 16-1 computes this claim as consisting of the following component parts:

1. Obligation secured by Deed of Trust.....($100,000)

2. Plus Attorney's Fees.....($114,174.42)

3. Plus Costs.....($ 44,205.25)

What is not clear to the court is whether there is a judgment obligation secured by a judgment lien and a separate promissory note obligation secured by a deed of trust, or that the note and deed of trust replaced the judgment.

Performing the "simple" 11 U.S.C. § 522(f) calculation, the number appear to line up as follows:

FMV of the Property.....$874,000

Rocket Mortgage Deed of Trust.....($294,815) POC 7-1
(March 16, 2017 Recording)

IRS Secured Claim.....($ 36,294) Amd. POC 13-2
(Nov. 26, 2013 Tax Lien Recorded)

Pacific Service Credit Union
Deed of Trust.....($99,670) [No Proof of Claim Filed]

Renew Financial PACE Loan.....($ 20,000) [No Proof of Claim Filed]

Value of Property For Judgment Lien
and Exemption Avoidance Calculation.....$572,891 [Assumes valid secured claims of Pacific Service CU and Renew Financial]

American Express Abstract of Jdgt.....($ 3,609) [No Proof of Claim Filed]

Credit's Judgment Lien.....($127,783) [principal amount of Judgment]
[Recorded January 24, 2022]

Creditor's Deed of Trust.....($258,379)
[Recorded August 27, 2022]

Debtor's bankruptcy case was filed on November 10, 2022. Creditor's Deed of Trust was recorded on August 27, 2022 - Seventy-Six (76) days before this Bankruptcy Case was filed.

What is not clear to the court is what claim or claims that Creditor has in this case. It is not clear if there is both an abstract of judgment securing a judgment or "just" a note secured by a deed of trust in place of the judgment.

In addressing whether Creditor has a judgment and judgment lien, or a note secured by a deed of trust, or both, Creditor's counsel **xxxxxxx**

Debtor's counsel, **xxxxxxx**

5.	**22-21528-E-13 JCW-1**	**MICHAEL CARTER AND TORRIE GIDGET CONN Pro Se**	**FINAL HEARING RE: MOTION TO VACATE 12-8-22 [165]**

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Set Hearing for Debtor's Motion to Vacate a Prior Order was served by the Clerk of the Court on Debtor (*pro se*), US Trustee, and Chapter 13 Trustee as stated on the Certificate of Service on October 29 and 30, 2022. The court computes that 9 and 10 days' notice has been provided.

The Motion to Vacate is Denied.

The court has included in Part I of this Ruling the Minutes from prior hearings and incorporate them herein.

In Part II, Final Motion Presented to the Court, the court addresses the Motion as supplemented by Debtor

PART I
ORIGINAL MOTION AND PRIOR HEARINGS

On October 24, 2022, Debtors Michael Carter and Torrie Conn ("Debtors") filed a pleading stating they "**object to** [the judge's] Order to Lift Automatic Stay (Unlawful Detainer). . . ." Dckt. 117, 1:12-13 (emphasis in original). The Objection continues, stating that the judge had "**no Authority** for said Lift of Automatic Stay." *Id*., 1:16 (emphasis in original).

The court cannot identify any procedural basis for "Objecting to" an order issued by the court, and such "objection" having any legal effect. However, the court construed this as a motion to vacate a prior order of the court as provided in Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024. The court continued the hearing to December 13, 2022, to afford Debtors the opportunity to file an amended motion and then for the court to evaluate the status of the prosecution of the Motion to Vacate and set a scheduling order as necessary.

Amended Motion to Vacate

The "Objection" focused on earlier challenges that Debtors do not believe that the attorneys who state that they represent the Party named seeking relief from the stay, Federal National Mortgage Association, are really not attorneys for Federal National Mortgage Association, and are officious intermeddler (the court's term) attorneys without a client. [Fn.1.]

FN. 1. As this court has addressed on prior occasions, the United States Supreme Court has made it clear that federal court trial judges determine the correct law and apply it, and are not dependant on and limited by what may be presented by the parties. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). This is contrasted to the presentation of evidence, for which the trial court is limited to the evidence presented by the parties, and the trial court does not conduct independent discovery and introduce its own evidence at trial.

Here, the court notes that the Debtors are in *pro se* (and have been working hard to identify applicable law) and to avoid a situation where Debtors might be surprised at a hearing where the court identifies the correct law (even if the opposing Party does not), the court has used this as an opportunity to survey the Amended Motion and identify some initial principles of law that appear from the text of the Amended Motion.

On December 8, 2022, Debtors filed their Amended Motion to Vacate (Dckt. 165). The court in previous orders and at prior hearings discussed the scope of motions for relief and the proceedings (traditional complaint and answer lawsuit) required for determination of rights and interests in property either in the State Court, District Court (if a basis exists for federal court jurisdiction), or in the Bankruptcy Court (adversary proceeding, Fed. R. Bank. P. 7001) pursuant to the federal court jurisdiction for matters arising under the Bankruptcy Code, in the bankruptcy case, or related to the bankruptcy case (28 U.S.C. § 1334).

In the prayer for relief, Debtors state that the eviction pursuant to the State Court Unlawful Detainer Judgment is scheduled for 6:00 a.m. on December 14, 2022.

With the Amended Motion being filed, the court can address the scheduling of filing responsive and reply pleadings, and any discovery issues.

The court provides a short, simple summary of the basic grounds asserted in the Amended Motion (which is not to be construed as an exclusive statement of such grounds):

A. Cause did not exist to grant the relief from the automatic, and Debtors should be allowed time to proceed with their discovery relating hereto (which is being conducted through 2004 examinations).

B. Fannie Mae has failed to establish that it is a real party in interest.

1. Evidence was not presented in support of the Motion for Relief From the Stay that it had been assigned or had possession of the Note upon which it asserted rights.

2. Citation is made to the Bankruptcy Appellate Panel Decision *Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897 (B.A.P. 9th Cir. 2010), for the legal principal that under Arizona law a mere assignment of a security interest does not assign the underlying obligation, and a purported assignment of only a security interest severing a lien from an obligation is a void transfer (the transfer is void, but it does not void the security interest). This is consistent

with this court's ruling in *In re Walker*, 2010 Bankr.LEXIS 3781 (Bankr. E.D. Cal. 2010), an unpublished decision.

On this point, the court notes (and the Debtors may wish to re-review) that the grounds stated in the Motion for Relief from the automatic stay were not based on an obligation due on a promissory note that was secured by real property. Rather, the basis for requesting relief from the stay was that after completing a purported nonjudicial foreclosure under a deed of trust:

> A Notice for Possession was served on **11/10/2021**. A copy of said Notice for Possession and Proof of Service is attached hereto marked **Exhibit "2"**. The Summons and Complaint was filed with the court on **12/06/2021**. A copy of filed Summons and Complaint is attached hereto marked **Exhibit "3"**. Defendants' answer filed on **02/10/2022**. A copy of the filed Verified Answer to the Complaint for Unlawful Detainer is attached hereto marked **Exhibit "4"**. The court issued a Judgment on **05/05/2022** and the Writ was subsequently issued on **05/10/2022**. A copy of said Judgment and Writ is attached hereto marked **Exhibit "5"**. The Debtor's filed Bankruptcy on **6/21/2022**.

Mtn for Relief, p. 2:17-24; Dckt. 47. The Motion for Relief states that the basis is the Judgment of the State Court, not a note and deed of trust. In the preceding paragraph in the Motion for Relief, it states that Fannie Mae (Debtors dispute that the attorneys in the State Court Action actually represent Fannie Mae) conducted a nonjudicial foreclosure sale and that Fannie Mae received a Trustee's Deed transferring title to the Property to Fannie Mae.

C. Debtors assert that Fannie Mae was required to file a proof of claim and the filing of such is required by Federal Rule of Bankruptcy Procedure 3002. Further, that Fannie Mae has not documented its security interest.

At a previous hearing the court discussed the requirements of Federal Rule of Bankruptcy Procedure 3002 and for what purposes a proof of claim must be filed. In pertinent part, Federal Rule of Bankruptcy Procedure 3002 provides (emphasis added):

> Rule 3002. Filing Proof of Claim or Interest
>
> (a) Necessity for filing. **A secured creditor, unsecured creditor, or equity security holder must file a proof of claim or interest for the claim or interest to be allowed**, except as provided in Rules 1019(3), 3003, 3004, and 3005. A **lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.**

As stated above, a secured creditor, and unsecured creditor, or an equity security holder, must file a proof of claim in order to have a claim or interest to be allowed. Congress defines "claim," "equity security holder" and "interest" in 11 U.S.C. § 101 (5) and ( ), respectively as follows:

> (5) The term "claim" means—

(A) **right to payment**, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) **right to an equitable remedy for breach of performance if such breach gives rise to a right to payment**, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(17) The term "equity security holder" means **holder of an equity security of the debtor.**

(16) The term "equity security" means—

(A) **share in a corporation**, whether or not transferable or denominated "stock", or similar security;

(B) **interest of a limited partner in a limited partnership**; or

(C) **warrant or right**, other than a right to convert, **to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B)** of this paragraph.

As stated in the Advisory Committee for the 2017 Amendments, this provision requires the proof of claim be filed for the creditor to have an allowed claim (right to payment):

Notes of Advisory Committee on 2017 Amendments.

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. . . .

Even if a creditor with a secured claim fails to file a proof of claim, that does not void the lien, and the debtor, Chapter 11 trustee, or Chapter 7 trustee still have to deal with (pay) the secured claim (defined in 11 U.S.C. § 506(a)) if they want to preserve the property (or any value in excess of the debt secured by the lien) for the bankruptcy estate or debtor.

As noted above, Fannie Mae does not assert a right to payment of monies, but sought relief from the stay to continue in the enforcement of the State Court Unlawful Detainer Judgment saying it had right to possession of the Property which is being occupied by Debtors.

D. Fannie Mae is not a secured creditor, is not a real party in interest, and does not have standing to seek relief from the stay.

E Debtors state that they have filed a proof of claim for ($2,383,728.00) in their own bankruptcy case and that they create a lien on the Property that is the subject of the asserted Trustee's Deed. Debtors asserts that equity regards the beneficiary as the true

owner (no legal authorities stated) and that rights and interest that are superior to any purported interests of Fannie Mae, but those superior interests will be forfeited in the motion granting relief from the stay so that the unlawful detainer proceedings can proceed (in which Debtors can assert their rights and why such unlawful detainer judgment is void or should be vacated). A legal basis for why any interests of Debtors, which are asserted to be superior to those purported interests of Fannie Mae being asserted, would be forfeited is not apparent from the Amended Motion.

F. Debtors assert that there are obligations owed to Debtors that can be offset against any rights or interests of Fannie Mae (if the court determines that Fannie May has standing to seek relief from the stay).

G. On March 9, 1933, Congress passed the Emergency Banking Relief Act, which permits the paying of all obligations with U.S. Dollars (with purported creditors not being allowed to demand gold, silver, or other form of payment). Debtor's then cite to comments made by a U.S. Senator in 1933 in connection with Senate Resolution 62, dated April 18, 2933, that:

> **The ultimate ownership of all property is in the State**; individual so-called "ownership" is only by virtue of Government, i.e. law, amounting to mere user; and use must be in accordance with law, and subordinate to the necessities of the State.

Amd. Mtn, p. 16:11-16; Dckt. 165 (emphasis in original).

Debtors then state that "The above Senate declaration placed all property in the State, the Notice to Preserve Interest expresses the trust where the debtors are beneficiaries *nunc pro tunc* from March 2, 1983." *Id*., p:2:17-20. The court addressed previously with Debtors that the court could not find a record of the Senate Resolution having been passed by the Senate, or passed as a Joint Resolution with the House, or it having been signed into law. The quote provided appears to be the opinion of one Senator, not a law established by Congress and signed into law by the President. Debtors have not provided any federal (with respect to federal land) or state court (with respect to the land of the sovereign States) decision interpreting applicable State law to provide that there is no private right of ownership of property in California (where the Property is located).

H. Based on comments of a Senator concerning Senate Resolution 62 (which does not appear to have been passed even by the Senate), Debtors conclude that for all property there is a Government Landlord - Tenant relationship between debtors and the government. While using the term "debtor," the proposition is stated for all residents in a state, the District of Columbia, the Commonwealth of Puerto Rico, and other territories of the United States.

Debtors do state that the Emergency Banking Relief Act was held constitutionally valid by the Supreme Court of the United States. However, while stating that, Debtors did not cite to any authority, such as the federal or state courts determining that is the law, that all property is owned by the state and individuals have no right of ownership.

I. Debtors conclude that since the State of California owns all of the non-federal land in the State of California, it was a necessary party to any litigation concerning a dispute whether Fannie Mae or the Debtors can occupy the Property that is the subject of the dispute.

Debtors' Affirmation in Support of the Motion

Debtors have provided their "Affirmation" as to certain facts and arguments in support of the Amended Motion. In some respects the Affirmation reads like arguments that one would find in a points and authorities. In other respects, it appears to make statements one would find in a declaration or affidavit (written testimony under penalty of perjury). In light of the pro se Debtors prosecuting this Amended Motion, the has reviewed the Affirmation, and to the extent testimony is to be presented by either of the two debtors, that can be properly documented.

The Affirmation begins with a candid acknowledgment of stumbles along the way by *the pro se* debtors. While pro se parties must comply with the law, and rules, the courts recognize that pro se parties who are not lawyers can stumble. While this does not mean that pro se parties can "write their own" law and rules, the judicial process is not a "gotcha game" where one stumble flushes someone from the courthouse. The Affirmation includes a review of the legal and personal faith path of debtor Torrie Gidget Carter in this process.

On page 3 of the Affirmation, Debtors discuss proceedings in State Court in connection with the Unlawful Detainer Action, for which a Unlawful Detainer Judgment has been entered, concerning Debtors seeking a stay pending appear, changing hearing dates, and having only magistrates in the courthouse when that was considered.

Additionally Debtors state that they "Respectfully request that the court place in the hands of Federal National Mortgage Association and the alleged counsel/Attorneys, McCarthy & Holthus, LLP to be in control of a quick resolve to the matter simply by their answer/production of Documents of 2004 Subpoenas." Affirmation, p. 3:15-17; Dckt. 166.

DECEMBER 13, 2022 HEARING, EVALUATION, AND SCHEDULING CONFERENCE

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463 (citations omitted).

In considering the above factors and the circumstances of this case, the court determines a partial vacating of the court's Order Granting Relief From the Automatic Stay is proper. Which the December Holidays, the court's hearing calendar is limited. Debtors have struggled, in *pro se*, in this Case but have learned and are attempting to prosecute their rights and interests.

This relief from stay order relates to an Unlawful Detainer Judgment in the State Court. Debtors are facing an eviction on December 14, 2022, pursuant to a State Court Unlawful Detainer Judgment, which Debtors are currently appealing but for which Debtors have not obtained a stay pending appeal. Debtors have set forth in the pleadings and recounted at the hearing some challenges faced in trying to get a stay pending appeal.

If the court does not partially vacate the stay so as to stop the December 14, 2022 eviction, Debtor's Amended Motion to Vacate will be rendered moot. This would be of great prejudice to Debtors. Conversely, delaying the eviction for Fannie Mae does not appear to be of any significant prejudice.

Additionally, the Debtors now understand that they need to actively pursue their appeal of the State Court Unlawful Detainer Judgment, and that it is not within this court's prerogative to "overrule" or "reverse" the State Court Judgment. Debtors understand that they must actively prosecute that appeal, and may need to seek a stay pending appeal from the State Court.

Here, Debtors assertion is that Fannie Mae is not before this court and the attorneys who purport to represent Fannie Mae are not so employed. Fannie Mae has now filed an Affidavit attesting to such, though Debtors do not recognize the person providing the Affidavit as credible.

Debtors are pursuing discovery in connection with this Amended Motion (using the 2004 Examination document production process). Debtors have advanced other more unique arguments concerning ownership of property, what is a note, and that they are creditors of the government.

Weighing all of the factors, prejudice to Debtors, prejudice to Fannie Mae, the ability of the court to promptly adjudicate the issues on the Amended Motion to Vacate after the first of the year, the prejudice to Debtors of allowing the eviction to proceed prior to the hearing on the Amended Motion; the court concludes that vacating that portion of the Order granting relief from the stay to allow Fannie Mae to obtain possession of the Property, evict Debtors from the Property, remove the Debtors and assets of the Debtors from the Property, or to interfere with Debtors and Debtors' grandchildren (who are living with Debtors) occupying, living in, or otherwise using the Property is VACATED on an interim basis pending final hearing on the Debtors' Amended Motion to Vacate the Order Granting Relief From the Stay is proper.

The Automatic Stay is in full force and effect, the court's order having been partially vacated, with respect to the acts or actions set forth in the forgoing paragraph.

The Order Granting Relief From the Stay is not vacated as to Fannie Mae providing notices, obtaining supplemental orders from the State Court for continuing the eviction to a later date, or issuing instructions or taking other actions to continue the eviction under after the January 24, 2022 Final Hearing on the Motion to Vacate. This protects the time and money invested to date in obtaining the Unlawful Detainer Judgment by Fannie Mae and only delays the eviction process, if Fannie Mae prevails, and additional 40 days (with 16 of those being the Christmas/New Years period at the end of the year).

The court has made it clear that this is the Final Hearing on the Amended Motion to Dismiss. The court has also addressed what is required of a debtor who seeks to use the automatic stay in lieu of obtaining a stay pending appeal (and posting the required bond). Generally, this requires making a monthly deposit into a blocked account or with the Clerk of the Court, generally in an amount equal to a mortgage payment for the property, which serves as a self-funded bond for damages caused to the stayed party if the debtor loses on appeal. The automatic stay is a "free stay pending appeal."

The prior order of the court is partially vacated on an interim basis pending the Final Hearing on the Amended Motion to Vacate.

PART II
SUPPLEMENTAL PLEADINGS
FINAL MOTION BEFORE THE COURT

Supplement to Amended Motion

On December 23, 2022, Debtors filed a Supplement to the Amended Motion. Dckt. 181. Debtors state:

1. The court should grant the Motion because entry of judgment would cause a harsh or unfair result. Supplement, Dckt. 181 at ¶ 8.

2. The court may set aside an entry of judgment for good cause and may set aside a final judgment under Rule 60(b). *Id.* at ¶ 9 (citing *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90 (2d Cir. 1993)).

3. Fannie Mae has failed or refuses to produce the actual Note. *Id.* at 3:14-15. Since they cannot prove the existence of the note, there is no note. *Id.* at 3:14-15.

The court notes, even if Fannie Mae were no longer in possession of the Note, " . . . a person no longer in possession of an instrument is nonetheless entitled to enforce it if that person was in possession and entitled to enforce it when the loss of possession occurred." *In re Allen*, 472 B.R. 559, 566 (B.A.P. 9th Cir. 2012). "These rules do not absolutely require physical possession of a negotiable instrument in order to enforce its terms. Rather, Article 3 states that the ability to enforce a particular note - a concept central to our standing inquiry - is held by the 'person entitled to enforce' the note." *In re Veal*, 450 B.R. 897, 910 (B.A.P. 9th Cir. 2011)

4. The court must take mandatory judicial notice that Fannie Mae is a "subset of the debt collection racket, a wide-spread, far-reaching scam of artists." Supplement, Dckt. 181 at 5:5-10.

Federal Rule of Evidence 201 governs (and allows) judicial notice of certain adjudicative facts. That rule specifies the court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b). The court does not find the facts Debtors are requesting the court to take judicial notice of fall under the Federal Rules of Evidence Rule 201(b).

5. Debtors cite Maryland law to discuss nonassignability of guaranties. Supplement, Dckt. 181 at 2:16-18.

The court does not find the Maryland law cited as compelling. Additionally, as the court has previously stated in prior orders and at prior hearings (including hearings on this matter), in adjudicating motions for relief from the automatic stay the court does not determine rights and interests in property. Rather, these are to be determined in either in the State Court, District Court (if a basis exists for federal court jurisdiction), or in the Bankruptcy Court (adversary proceeding, Fed. R. Bank. P. 7001) pursuant to the federal court jurisdiction for matters arising under the Bankruptcy Code, in the bankruptcy case, or related to the bankruptcy case (28 U.S.C. § 1334).

6. The attorney for Fannie Mae cannot testify, and, therefore, Fannie Mae has called no competent fact witness with factual sufficiency to prove their claim a duty was breached.

Again, the court is not determining the rights and interests in the property in the motion for relief. Additionally, under the California Rules of Professional Conduct, Rule 3.7, there are circumstances in which a lawyer may act as an advocate in a trial: (1) the lawyer's testimony relates to an uncontested issue or matter; (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer has obtained informed written consent from the client. Limitations on lawyers as witnesses only applies to trials.

> As discussed in Weinstein's Federal Evidence § 602.02:
>
> > A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness's testimony must be based on events perceived by the witness through one of the five senses.
>
> Recently, the Ninth Circuit Court of Appeal addressed this personal knowledge issue, stating:
>
> > Under Rule 602, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FED. R. EVID. 602. Rule 602 requires any witness to have sufficient memory of the events such that she is not forced to 'fill[] the gaps in her memory with hearsay or speculation.' 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE Evidence § 6023 (2d ed. 2007). Witnesses are not 'permitted to speculate, guess, or voice suspicions.' *Id.* § 6026. However, '[p]ersonal knowledge includes opinions and inferences grounded in observations and experience.' *Great Am. Assurance Co. v. Liberty Surplus Ins. Co.*, 669 F. Supp. 2d 1084, 1089 (N.D. Cal. 2009) (citing *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999)). Lay witnesses may testify about inferences pursuant to Rule 701:
>
> > > If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
> >
> > FED. R. EVID. 701.

United States v. Whittemore, 776 F.3d 1074, 1082 (9th Cir. 2015).

Therefore, lawyers do, and often, have the ability to testify as witnesses so long as they have personal knowledge as to the facts at hand.

Fannie Mae's Opposition

> Fannie Mae filed an opposition to Debtors' Motion to Vacate. Dckt. 184. Fannie Mae states:
>
> > Debtors have not offered any meritorious evidence or argument which would meet the elements required under 60(b) to justify reconsideration of the Relief from Stay Order to be vacated. The Motion only contains a series of stated legal conclusions but unsupported by any evidence or facts.

Id. at 2:8-11. In relevant part, Fannie Mae argues:

1. Debtors' Motion lists new legal theories not initiated during their initial stay from relief hearing. Debtors' new legal theories are not appropriate under the Federal Rules of Civil Procedure 60(b) standard. *Id.* at 4:1-15.

2. There is no legal basis to vacate the relief from stay as Fannie Mae obtained an Unlawful Detainer Judgment on May 5, 2022 and a Write of Possession on May 10, 2022. Both were obtained pre-petition, and the Ninth Circuit has ruled that an eviction does not violate the automatic stay. *Id.* at 4-5.

3. The arguments asserted by Debtors are not relevant to the stay termination because:

   a. Fannie Mae is not a creditor in the bankruptcy case, therefore, filing a Proof of Claim is inappropriate.

   b. Debtors have not established Fannie Mae is not entitle to relief from stay.

   c. Fannie Mae is a real party in interest and the owner of the Property.

   Id. at 6.

Debtors' Reply to Opposition

Debtors filed a Reply to Fannie Mae's Opposition on January 17, 2023. Dckt. 188. Debtors state:

1. Fannie Mae's security interest is not adequately shown on the Motion. *Id.* at 4:19-21.

2. The Superior Court should have examined all elements of Fannie Mae's claim. *Id.* at 5:3-6.

3. The Deed of Trust that was foreclosed on was invalid because JPMorgan Chase Bank, NA was not the lender.

4. The state court lacked jurisdiction to enter a judgment in the eviction hearing and the judge relied on improper testimony from an attorney witness, "Attorney Chase." *Id.* at 8:18-23.

5. In this case, Fannie Mae has failed to produce admissible evidence because they improperly used an attorney as a witness. *Id.* at 9:21-24.

6. Debtors are entitled to relief under Federal Rules of Civil Procedure 60(b) under:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, misconduct by an opposing party;

(4) the judgement is void; . . .

(6) any other reason that justifies relief.

Id. at 11:9-15.

Debtors' Request for 2004 Examinations

Debtors filed a 2004 Motion, pursuant to Federal Rules of Bankruptcy Procedure 2004, requesting examination of individuals of Fannie Mae, JPMorgan Chase Bank, NA, Federal Deposit Insurance Corporation, United States Security Exchange Commission, and National Association of Securities Dealers Automated Quotations, Stock Exchange. Dckt. 191. Debtors are requesting the production of documents, only.

January 24, 2023 Hearing

Debtor commenced this bankruptcy case on June 21, 2022. In the seven months since this case has been pending, Debtor has not been able to prosecute a Chapter 13 Plan. The court has previously addressed with Debtor the need for them to prosecute the various legal theories, rights, and claims against Fannie Mae in the appropriate State or Federal Court proceeding. Those legal arguments and disputes are not adjudicated in a motion for relief from the stay.

The court also addressed the need for Debtor to diligently prosecute an appeal of the unlawful detainer judgment. This court cannot "reverse" a state court or other court judgment.

The court has, in light of Debtor prosecuting this bankruptcy case in pro se, been overly "generous" in allow them time to get an attorney, prosecute this bankruptcy case, and prosecute their appeal and challenges to Fannie Mae's asserted ownership of the Property in State or Federal [if federal court jurisdiction exits] Court lawsuits.

In granting the Motion for Relief From the Automatic Stay, the courts Ruling include the following:

Movant has provided a properly authenticated copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership and the Judgment. Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel, relief from stay proceedings are summary proceedings that address

issues arising only under 11 U.S.C. Section 362(d). *Hamilton v. Hernandez (In re Hamilton)*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427, at *8–9 (B.A.P. 9th Cir. Aug. 1, 2005) (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of Case Number: 2022-21528 Filed: 10/18/2022 Doc # 100 parties, or issue declaratory relief as part of a motion for relief from the automatic stay in a Contested Matter (Federal Rule of Bankruptcy Procedure 9014).

That Ruling stands correct today. As set forth in detail in the Amended Motion and Supplemental Pleadings, Debtor's opposition and dispute goes to non-bankruptcy substantive law, which by Debtor's reading renders the rights, interests, note, and deed of trust insufficient to have conducted a non-judicial foreclosure sale.

Those disputes are not litigated in a relief from stay motion. Debtor needs to litigate those in state or federal court lawsuits, not this Motion for Relief.

There has been no mistake or error in the court's prior ruling. Going through the Rule 60(b) grounds:

(1) There has been no mistake, inadvertence, surprise, or excusable neglect by Debtor.

(2) Debtor has not presented the court with newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) There has been no fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by Movant. While Debtor disputes the evidence, that does not equate to fraud. In fact, the evidence upon which the relief is sought, the State Court Unlawful Detainer Judgment is quite simple and easily documented.

(4) The Order granting relief is not void;

(5) The Order has not been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) Debtor has not presented the court with any other reasons that justifies relief in voiding the Order granting relief from the stay. Debtor has disputes Debtor seeks to assert and rights to litigate, but those are not proper in a relief from stay motion..

Since the September 29, 2022 denial of confirmation for Debtor's Amended Plan (Order, Dckt. 72), Debtor has not filed a further plan and has not prosecuted a plan for confirmation.

The fights and battles Debtor seeks to have are not being prosecuted as part of a bankruptcy plan. In substance, the automatic stay has been a free, non-bonded, non-adequate protection funded, stay of the State Court Unlawful Detainer Judgment.

The Motion to Vacate is denied.

At the hearing, XXXXXXXXXX

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

The Motion to Vacate filed by Michael Carter and Torrie Gidget Conn ("Debtors") 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 Vacate is denied.

6. 21-21429-E-13 JAMIE HOWELL
Stacie Power

7 thru 9

OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK TRUST NATIONAL ASSOCIATION
12-14-22 [178]

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 December 14, 2022. By the court's calculation, 41 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 dismissed without prejudice.

The Objection appears to be nearly identical to a second Objection ("Second Objection"), Docket Control No. RAS-1, filed by the same Creditor, U.S. Bank Trust National Association ("Creditor"). The Second Objection was filed only two hours after the current Objection.

The current Objection does not comply with all local rules, including using a Docket Control Number and the Eastern District of California Certificate of Service Form (Form EDC 007-005). The Second Objection complies with these rules. Given the compliance with specific local rules in the Second Objection, it appears to the court this Objection was inadvertently submitted. At the hearing, XXXXXXXXXX

The Objection to Confirmation of the Plan is dismissed without prejudice, the court hearing and deciding on the merits of Creditor's objections through Docket Control No. RAS-1.

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 U.S. Bank Trust National Association ("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 dismissed without prejudice.

7.	**21-21429-E-13** **DPC-1**	**JAMIE HOWELL** **Stacie Power**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **12-21-22 [184]**

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, and parties requesting special notice on December 21, 2022. 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 sustained.

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

A. Debtor has not been examined.

B. Plan contains "Docusigned" signature.

C. 521 Documents not provided.

D. Debtor has possible additional expenses.

E. Debtor's Chapter 13 documents are incomplete/inaccurate.

F. Debtor may be unable to make payments called for under the Plan.

G. The Plan fails the Chapter 7 Liquidation analysis.

H. The terms for payment of the Debtor's Attorney's fees are unclear.

I. The Plan is overextended.

DISCUSSION

Trustee's objections are well-taken.

Failure to be Examined at 341 Meeting

Debtor did appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341, but was not examined, as the Debtor was ill and did not have her documents readily available. 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 Trustee agreed to continue the meeting to January 19, 2023, at 1:00 pm. At the hearing, Trustee reported xxxxxxxx.

Plan Contains DocuSigned Signature by Debtor

Debtor's signature on the Debtor's Plan has been electronically signed with the "DocuSign" program. The Trustee cannot assess whether the documents on file with the Court were signed at they time they were filed, and the Trustee has not received any proof that the documents were signed with a wet ink signature before filing.

Federal Rules of Bankruptcy Procedure 1008 states:

> All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. §1746.

Federal Rules of Bankruptcy Procedure 9011 states:

> Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> Local Bankruptcy Rule 9004-1(c) states:
>
> All pleadings and non-evidentiary documents shall be signed by the individual attorney for the party presenting them, or by the party involved if that party is appearing in *propria persona*. Affidavits and certifications shall be signed by the person offering the evidentiary material contained in the document. The name of the person signing the document shall be typed underneath the signature.
>
> . . .
>
> (1)(A) . . . Unless the electronically filed document has been scanned and shows the registered user's original signature or bears a software-generated electronic signature thereof, an "/s/" and the registered user's name shall be typed in the space where the signature would otherwise appear.

Both the Federal Rules and Local Rules require an original signature on all pleadings and non-evidentiary documents. Here, evidence shows that the documents filed may not have been originally signed. At the hearing, XXXXXXXXXX

Combined Pay Stubs &Tax Returns

Debtor has not provided Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). Also, Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Cannot Comply with the Plan

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

1. The Debtor fails to list any secured creditors on Schedule D. However, Wells Fargo Auto has filed two secured proofs of claim in the amounts of $50,142.04 and $40,910.10, for a 2019 Chevy Camaro and a 2020 Harley Davidson. These debts are not provided for in the Plan, and there are no expenses listed on Schedule J to provide for payment of these claims.

Without an explanation for an alternative way to provide for that debt the Trustee cannot ascertain whether or not the Plan is feasible.

2. The Debtor proposes plan payments of $3,650.00, however, the Debtor's budget does not support the plan payment. Debtor's Schedule J indicated monthly net income of $980.61.

3. Debtor cannot make the payments under the Plan because the Debtor's schedules are incomplete. The errors in the schedules are as follows:

   a. Debtor has failed to disclose several secured assets (Court Claims #17 and #18).

   b. The Debtor has failed to list a dollar amount for the exemption claimed on 9 Charley Lynds Way, Forbestown, CA, 95941.

   c. The Debtor failed to include all secured claims on Schedule D.

   d. The Debtor has inconsistencies in their Schedule I.

4. The Trustee is unable to effectively administer the plan as the terms of payment of the Debtor's attorney's fees are unclear. The Plan and the Disclosure of Compensation state that the Attorney received $1,500.00 prior to filing the case and $0.00 shall be paid through the plan. However, in the Plan under "Administrative expenses" Debtor specifies that the monthly administrative expense shall be $10531.06 per month. The Statement of Right and Responsibilities of Chapter 13 Debtors and their Attorneys have not been filed identifying what fees have been charged and what fees were paid prior to filing this case.

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

Debtor Fails Liquidation Analysis

Debtor's plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Trustee states that Debtor's non-exempt equity totals $514,612.50 and proposes to pay the unsecured creditors a 25% dividend, or approximately $48,436.43 based on scheduled claims. With Debtor's nonexempt equity totaling $514,612.50, it is unclear why Debtor is only proposing to pay unsecured claims only twenty-five percent, rather than proposing a one hundred percent plan.

Plan Term is in Excess of 60 months

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to Trustee, the Plan will complete in 66 months. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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

The court shall issue 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.

8. **21-21429-E-13 RAS-1** | **JAMIE HOWELL** **Stacie Power** | **OBJECTION TO CONFIRMATION OF PLAN BY U.S. BANK TRUST NATIONAL ASSOCIATION 12-14-22 [181]**

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 December 14, 2022. By the court's calculation, 41 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.

U.S. Bank Trust National Association ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor's proposed Plan fails to cure Creditor's pre-petition arrears.

Failure To Provide Evidence

Creditor's Objection makes several factual assertions. However, no declaration of the Creditor or other evidence was filed to support those assertions.

At a very basic level, every law student is taught that the court relies on properly authenticated, admissible evidence to establish facts in any proceeding–the court cannot and does not merely take counsel at their word. Apart from the practical effect that the court has been given a request for relief without any established factual basis, the Local Rules also affirmatively require that evidence be filed along with every

motion and request for relief. LOCAL BANKR. R. 9014-1(d)(3)(D). Failure to comply with the Local Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g).

However, on January 11, 2023, Creditor filed Proof of Claim 19-1 which asserts a claim in the amount of ($264,163.33), for which it is asserted there is an ($80,961.56) default to be cured.

As this court has discussed in other cases, 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).

DISCUSSION

Failure to Cure Arrearage of Creditor

The objecting creditor holds a deed of trust secured by Debtor's residence. Debtor has proposed a Plan which asserts that the Creditor's pre-petition arrears are $20,000.00. However, Creditor has filed a timely proof of claim in which it asserts the pre-petition arrearages are expected to be $66,032.09. The Plan does not propose to cure the entirety of the arrearages the Creditor has indicated. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. See 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages..

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

The court shall issue 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 U.S. Bank Trust National Association ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

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

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 November 22, 2022. By the court's calculation, 63 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

The debtor, Jerry Richard Lopez ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for $2,700.00 for 9 months and increase to $4,481.00 in May 2023 for the remainder of the plan and a 0% dividend to general unsecured claims. Amended Plan, Dckt. 41.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Opposition on January 24, 2023. Dckt. 48. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor is delinquent in Plan payments.

B. Debtor may fail liquidation analysis.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is $2,700.00 delinquent in plan payments, which represents one month of the $2,700.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

Debtor Fails Liquidation Analysis

The Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). The Chapter 13 Trustee states that Debtor has supplied insufficient information relating to non-exempt funds that may be received from a lawsuit against Debtor's previous landlord.

In Debtor's Schedule A/B, Debtor states they have a "[p]ossible lawsuit against previous landlord for used household items and clothing the debtor was not allowed access to; incident occurred [*sic*] in 11/2019. Debtor has not hired an attorney." Schedule A/B, Dckt. 16 ¶ 33. Debtor's Plan should be amended to include any possible funds received as a lump sum payment.

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, Jerry Richard Lopez ("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 denied, and the proposed Chapter 13 Plan is not confirmed.

10. 18-26350-E-13 PGM-6 | **ROQUE DELAROSA**
Peter Macaluso | **MOTION TO WAIVE FINANCIAL MANAGEMENT COURSE REQUIREMENT,WAIVE SECTION 1328 CERTIFICATE REQUIREMENT, SUBSTITUTE PARTY, AS TO DEBTOR**
12-27-22 [114]

Appearance at the Hearing is Not Required
The Court Posted as a Tentative Ruling
If Counsel for Successor Representative Has
Any § 1328 Certification Issues to Address
With the Court

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 27, 2022. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute and Waive Financial Management Course Requirement is granted. The Court does not waive the Section 1328 Certification

Successor-in-interest, Cathleen Delarosa, ("Successor") seeks an order approving the motion to substitute for the deceased Debtor, Roque Delarosa. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016 and 7025.

Deceased Debtor filed for relief under Chapter 13 on October 8, 2018. On December 9, 2021, deceased Debtor's Chapter 13 Plan was confirmed. Dckt. 101. On November 3, 2022, deceased Debtor Roque Delarosa passed away. Successor asserts that she is the lawful successor and representative of deceased Debtor.

Successor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party. A Suggestion of Death was filed on December 2, 2022. Dckt. 112. Successor is the surviving spouse of the deceased party and is the successor's heir and lawful representative. Successor states that she will continue to prosecute this case in a timely and reasonable manner.

TRUSTEE'S NONOPPOSITION

Chapter 13 Trustee, David P. Cusick ("Trustee"), filed a nonopposition on January 10, 2023. Dckt. 120.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads (In re Eads)*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.

> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." FED. R. BANKR. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Local Bankruptcy Rule 5009-1(b) requires the filing with the court of Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. LOCAL BANKR. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge.

Here, Cathleen Delarosa has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 112. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Successor Cathleen Delarosa, as the surviving spouse of the deceased party and as the successor's heir and lawful representative, may continue to administer the case on behalf of the deceased debtor, Roque Delarosa. The court grants the Motion to Substitute Party and to waive the Financial Management Course requirement, but does not waive the requirement for the successor to provide the § 1328 certifications..

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

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

The Motion for Substitute After Death filed by Successor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and Cathleen Delarosa is substituted as the successor-in-interest to Roque Delarosa and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

IT IS FURTHER ORDERED that the requested waiver of post-petition Financial Management Course completion is granted and such requirement waived. The court does not waive the other 11 U.S.C. § 1328 certifications, which may be provided by the successor representative of the Late Debtor Roque Delarosa.

11. 22-22864-E-13 AP-1 | **NATHANIEL SOBAYO** | **OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A.**
Pro Se | **12-22-22 [76]**

14 thru 17

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 (*pro se*), Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 22, 2022. By the court's calculation, 33 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.

Wells Fargo Bank, NA ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor's Plan was not proposed in good faith.

B. Debtor's Plan fails to provide for ongoing post-petition payments.

C. Debtor's Plan is not feasible.

DEBTOR'S REQUEST FOR CONTINUANCE

Debtor filed a request application for an order continuing "Defendant's" Motion. Dckt. 82. Debtor requests at least a 120 day continuance in order to secure a court-appointed lawyer. Debtor does not

cite any legal basis for the court appointing counsel for Debtor in this civil proceeding. While in State and Federal proceedings there are Public Defender and Federal Defender, as well as attorneys to volunteer to serve on panels funded by the State or Federal agencies to defend persons in criminal matters, no such mechanism exists for civil matters in Federal Court.

The court has already addressed in detail the lack of court authority to appoint counsel in the Civil Minutes of Creditor Gordon Property Management San Francisco's Motion for Relief from Automatic Stay. Docket Control No. JHR-1, Civil Minutes, Dckt. 96.

At the hearing, XXXXXXXXXX

DISCUSSION

Creditor's objections are well-taken.

Multiple Bankruptcy Filings

Creditor argues that Creditor has been delayed in foreclosure proceedings since 2018 by Debtor's multiple bankruptcy filings. Debtor's prior bankruptcy cases were dismissed for failure to prosecute. Creditor argues the filings are an attempt to delay the foreclosure of the Property.

Creditor cites *In re Goeb*, 675 F.2d 1386 (9th Cir. 1982) and *In re Warren*, 89 B.R. 87 (B.A.P. 9th Cir. 1988).

Under the Ninth Circuit decision, *In re Goeb*, the Ninth Circuit states to determine whether there is good faith, a bankruptcy court, "must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Act, or otherwise proposed his Chapter 13 plan in an inequitable manner." *In re Goeb*, 675 F.2d at 1390. The Ninth Circuit states a court must make its determination in light of all mitigating factors.

Under the Ninth Circuit Bankruptcy Appellate Panel Decision (B.A.P.) , *In re Warren*, the B.A.P. listed a number of guidelines for determining 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.

In re Warren, 89 B.R. at 93. However, as explained in the leading treatise on bankruptcy, "the fact that bankruptcy relief has been sought previously should cease to be a factor in determining good faith when a debtor proposes to pay to creditors all that the debtor can reasonably afford to pay." 8 Collier on Bankruptcy P 1325.04 (16th 2022). Although a debtor's history of filings and dismissals is relevant, a judge should ask whether there was misrepresentation, manipulation, or otherwise inequity in filing the petition or plan. *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994).

In Debtor's prior *Ex Parte* Motion to Extend the Automatic Stay, Dckt. 10, Debtor addresses their prior filings, some with the assistance of counsel:

a. Eastern District of California Case 22-20063; filed with counsel who substituted out, and then by Debtor in *pro se*.

i. Filed.....January 11, 2022

ii. Dismissed.....September 14, 2022

iii. Grounds for Dismissal

(1) The court's findings stated in the Civil Minutes (22-20063; Dckt. 89) include:

(a) Debtor has failed to file tax returns.

(b) Debtor failed to file an amended Chapter 13 Plan after denial of confirmation of original Plan filed.

(c) Debtor had not obtained an attorney to represent him during the period from the August 2, 2022 first hearing date on the Motion to Dismiss and the continued hearing on September 13, 2022.

(d) Business Questionnaire, bank statements, and non-filing spouse financial statements had not been provided by Debtor.

(e) The Schedules and Statement of Financial Affairs, which did not disclose non-filing spouses:

(i) income,
(ii) credit card debt,
(iii) co-debtor obligations,
(iv) payments made to Carrington Mortgage,
(v) lawsuits, and
(vi) property being repossessed;

1)and such Schedules and Statement of Financial Affairs had not been amended during the nine months the case was pending.

b. Northern District of California Chapter 13 Case 19-50887, represented by William Winters Esq. (for a portion of the case).

i. Filed.....April 30, 2019

ii. Dismissed.....August 26, 2019

iii. Grounds for Dismissal

(1) Trustee's Motion alleged grounds that Debtor was not providing proof of making pre-confirmation payments on secured claims. 19-50887; Motion, Dckt. 31.

c. Northern District of California Chapter 13 Case 18-52672, represented by William Winters, Esq.

i. Filed..... December 5, 2018

ii. Dismissed.....February 4, 2019

iii. Grounds for Dismissal

(1) Though granted extensions, Debtor had not filed required documents or provide the Trustee with most recent tax returns. 18-52672; Order, Dckt. 33, and Order Denying Motion to Vacate, Dckt. 40.

Unlike Creditor, the court does not find Debtor's prior filings necessarily indicate bad faith. Rather, it appears Debtor ran into some unfortunate circumstances with securing counsel.

In the current case, Debtor states, "Debtor will enthusiastically and fully perform the terms of a confirmed plan in this subject pending chapter 13 petition case, Debtor pleads for the grace and the mercy of the Presiding Judge, to grant the approval of this motion." *Ex Parte* Motion to Extend Automatic Stay, Dckt. 10 at ¶ 6.

Looking at Schedule I, Debtor has been working at St Mary's College since October 10, 2022. Schedule I, Dckt. 19. In Debtor's prior case in this district, as of January 18, 2022, Debtor only had net income of $150 per month. Case No. 22-20063, Schedule I, Dckt. 10. In the current case, Debtor now estimates their net income of $2,472.98. Schedule I, Dckt. 19. This indicates a Chapter 13 case may be more feasible under the current financial circumstances of Debtor.

The court does not find, under the totality of circumstances, that the current case was not proposed in good faith. The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation.

Failure to Provide for a Secured Claim

Creditor asserts a claim of $862,700.56 in this case. Debtor's Schedule D estimates the amount of Creditor's claim as $724,000.00 and indicates that it is disputed, and does not indicate the nature of the lien. However, Creditor's Proof of Claim, Proof of Claim 10-1, indicates the claim is secured by a deed of trust on Debtor's residence, and there is $185,672.12 in pre-petition arrearages.

The Plan does not propose to make ongoing payments or cure those arrearages. The Plan, instead, purposes to "list and sell his property . . . to satisfy the secured claim of [Creditor]."

If Debtor elects to provide for Creditor, they must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for ongoing payments and the full payment of arrearages.

Infeasible Plan

Creditor alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). First, Debtor has provided no details regarding the proposed sale of the Property. Second, it is unclear whether Debtor has the ability to sell and transfer title to the Property. Thus, the Plan may not be confirmed.

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

The court shall issue 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 Wells Fargo Bank, NA ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

12. 22-22864-E-13 DPC-1 | **NATHANIEL SOBAYO** Pro Se | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** 12-20-22 [72]

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 (*pro se*), Debtor's Attorney, and parties requesting special notice on December 20, 2022. 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.

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

A. Debtor has not provided sufficient evidence to the court that Debtor will be able to sell the Property.

B. Not all tax returns have been filed.

C. Debtor has not supplied to the Trustee various business documents.

DEBTOR'S REQUEST FOR CONTINUANCE

Debtor filed a request application for an order continuing "Defendant's" Motion. Dckt. 82. Debtor requests at least a 120 day continuance in order to secure a court-appointed lawyer. Debtor does not

cite any legal basis for the court appointing counsel for Debtor in this civil proceeding. While in State and Federal proceedings there are Public Defender and Federal Defender, as well as attorneys to volunteer to serve on panels funded by the State or Federal agencies to defend persons in criminal matters, no such mechanism exists for civil matters in Federal Court.

The court has already addressed in detail the lack of court authority to appoint counsel in the Civil Minutes of Creditor Gordon Property Management San Francisco's Motion for Relief from Automatic Stay. Docket Control No. JHR-1, Civil Minutes, Dckt. 96.

At the hearing, XXXXXXXXXX

DISCUSSION

Failure to Afford Plan Payment / Cannot Comply with the Plan

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

It is not clear to whether the claims of Select Portfolio or Wells Fargo Bank, N.A. were in default. Additionally, the Plan does not disclose whether Debtor will continue with ongoing mortgage payments.

Additionally, there are numerous discrepancies and incomplete information in Debtor's Petition, particularly on Debtor's Schedules A/B, D, and Statement of Financial Affairs. There court is unable to determine Debtor's financial reality.

Also, Debtor has not provided any information on how they intend to sell their property, which Debtor intends to use the proceeds to fund the Plan.

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

Failure to File Tax Returns

The IRS has records that Debtor failed to file pre-petition tax returns for the 2019, 2020, and 2021 tax years. 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).

Failure to File Documents Related to Business

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

A. Questionnaire,
B. Two years of tax returns,
C. Six months of bank account statements, and

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302(c); FED. R. BANKR. P. 4002(b)(2) & (3). Debtor is required to submit those documents and cooperate with Trustee. 11 U.S.C. § 521(a)(3).

Without Debtor submitting all required documents, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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

The court shall issue 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. 22-22864-E-13 NLG-1 | **NATHANIEL SOBAYO** **Pro Se** | **OBJECTION TO CONFIRMATION OF PLAN BY THE BANK OF NEW YORK MELLON** **12-19-22 [59]**

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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on December 19, 2022. By the court's calculation, 36 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.

The Bank of New York ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor's plan fails to provide for the curing of the default on the Creditor's claim.

DEBTOR'S REQUEST FOR CONTINUANCE

Debtor filed a request application for an order continuing "Defendant's" Motion. Dckt. 82. Debtor requests at least a 120 day continuance in order to secure a court-appointed lawyer. Debtor does not cite any legal basis for the court appointing counsel for Debtor in this civil proceeding. While in State and Federal proceedings there are Public Defender and Federal Defender, as well as attorneys to volunteer to serve on panels funded by the State or Federal agencies to defend persons in criminal matters, no such mechanism exists for civil matters in Federal Court.

The court has already addressed in detail the lack of court authority to appoint counsel in the Civil Minutes of Creditor Gordon Property Management San Francisco's Motion for Relief from Automatic Stay. Docket Control No. JHR-1, Civil Minutes, Dckt. 96.

At the hearing, XXXXXXXXXX

DISCUSSION

Creditor's objections are well-taken.

Failure to Cure Arrearage of Creditor

The objecting creditor holds a deed of trust secured by Debtor's residence. Creditor has filed a timely proof of claim in which it asserts $4,242.88 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

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

The court shall issue 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 Bank of New York ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

14.	**22-22864-E-13** **USA-1**	**NATHANIEL SOBAYO** **Pro Se**	**OBJECTION TO CONFIRMATION OF PLAN BY INTERNAL REVENUE SERVICE** **12-20-22 [63]**

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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on December 20, 2022. 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.

The United States Internal Revenue Service ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor has failed to file pre-petition tax returns for 2019, 2020, and 2021.

B. Debtor has failed to address their tax liability.

DEBTOR'S REQUEST FOR CONTINUANCE

Debtor filed a request application for an order continuing "Defendant's" Motion. Dckt. 82. Debtor requests at least a 120 day continuance in order to secure a court-appointed lawyer. Debtor does not cite any legal basis for the court appointing counsel for Debtor in this civil proceeding. While in State and Federal proceedings there are Public Defender and Federal Defender, as well as attorneys to volunteer to serve on panels funded by the State or Federal agencies to defend persons in criminal matters, no such mechanism exists for civil matters in Federal Court.

The court has already addressed in detail the lack of court authority to appoint counsel in the Civil Minutes of Creditor Gordon Property Management San Francisco's Motion for Relief from Automatic Stay. Docket Control No. JHR-1, Civil Minutes, Dckt. 96.

At the hearing, XXXXXXXXXX

DISCUSSION

Creditor's objections are well-taken.

Failure to File Tax Returns

The IRS has records that Debtor failed to file pre-petition tax returns for the 2019, 2020, and 2021 tax years. 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).

Failure to Provide for a Priority Claim

Creditor has a claim for $162,514.81 in secured debt, $95,422.38 in unsecured priority debt, and $87,719.41 in general unsecured debt. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2).

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

The court shall issue 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 United States Internal Revenue Service ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

15. 18-20567-E-13 DPC-2 | **JOYCE BILYEU** Lucas Garcia | **CONTINUED MOTION TO DISMISS CASE** 7-27-22 [57]

The Motion to Dismiss is granted, and the case is dismissed.

The Chapter 13 Trustee, David Cusick ("Trustee"), filed this Motion on July 27, 2022 requesting that the court seeks dismissal of the case on the basis that:

1. the debtor, Joyce Ann Bilyeu ("Debtor"), is delinquent in Plan payments.

Debtor was determined to be $2,799.00 delinquent in plan payments, which represents multiple months of the $700.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Based on the foregoing, the court dismissed the case. Order, Dckt. 62.

VACATING DISMISSAL AND RESETTING HEARING ON MOTION TO DISMISS

On November 9, 2022, this court entered an order vacating the dismissal. Dckt. 83. The court's detailed findings in vacating the dismissal order and the recitation of the Debtor's "mistakes" is set forth in the Civil Minutes from the hearing on the Motion to Dismiss. Dckt. 82.

DECEMBER 13, 2022 RESET HEARING ON MOTION TO DISMISS

On December 6, 2022, the Trustee provided the court with a Supplemental Pleading (titled Status Report), Dckt. 86, asserting the following:

A. Debtor's Plan payments are currently delinquent $4,899.00, and no Plan payment has been made since September 1, 2022.

B. The delinquency includes the $3,500.00 that Debtor's counsel was ordered to disburse from his Trust Account to the Chapter 13 Trustee.

C. The Debtor is now in month 58 of a 60 month Plan. While 57 payments totaling $41,241.00 are required under the Plan, Debtor has made payments totaling only $36,342.00.

D. Debtor has taken no action to prosecute this case since the court vacated the dismissal.

Based on the Debtor's further defaults, the Trustee renews the request that this case be dismissed.

As was clear in the court addressing the Motion to Vacate, the monetary defaults were caused by the Debtor incorrectly terminating the Plan payments. From the Trustee's report, Debtor (though presumably having the excess funds by not having made the Plan payments) is not prosecuting this case.

Though Debtor has offered no opposition, the Trustee requested a continuance. The Trustee reports that the Debtor and Debtor's counsel have not yet complied with this court's prior order to disburse the $3,500.00 that Debtor's counsel held in his trust account for the plan payments be immediately disbursed to the Trustee so that the monies could be disbursed through the Plan to creditors.

The court continues this hearing to afford the Trustee to consider whether further motions will be required in the administration of this case.

January 17, 2023 Status Report

Trustee filed a Status Report on January 17, 2023. Dckt. 92. Trustee states Debtor is still delinquent $1,399.00. Trustee requests the Motion is granted.

January 24, 2023 Hearing

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 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** that the Motion to Dismiss is granted, and the case is dismissed.

16. 22-22970-E-13 APN-1 | **BRANDON VILLICANA** **Richard Kwun** | **OBJECTION TO CONFIRMATION OF PLAN BY GLOBAL LENDING SERVICES LLC** **12-15-22 [12]**

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 December 15, 2022. By the court's calculation, 40 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.

Global Lending Services LLC ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor's Plan improperly reduces Creditor's interest rate.

DISCUSSION

Interest Rate

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 5.00%. Creditor's claim is secured by a 2019 Jeep Wrangler. Creditor argues (1) they object to any interest rate less than the agreed interest rate of 12.45%, or, in the alternative, (2) that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. The court fixes the interest rate as the prime rate in effect at the commencement of the case, 7.0%, plus a 1.25% risk adjustment, for a 8.25% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

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

The court shall issue 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 Global Lending Services LLC ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

17. 20-23971-E-13 TLA-3 — FARRIS AND ALISA COLLIER — MOTION TO MODIFY PLAN
Thomas Amberg — 12-9-22 [44]

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, creditors, Chapter 13 Trustee, and Office of the United States Trustee on December 9, 2022. By the court's calculation, 46 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

The debtor(s), Farris M Collier and Alisa A Melendez-Collier ("Debtor") seeks confirmation of the Modified Plan to incorporate a previously agreed upon step-up provision and purchase a home. Declaration, Dckt. 47. The Modified Plan provides for monthly payments of $750.00 for 60 months and a 14 percent dividend to unsecured claims totaling $40,567.75. Modified Plan, Dckt. 46. 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 January 9, 2023. Dckt. 53. Trustee opposes confirmation of the Plan on the basis that:

A. The feasibility of the plan cannot be assessed. The modified plan indicates a payment of $19,500 from September 2020 - November 2022 and then a $1,000 monthly payment. Modified Plan, Dckt. 46. However, the Debtors' declaration indicates a monthly payment of $750.00. Declaration, Dckt.. 47.

B. The Debtor's Plan is not the Debtor's best effort regarding withholding of their income:

> Debtor Farris - Debtor Farris' income has increased, however, their deductions have decreased. The Trustee is concerned that debtor Farris may be subject to tax liability, unless they address why deductions have decreased with an increased income.
>
> Debtor Alisa - Debtor's Supplement Schedule I shows debtor Alisa having total deductions for tax, medicare, and social security as $1,412.00. Trustee indicates, however, debtor Alisa's paystubs indicate she is exempt from paying State and Federal taxes. Debtor Alisa's paystubs indicate total amount deducted for tax, medicare, and social security is $465.50 (with $0.00 deducted for taxes). This discrepancy indicates not best efforts.

DEBTORS' RESPONSE

Debtor filed a Response on January 17, 2023. Dckt. 56. Debtor addresses the Trustee's opposition with the following:

A. Debtor specifies that the "$1,000.00" monthly payment seen under Section 7.01 of the Modified Plan (Dckt. 46) was a scrivener's error and should read "$750.00" as stated on the first page of the Modified Plan. Additionally, Debtors has also provided a Declaration supporting the assertion that the discrepancy was scrivener's error. Dckt. 57.

Debtor's response clarifies the correct monthly amount is the amount listed in the Debtor's Declaration: $750.00. Dckt. 47. Trustee's objection on these grounds appear to be resolved, however, any order confirming the Plan would need to amend the terms of the Plan to provide:

1. Pay a total of $19,500.00 from September 2020 – November 2022.

2. Pay $750.00 per month for the remainder of the plan.

3. All previous distributions made by the Trustee are authorized.

B. Regarding Trustee's concerns with tax withholdings, Debtor indicates that the change in tax withholdings was only for a brief period of time in order cover additional school-related expense. Dckt. 56, 57. Debtor states they have "adjusted our withholdings again and we are aware that we are not allowed to incur debt"

Debtor indicates they are aware of the potential tax liability and stated that they will adjust their withholdings again. Declaration, Dckt. 57. It is unclear to the court whether Debtor will file additional supplemental schedules I and J to address the additional changes to withholdings.

At the hearing, XXXXXXXXXX

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 Farris M Collier and Alisa A Melendez-Collier ("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 xxxxxxx

18. 22-21985-E-13 JL-1 | **LINDA NOVOA HUF** **Peter Macaluso** | **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY** **12-12-22 [29]**

YOSEMITE CAPITAL, LLC VS.

21 thru 22

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 December 12, 2022. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay 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 Relief from the Automatic Stay is xxxxxxx

Yosemite Capital, LLC ("Movant") seeks relief from the automatic stay with respect to Linda Louise Novoa Huf's ("Debtor") real property commonly known as 430 Justin Drive, San Francisco, California ("Property"). Movant has provided the Declaration of Tom Malgesini to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made four post-petition payments and eight pre-petition payments in default. Movant's Information Sheet, Dckt. 29.

CHAPTER 13 TRUSTEE'S REPLY

David Cusick ("the Chapter 13 Trustee") filed a Reply on December 20, 2022. Dckt. 35. Trustee requests the Motion be granted.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on December 27, 2022. Dckt. 44. Debtor asserts they have filed a new plan are a motion to sell the Property. Debtor asserts the proposed plan should be "given a chance to confirm" and the motion to sell should be granted prior to the approval of this Motion.

From the court's review of the docket, Debtor has a Motion to Sell the Property scheduled for January 24, 2023. Dckt. 38. Additionally, a Motion to Confirm Debtor's Second Amended Plan is set for February 7, 2023. Motion to Confirm, Dckt. 55. The Plan calls for all liens and encumbrances on the Property to be paid in full on or before April 1, 2023.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $1,113,688.40 (Movant Information Sheet, Dckt. 33), while the value of the Property is determined to be $1,800,000.00, as stated in Schedules A/B and D filed by Debtor.

Although there may be cause to terminate the provisions of 11 U.S.C. § 362(d), Debtor appears to be actively prosecuting this case and making a good faith attempt to sell the Property in order to pay Movant in full.

The court continued the matter to 2:00 p.m. on January 24, 2023 allow adequate time for Debtor to sell the Property, confirm a Plan paying Movant in full, and address issues relating to the closing of the sale.

January 24, 2023

On January 20, 2023, counsel for Movant filed her Declaration (Dckt. 71), in which she testifies that Debtor has not provided Movant with proof of insurance for the Property.

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 Motion for Relief from the Automatic Stay filed by Yosemite Capital, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Relief from the Automatic Stay is xxxxxxxx

19. 22-21985-E-13 PGM-1 | **LINDA NOVOA HUF** | **Peter Macaluso** | **MOTION TO SELL** | **12-27-22 [38]**

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, creditors, parties requesting special notice, and Office of the United States Trustee on December 27, 2022. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

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

The Bankruptcy Code permits Linda Louise Novoa Huf, Debtor, ("Movant") to sell property of the estate or under the confirmed plan after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 430 Justin Drive, San Francisco, California ("Property").

The proposed purchaser of the Property is Manuel and NhuLang Roman, and the terms of the sale are:

A. Purchase Price: $1,350,000.00

B. Estimated net proceeds to Debtor: $161,189.28

C. Initial Deposit: $39,750.00

D. Broker's Commission: 5%

TRUSTEE'S RESPONSE

Trustee filed a response on January 10, 2023. Dckt. 62. Trustee does not oppose the Motion, however, addresses a few concerns with the court:

1. This is an unconfirmed case with a Second Amended Plan set for confirmation hearing on February 7, 2023. The Proposed Plan proposes to pay all allowed claims in full.

2. If a sale occurs prior to confirmation, Trustee is unable to disburse on Class 1 arrears. Trustee is willing to allow Class 1 claim, Yosemite Capital, to be paid through escrow, and requests all additional proceeds be paid to Trustee to hold and then pay creditors once a plan is confirmed.

3. Trustee is concerned that other governmental entities have the potential of filing claims up until February 6, 2023. If additional claims are filed, Trustee is uncertain if Debtor will have enough funds from the net proceeds to pay all priority and unsecured claims at one-hundred percent.

At the hearing, XXXXXXXXXX

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because the proceeds allows Debtor to pay all allowed claims in full at one-hundred percent.

Professional Fees

The court cannot identify a motion authorizing Debtor to hire a real estate professional to market and sell the property. The Motion does not include a request for the payment of any professional fees for a realtor/broker.

However, in the Purchase and Sale Agreement a realtor/broker for Debtor as seller and a realtor for the buyer are identified.

In the Estimated Seller's Settlement Statement there is 5.0% broker's commission that is to be split between the Debtor's broker and the buyer's broker.

This commission has not been approved by the court, nor has a professional been authorized to be employed.

At the hearing, **xxxxxxx**

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court to allow the Trustee to issue a demand and fund the Plan from the proceeds of the sale.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Linda Louise Novoa Huf, Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that by Linda Louise Novoa Huf, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Manuel and NhuLang Roman or nominee ("Buyer"), the Property commonly known as 430 Justin Drive, San Francisco, California ("Property"), on the following terms:
>
> A. The Property shall be sold to Buyer for $1,350,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. A, and as further provided in this Order.
>
> B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.
>
> C. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> ~~D. Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount not more than five percent of the actual purchase price upon consummation of the sale. The five percent commission shall be paid to Chapter 13 Debtor's broker, Polaris Realty.~~
>
> ~~D. The Debtor is authorized to, and shall have $67,500.00 of the sale proceeds to be held in escrow pending the court authorizing the employment of a real estate professional by Debtor and a 5.0% commission, and then approving such compensation, which will be divided with the Buyer's broker.~~

E. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

20. 22-22987-E-13 DPC-1 | **ANTHONY TAMBASCO** **Richard Hall** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **12-21-22 [13]**

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the 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, creditors, on December 21, 2022. 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 sustained.

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

A. Debtor failed to appear at the first meeting of creditors.

B. Debtor's first plan payment is coming due on December 25, 2022, prior to the hearing on this objection, and to date has not been paid.

C. The Trustee is unable to assess the feasibility of the plan as the terms for payment of the Debtor's Attorney fees is unclear.

D. The Plan misclassified a claim, and does not provide for the cure of the default on the mortgage.

E. The Debtor's plan fails the Chapter 7 liquidation analysis.

F. The Chapter 13 plan has missing and incomplete information.

G. The Debtor cannot make the payments and comply with the Plan because Debtor's Schedule J fails to address their ongoing mortgage expenses.

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.

The meeting has been continued to January 26, 2023.

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).

Plan Payment Coming Due

As of the date of filing the Objection, December 21, 2022, Trustee alleges Debtor had yet to pay their first Plan payment of $178.00, which was set to come due on December 25, 2022. Trustee has not filed any supplemental documents to indicate whether Debtor did or did not pay their first Plan payment before it came due.

Failure to Afford Plan Payment / Cannot Comply with the Plan

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

1. Trustee is unsure how much Debtor's Attorney has been paid and whether they are opting for the "no-look fees." If so, they received $629.00 more than allowed through Local Bankruptcy Rule 2016-1(c).

2. The Plan is not feasible because the claim of Quality Loan Services Corp is misclassified as both a Class 1 and Class 4 claim. Debtor asserts arrearages of $6,426.00, so the claim must be classified as Class 1, not Class 4.

3. Section 6.01 fails to identify whether property of the estate shall or shall not revest upon confirmation of the Plan.

4. The Debtor's Plan in part calls for a mortgage expense of $2,142.00 per month to be paid directly by the Debtor. Proposed Plan, Dckt. 3, § 3.10. The Debtor's Schedule J reflects $0.00 for monthly mortgage expenses. Schedule J, Dckt. 1. The Debtor presently lists $206.05 in net monthly disposable income. *Id.* Thus, factoring the Debtor's monthly mortgage expense into the Debtor's expenses will result in a negative disposable income and an inability to make plan payments.

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

Debtor Fails Liquidation Analysis

Debtor's plan fails the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). Trustee states that the Debtor's non-exempt equity totals $43,437.00 and the Debtor is proposing a 25% dividend to unsecured creditors. The Debtor has estimated the total unsecured debt to total $13,211.00 which, at 25%, is approximately $3,302.84 over 60 months. With Debtor's nonexempt equity totaling $43,437.00, it is unclear why Debtor is only proposing to pay unsecured claims $3,302.84, rather than proposing a one hundred percent plan.

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

The court shall issue 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.

21. 22-21297-E-13 JAY SMITH MOTION TO CONFIRM PLAN
DBJ-2 Douglas Jacobs 12-7-22 [44]

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, and Office of the United States Trustee on December 7, 2022. By the court's calculation, 48 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The debtor, Jay Andrew Smith ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for Debtor to pay $4,720.95 per month, one hundred percent to general unsecured claims, and to sell their property, commonly known as 2576 & 2582 Palmira Avenue, South Lake Tahoe, within 12 months. Amended Plan, Dckt. 46. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR'S OPPOSITION

TIAA, FSB ("Creditor") holding a secured claim filed an Opposition on December 28, 2022. Dckt. 51. Creditor opposes confirmation of the Plan on the basis that:

A. There is no default provision in the chance the Property does not sell and contains no provision as to payment in full of Creditor's claim if the Property does not sell in the next twelve months. Additionally, Debtor's Plan does not provide ongoing payments and curing any default if the Property does not sell.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on January 5, 2023. Dckt. 54. Trustee opposes confirmation of the Plan on the basis that:

A. The plan is not feasible and may exceed the maximum amount of time allowed.

B. Debtor may not be able to make payments without providing supplemental evidence of increased business income.

C. It is not clear to the Trustee whether Debtor is proposing an 18 or 60 month plan.

DEBTOR'S RESPONSE TO TRUSTEE'S OBJECTION

Debtor filed a response on January 17, 2023 to Trustee's Opposition. Dckt. 57. Debtor states their Declaration in support of their Motion to Confirm explains Debtor's increase in business income. Upon the court's review of the Declaration, Dckt. 47, Debtor indicates their contracting work is more stable now and, in addition, they are now receiving rental payments from other units on the Property. This appears to clarify Trustee's concerns regarding increased business income. At the hearing, XXXXXXXXXX

Debtor does not state whether they are proposing an 18 or 60 month plan, however, they state they are proposing to sell their Property within 12 months of confirmation which will pay the existing mortgage and all arrears.

DEBTOR'S RESPONSE TO CREDITOR'S OBJECTION

Debtor filed a response on January 17, 2023 to Trustee's Opposition. Dckt. 59. Debtor states they will "aggressively market the property to pay this creditor." Debtor does not address what will occur if Debtor is unable to sell the Property.

DISCUSSION

Infeasible Plan

The court agrees with Trustee and Creditor's concerns that the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

It is common for a Debtor to confirm a plan and sell real property in order to pay off the plan in a shorter period than the anticipated plan time. Therefore, Debtor can properly propose to sell their Property in order to pay off the Plan. However, the sale of the Property is not guaranteed. The "cleanest" way for Debtor to propose a plan would be for the entire sixty-month period, under the worst case that the Property does not sell. Debtor should not propose a twelve month Plan, unless Debtor is able to pay all creditors within the twelve month period based on future earnings.

Creditor's secured claim appears to be the only secured claim against Debtor. Debtor estimates Creditor's claim as $283,197.24. Schedule D, Dckt. 1. Creditor's Proof of Claim, Proof of Claim 2-2, shows a total claim of $281,000.08 with $120,496.83 in pre-petition arrearages.

As for other claims, the Franchise Tax Board holds a priority claim in the amount of $102.75, Proof of Claim 3-1, and LVNV Funding holds a general unsecured claim in the amount of $876.69, Proof of Claim 1-1.

Debtor's proposed Plan, if Debtor elects to provide for Creditor, should cure the prepetition arrearage, as well as make ongoing payments. The Plan currently proposes a $1,900 arrearage dividend for twelve months, and then payment in full from the sale of the Property. If Debtor extended the twelve month Plan to sixty months, with the same payment terms, a $1,900 arrearage dividend over sixty months will not cure the $120,496.83 in pre-petition arrearages. Therefore, even if Debtor agreed to making their twelve month Plan into a sixty month plan, the payment terms would need to be adjusted to comply with applicable laws.

The Plan may not be confirmed.

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, Jay Andrew Smith ("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 denied, and the proposed Chapter 13 Plan is not confirmed.

FINAL RULINGS

22. 22-21515-E-13 GC-1 | **MICHAEL/SUSAN COFFMAN** **Julius Cherry** | **MOTION TO SUBSTITUTE PARTY, AS TO JOINT DEBTOR 12-3-22 [25]**

Final Ruling: No appearance at the January 24, 2023 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 3, 2022. By the court's calculation, 52 days' notice was provided. 28 days' notice is required.

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

The Motion to Substitute is granted.

Joint Debtor, Michael Allen Coffman, seeks an order approving the motion to substitute Joint Debtor for the deceased Debtor, Susan Carol Coffman. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016.

Debtor filed for relief under Chapter 13 on June 17, 2022. Debtor's Chapter 13 Plan has not yet been confirmed.

On August 15, 2022, Debtor Susan Carol Coffman passed away. Joint Debtor asserts that he is the lawful successor and representative of Debtor.

Joint Debtor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing his own obligations

and duties. A Suggestion of Death was filed on December 3, 2022. Dckt. 25. Joint Debtor is the surviving spouse of the deceased party and is the successor's heir and lawful representative. Joint Debtor states that he will continue to prosecute this case in a timely and reasonable manner.

TRUSTEE'S NONOPPOSITION

Chapter 13 Trustee David Cusick, ("Trustee"), filed a nonopposition on January 10, 2023. Dckt.33. Trustee states Debtor is current in Plan payments and requests the Motion be granted.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads (In re Eads)*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule

> 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." FED. R. BANKR. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Here, Michael Allen Coffman has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 25. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Joint Debtor, Michael Allen Coffman, as the surviving spouse of the deceased party and as the successor's heir and lawful representative, may continue to administer the case on behalf of the deceased debtor, Susan Carol Coffman. The court grants the Motion to Substitute Party.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Michael Allen Coffman is substituted as the successor-in-interest to Susan Carol Coffman and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

23. 22-22538-E-13 DPC-2 | **GRANT HANEY** **Eric Schwab** | **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS 12-14-22 [22]**

Final Ruling: No appearance at the January 24, 2023 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on December 14, 2022. By the court's calculation, 41 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

The Chapter 13 Trustee, David Cusick ("Trustee") objects to Grand Douglas Haney's ("Debtor") claimed exemptions under California law because the Trustee cannot determine the amount being claimed and believes the amount attempting to be claimed exceeds the exemption limit allowed under California Code of Civil Procedure § 704.730.

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*.

A review of Debtor's Schedule C shows that real dollar amounts have not been claimed. Rather, Debtor has checked the box "100% of fair market value, up to any applicable statutory limit." Schedule C, Dckt. 1. The court is unable to determine the amount Debtor is claiming as exempt, whether that be 100% of the fair market value, or a certain dollar amount limited by California Code of Civil Procedure § 704.730. The court requires a dollar amount in order to determine whether the amount claimed is statutorily allowed. Therefore, the Chapter 13 Trustee's Objection is sustained, and the claimed exemption is disallowed.

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 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 Objection is sustained, and the claimed exemption for the homestead listed on Debtor's Schedule C, Dckt 1, under California Code of Civil Procedure § 704.730 are disallowed in their entirety.

24. 22-22743-E-13 TIMOTHY WILLIAMS
Pro Se
MOTION TO SELL
11-14-22 [29]

CASE DISMISSED: 11/23/22

Final Ruling: No appearance at the January 24, 2023 hearing is required.

The case having previously been dismissed, the Motion is dismissed as moot.

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 Sell having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.