

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

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

**February 7, 2023 at 2:00 p.m.**

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<b>1. <a href="#">22-22970</a>-E-13 <a href="#">APN-1</a></b>	<b>BRANDON VILICANA Richard Kwun</b>	<b>CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY GLOBAL LENDING SERVICES LLC 12-15-22 <a href="#">[12]</a></b>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on 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.

<b>The Objection to Confirmation of Plan is overruled.</b>
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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.

At the hearing, counsel for the Debtor reported that an agreement has been reached on the interest, and the Parties request a continuance.

### **February 6, 2023 Stipulation**

On February 6, 2023, Creditor and Debtor filed a stipulation (Dckt. 22) agreeing to the following treatment of Creditor’s claim:

1. The Plan shall pay Creditor’s claim in full a rate of nine (9) percent interest to satisfy the loan obligation of Debtor and non-filing co-debtor, Miranda Castle.
2. Creditor’s claim shall be a Class 2 claim.
3. Debtor will amend the Plan to provide for the above terms.

### **Monthly Payments with Adjusted Interest**

Debtor is proposing a \$1,665.00 Plan payment. With the increase in a 9.00% interest rate for Creditor’s claim, the court estimates the following distributions, amortized over sixty (60) months, through the Plan:

Attorney's fees (\$2,000).....(\$33.55)

Trustee's fees (estimate six percent).....(\$99.90)

Class 2 CarMax Auto Finance.....(\$304.19)

Class 2 Global Lending Services.....(\$635.16)

Unsecured claims.....(\$581.63)

Total monthly distributions.....**(\$1,654.43)**

The monthly Plan payment appears to nearly exactly support all distributions through the Plan. At the hearing, **XXXXXXXXXX**

~~\_\_\_\_\_ The court fixes the interest rate as stipulated for a 9.00 % interest rate. The objection to confirmation of the Plan is overruled, and the Plan shall be confirmed with the above amendments.~~

~~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 is overruled, and Brandon Fernando Villicana's ("Debtor") Chapter 13 Plan filed on November 15, 2022 as amended:~~

~~\_\_\_\_\_ 1. \_\_\_\_\_ The Plan shall pay Creditor's claim in full a rate of 9% interest to satisfy the loan obligation of Debtor and non-filing co-debtor, Miranda Castle.~~

~~\_\_\_\_\_ 2. \_\_\_\_\_ Creditor's claim shall be treated a Class 2 claim.~~

~~\_\_\_\_\_ is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.~~

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, and parties requesting special notice on December 13, 2022. By the court's calculation, 28 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 xxxxxx.**

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 tax returns have not been provided to Trustee.

In addition, Trustee requests this objection be continued to after the continued First Meeting of Creditors, set for January 26, 2023 at 1:00 p.m.

## DISCUSSION

Trustee's objections are well-taken.

### Failure to Appear at 341 Meeting

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by the Chapter 13 Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### Failure to Provide Tax Returns

The Chapter 13 Trustee argues that 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 the tax transcript. That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Continuance of January 10, 2023 Hearing**

The Trustee requests that the court continue this hearing to after the January 26, 2023 continued meeting of creditors. The court concurs that a continuance is in the best interests of the court and parties (time, money, and resources), and saves them the time and expense of having to come to court to hear that message.

### **February 7, 2023 Hearing**

On February 1, 2023, the chapter 13 Trustee filed a Status Report. Dckt. 67. The Trustee reports that the Debtor failed to appear at the continued Meeting of Creditors on January 26, 2023. Debtor's counsel did appear, advising the Trustee that Debtor was still hospitalized.

The Trustee further reports that the tax documents have not yet been provided and that Debtor is now \$4,640.00, with Debtor not having made any Plan payments since this case was filed on November 10, 2022.

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 **XXXXXXXXXX**.

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 December 15, 2022. By the court’s calculation, 26 days’ notice was provided. 14 days’ notice is required.

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

**The Objection to Confirmation of Plan is XXXXXX.**

Cheryl Henry (“Creditor”) holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Debtor has failed to satisfy credit counseling requirements.
- B. Debtor’s Plan does not provide for Creditor’s claim.

## **DISCUSSION**

Creditor’s objections are well-taken.

### **Credit Counseling**

On November 16, 2022, the court entered an order allowing a thirty-day temporary waiver of credit counseling. The court set a deadline to December 14, 2022. Order, Dckt. 14. Debtor has not updated the court with whether they have received credit counseling. Attempting to confirm a plan while failing to file a certificate of credit counseling is in violation of 11 U.S.C. § 521((b)(1). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Failure to Provide for a Secured Claim**

Creditor has not filed a Proof of Claim in this case. However, Debtor’s Schedule D estimates the amount of Creditor’s claim as \$191,645.00 and indicates that it is secured by judgment lien on Debtor’s residence. The Plan does not provide for treatment of this claim.

Creditor alleges that the Plan is not feasible and violates 11 U.S.C. § 1322(b)(2) because it contains no provision for payment of Creditor's obligation, which is secured by Debtor's residence. *See* 11 U.S.C. § 1325(a)(6).

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Chapter 13 Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

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

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

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

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

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

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

### **Continuance of Hearing**

The Chapter 13 Trustee has also filed an Objection to Confirmation, which grounds include Debtor not having yet attended the First Meeting of Creditors. That Meeting has been continued to January 26, 2023, and the Trustee requested his Objection to Confirmation be continued to a hearing date after January 26, 2023.

Continuance of both the Trustee's and Creditor's hearings on the Objection to Confirmation make sense and will save the court and parties in interest their time, resources, and monies from having to appear on January 10, 2023.

Continuance of the hearing and not denying of confirmation at this time will not alter the parties respective positions.

The court notes that Debtor has now filed a Motion to Avoid Creditor's Judgment Lien on the Vintage Court property. By Debtor's alleged calculations, the Property has a value of \$847,000 and is subject to the following encumbrances and homestead exemption ahead of Creditor's judgment lien:

- A. First Deed of Trust securing.....(\$305,000)
- B. Second Deed of Trust securing.....(\$ 99,670)
- C. PACE Loan.....(\$ 20,000)
- D. Abstract of Judgment.....(\$ 3,609)
- E. Homestead Exemption.....(\$422,330)

The alleged senior liens and homestead exemption total (\$850,000), which would consume the value of the Property, leaving nothing for Creditor's judgment lien. That Motion was just filed and Creditor has not yet had the opportunity to respond.

For Creditor, the condition precedent fight will be on the Motion to Avoid Judgment Lien.

The court continues the hearing on the Objection to Confirmation of Plan to 2:00 p.m. on February 7, 2023, the first available Chapter 13 law and motion date after the January 26, 2023 continued First Meeting of Creditors.

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 Cheryl Henry ("Creditor") holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 21, 2022. By the court's calculation, 48 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).

<b>The Motion to Confirm the Modified Plan is granted.</b>
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The debtors, Marvin Dominguez and Gina Dominguez ("Debtor") seek confirmation of the Modified Plan because they are delinquent \$6,969.03 in plan payments, and are adjusting their plan accordingly. Declaration, Dckt. 83. The Modified Plan provides \$38,340.00 to be paid through payments of \$4,260.00 for 9 months, and a 0 percent dividend to unsecured claims totaling \$173,811.00. Modified Plan, Dckt. 82. 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 17, 2023. Dckt. 88. Trustee opposes confirmation of the Plan on the basis that:

A. **Post-petition mortgage arrears**

The proposed plan does not specify a cure for post-petition mortgage arrears comprised of a May 2022

payment due to Safe Credit Union in the amount of \$1,740.45.

**B. Prior Post-Petition Mortgage Arrears**

The proposed plan is missing necessary language to incorporate and clarify prior post-petition mortgage payments in the amount of \$3,480.90 owed to Class 2 creditor for months October and December 2021.

**C. Allowable Attorney's Fees**

Section 3.05 of the Plan states attorney's fees in the total amount of \$5,000.00, where the prior order confirming, Dckt. 28, and attorney's right;s and responsibilities, Dckt., 3, approve attorney's fees in the amount of \$4,000.00.

**DEBTOR'S REPLY**

Debtor filed a reply on January 24, 2023. Dckt. 91. Debtor's Reply appears to resolve Trustee's concerns stating:

**A. Post-petition mortgage arrears**

Debtor requests the proposed Plan be amended to provide the arrearage from the May 2022 post-petition missed payment to Safe Credit Union shall be paid in the amount of \$1,740.45 with an interest rate of 0.00% and a monthly payment of \$194.00.

**B. Prior Post-Petition Mortgage Arrears**

Debtor does not oppose the proposed Plan being amended to incorporate prior post-petition mortgage arrears and stating: prior missed Class 1 ongoing payments to Safe Credit Union in the amount of \$3,480.90 representing the payments for October 2021 through December 2021 have been paid in full.

**C. Allowable Attorney's Fees**

Debtor and their attorney are only requesting attorney's fees in the total amount of \$4,000.00, with \$700.00 being paid prior to filing and the remaining \$3,300.00 to be paid throughout the Plan.

Debtor's reply appears to resolve Trustee's concerns. At the hearing, **XXXXXXX**

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

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

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

~~The Motion to Confirm the Modified Chapter 13 Plan filed by the debtors, Marvin Dominguez and Gina Dominguez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on December 21, 2022 as amended:~~

~~1. The arrearage from the May 2022 post-petition missed payment to Safe Credit Union shall be paid in the amount of \$1,740.45 with an interest rate of 0.00% and a monthly payment of \$194.00.~~

~~2. Prior missed Class 1 ongoing payments to Safe Credit Union in the amount of \$3,480.90 representing the payments for October 2021 through December 2021 have been paid in full.~~

~~3. Debtor's attorney was paid \$700.00 prior to the filing of the case. Subject to prior court approval, additional fees of \$3,300.00 shall be paid through the Plan.~~

~~is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to 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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor's Attorney on January 10, 2023. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

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

Based on the Plan, Debtor's attorney has not checked whether Debtor's attorney will be paid through Local Bankruptcy Rule 2016-1(c) or by filing and serving a motion in accordance with 11 U.S.C. § 329 and 330. The Plan does provide, however, that Debtor's attorney will be paid a total of \$4,000.00. This fixed fee is standard for the court's "No-Look" fees of Local Bankruptcy Rule 2016-1(c). Therefore, it appears Debtor's Attorney inadvertently did not check the box stating they are choosing to comply with Local Bankruptcy Rule 2016-1(c).

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 is overruled, and Ailee Gale Jordan’s (“Debtor”) Chapter 13 Plan filed on December 2, 2022, as amended to provide:~~

- ~~1. Debtor’s attorney will seek the court’s approval for attorney’s fees by complying with Local Bankruptcy Rule 2016-1(c)~~

~~is confirmed. Counsel for Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 21, 2022. By the court's calculation, 48 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).

<p><b>The Motion to Confirm the Modified Plan is denied.</b></p>
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The debtor, Mario Manuel Borrego and Christine Joy Borrego ("Debtor") seeks confirmation of the Modified Plan because Debtor is having difficulty making payments due to family illnesses. Declaration, Dckt. 165. The Modified Plan provides \$745.73 for sixty-seven months and then \$1,200.00 by December 25, 2022. Modified Plan, Dckt. 167. 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 24, 2023. Dckt. 170. Trustee opposes confirmation of the Plan on the basis that Debtor's Plan is overextended.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty-four months. Debtor previously modified their Plan under the CARES Act, which extended their Plan to sixty-four months. Civil Minutes, Dckt. 134.

Now, Debtor is seeking to extend their Plan an additional four months.

Pursuant to the CARES Act, under 11 U.S.C. § 1329(d), modification of a plan that was confirmed before March 27, 2021 may be extended up to seven (7) years so long as the debtor is or has “experienced a material financial hardship” due to COVID-19. 11 U.S.C. § 1329(d), however, has a sunset provision that effectively reverted 11 U.S.C. § 1329(d) to pre-CARES Act provisions on March 27, 2022. *See* H.R.1651 - 117th Congress (2021-2022): COVID-19 Bankruptcy Relief Extension Act of 2021, H.R.1651, 117th Cong. (2021).

The CARES Act has expired, due to the sunset provision. Therefore, the Plan cannot be extended another four months.

The Trustee, however, requests the Motion be granted, and amend the terms to complete the Plan. The terms to be amended are such:

\$45,764.00 total paid in through month 63;  
\$5,400.00 in month 64 to complete the Plan.

The Modified Plan, as amended, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Mario Manuel Borrego and Christine Joy Borrego (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor’s Modified Chapter 13 Plan filed on December 21, 2022, as amended:

Plan payments shall be as follows:

\$45,764.00 total paid through month 63;

\$5,400.00 in month 64 to complete the Plan.

is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick (“Trustee”), for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to 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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*) on January 12, 2023. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

1. Debtor is delinquent;
2. Debtor has not provided 521 Documents;
3. The Plan exceeds sixty-months;
4. Debtor may have more income available;
5. Debtor's expenses appear low;
6. Debtor is a serial filer; and



7. Debtor's Chapter 13 documents appear inaccurate.

## **DISCUSSION**

Trustee's objections are well-taken.

### **Delinquency**

Debtor is \$2,165.00 delinquent in plan payments, which represents one month of the \$2,165.00 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

### **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).

### **Plan Term is Greater Than 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 87 months because if Plan payments are \$2,165.00, it will take 87 months. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

### **Failure to Provide Disposable Income**

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

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

Schedule I indicates Debtor is contributing \$296.72 per month toward their retirement. These are not mandatory contributions. Schedule I, Dckt. 13.

The court notes, although these are “voluntary,” it may be reasonable for an individual to contribute to retirement savings. As there are no mandatory retirement contributions, the court finds Debtor’s voluntary contributions are appropriate. However, the Debtor must provide a basis for “taking that money for herself” is financially reasonable (such as age, other retirement benefits, and assets).

### **Failure to Afford Plan Payment / Cannot Comply with Plan**

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

1. On Debtor’s Schedule J, Debtor lists:

Rental or Home Ownership Expenses.....\$0.00

Home maintenance, repair, and upkeep.....\$0.00

Food and housekeeping supplies  
for Debtor and two Dependents.....\$300.00

Clothing, laundry, and dry cleaning  
for Debtor and two dependents.....\$100.00

Personal Care Products and Services  
for Debtor and two dependents.....\$0.00

Medical and Dental Expenses  
for Debtor and two dependents.....\$0.00

Insurance for Debtor and two dependents....\$0.00

Taxes.....\$0.00

Installment or Lease Payments.....\$0.00

These expenses appear unreasonably low. Without an explanation for these low expenses, complying with the Plan appears infeasible.

2. Debtor has filed eight prior Chapter 13 bankruptcy cases since 2009. Although not a reason to deny confirmation, a “serial filer” raises doubts to the feasibility of the Plan and being able to make Plan payments.
3. Debtor’s Schedules C, E/F, and J, Official Form 122C, and Master Address List all have discrepancies, as described in Trustee’s Objection. These inaccuracies make it unclear regarding Debtor’s financial reality and whether Debtor can make Plan payments.

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

## Prior Recent Bankruptcy Case Filings by Debtor

The Debtor has filed four prior bankruptcy cases in the past three and one-half years, all of which have been dismissed. These prior filings are summarized as follows:

- A. 22-20882 Chapter 13 Case, In *Pro Se*
  - 1. Filed.....April 8, 2022
  - 2. Dismissed.....August 26, 2022
  - 3. The case was dismissed due to:
    - a. Debtor being in default in Plan payments.
    - b. Debtor not having served parties in interest with her proposed Plan and no motion to confirm had been filed.
    - c. Debtor filing to provide copies of tax returns.
    - d. Debtor failing to provide copies of pay advices.

22-20882; Civil Minutes, Dckt. 31.
- B. Chapter 13 Case 21-23156, In *Pro Se*
  - 1. Filed.....September 3, 2021
  - 2. Dismissed.....January 27, 2022
- C. Chapter 13 Case 20-23362, In *Pro Se*
  - 1. Filed.....July 6, 2020
  - 2. Dismissed.....April 22, 2021
- D. Chapter 13 Case 19-24924, Represented by Counsel
  - 1. Filed.....August 5, 2019
  - 2. Dismissed.....March 19, 2020

Unfortunately, Debtor has shown a pattern of filing bankruptcy cases, and then failing to prosecute them.

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. [22-21985](#)-E-13      **LINDA NOVOA HUF**  
[JL-1](#)      **Peter Macalluso**

**YOSEMITE CAPITAL, LLC VS.**

**8 thru 9**

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY AND/OR  
MOTION FOR RELIEF FROM  
CO-DEBTOR STAY  
12-12-22 [\[29\]](#)**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on 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.

<b>The Motion for Relief from the Automatic Stay is <span style="color: red;">XXXXXXXX</span></b>
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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, the Parties agreed to further continue the hearing in light of the court granting the Motion to Sell the Property, which sale will provide for the payment of Movant's secured claim.

### **February 7, 2023 Hearing**

The court has granted Debtor's Motion to sell the Justin Drive Property for \$1,350,000. Order, Dckt., 79.

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

XXXXXXXXXX

9. [22-21985-E-13](#) **LINDA NOVOA HUF** **MOTION TO CONFIRM PLAN**  
[PGM-2](#) **Peter Macaluso** **12-29-22 [55]**

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 29, 2022. By the court’s calculation, 40 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).

<b>The Motion to Confirm the Amended Plan is denied.</b>
--

The debtor, Linda Novoa Huf (“Debtor”), seeks confirmation of the Amended Plan. The Amended Plan provides for Plan payments of \$2,100.00 paid thru December 2022; \$860.00 per month starting January 25, 2023; and \$85,000.00 on April 1, 2023, or an amount sufficient to pay the Plan in full.

Debtor will sell real property located at 430 Justin Drive, San Francisco, and contribute sufficient proceeds to pay Creditors in full within the 36 month Plan term, with 100% to general unsecured creditors. Amended Plan, Dckt. 59. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

The court has granted Debtor's Motion to sell the Justin Drive Property for \$1,350,000. Order, Dckt., 79.

### **CREDITOR'S OPPOSITION**

Yosemite Capital ("Creditor") holding a secured claim] filed an Opposition on January 18, 2023. Dckt. 67. Creditor opposes confirmation of the Plan on the basis that:

- A. The Second Amended Chapter 13 Plan erroneously lists Creditor as a Class 1 creditor.
- B. Debtor's Second Amended Chapter 13 Plan fails to provide for interest payments on Creditor's secured claim.
- C. Debtor's Plan may not be feasible, as it fails to provide adequate protection payments before the sale of property is completed, and it fails to state the treatment of Creditor's claim if the sale is not completed.

### **CHAPTER 13 TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Opposition on January 23, 2023. Dckt. 73. Trustee opposes confirmation of the Plan on the basis that:

- A. Debtor may not be able to make Plan payments as the Plan is vague, does not provide adequate protection, does not define the total amount to be received from the sale of Property, and is unclear who the disbursing agent is to the creditors.
- B. The Plan fails to state creditors' treatment, should the sale not complete by April 1, 2023.
- C. Debtor has failed to disclose information in the Plan and Schedules.

### **DEBTOR'S REPLY**

Debtor filed a Reply on January 31, 2023. Dckt. 82. The points stated in the Reply are:

- A. The Motion to Sell the Justin Drive property was granted.
- B. Debtor has amended Schedules B & D to list the jewelry from "Loyalty Pawn."
- C. Creditor Loyalty Pawn is to be provided for as a Class 2 claim, to be paid, with 3% interest, from the proceeds of the sale of the Justin Drive property.



- D. Creditor Yosemite Capital, LLC (this objecting Creditor) is properly classified as having a Class 1 claim. This is just asserted in the Reply, with out any legal analysis, authority, or argument.
- E. A Till interest rate of 6.38% is to be paid. The claims to which the 6.38% interest (which is not stated in the Plan) are not identified.
- F. Counsel for Debtor has filed a secured claim for Loyalty Pawn. Loyalty Pawn is listed on the Certificate of Service for the Reply. Dckt. 83. Debtor amended the Master Address List to include Loyalty Pawn on January 31, 2023. Dckt. 84.

## **DISCUSSION**

### **Cannot Comply with the Plan**

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

- 1. Debtor is not able to comply because Creditor is misclassified as a Class 1 creditor. Creditor's Note in question will mature in January 2025, before the scheduled completion of the plan.
- 2. Debtor may not be able to make plan payments because their ability to pay hinges on their sale of 430 Justin Drive, San Francisco.

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

### **Interest Rate**

#### *Pre-Petition Arrearages Interest*

Pursuant to 11 U.S.C. § 1322(e), for a Plan proposing to cure a default, the amount necessary to cure the default is to be determined in accordance with the underlying agreement and applicable nonbankruptcy laws.

Creditor asserts that it is entitled to its contract rate of interest until at least the confirmation of the Plan.

In Class 1 where Debtor lists (improperly, see discussion below) Creditor's claim, it provides that there will be 0.00% interest on the \$105,196.11 in arrears to be cured. That 0.00% would be from the date the Plan is confirmed.

It is not clear whether Creditor is asserting that a 0% interest rate on an arrearage cure is improper, as it appears Creditor argues that the Plan denies Creditor of all post-petition interest (that accruing on the non-arrearage amount).

It further appears that Creditor's reading of the 0.00% interest on the arrearage to be cured constitutes wiping out pre-petition interest. The grounds for stating such is not clear.

**XXXXXXX**

#### *Post-Petition Prime Rate Interest*

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 0.00%. – apparently believing stating a 0.00% interest for the \$105,196.11 pre-petition arrearage constitutes a 0.00% interest rate on Creditor's entire \$1,060,695.91 claim. It does not.

Here, Debtor's Plan states that Creditor will be paid its claim in full, including the \$105,196.11 arrearage cure with 0.00% interest. Thus, on the non-arrearage amount, Debtor has provided for the payment of Creditor's contract rate of interest.

#### **Classification of Creditor's Claim**

Creditor states to the court that the Note upon which its claim is based matures, with all amounts owed thereunder due, in January 2025. Opposition (not stating date when due in January 2025), p. 2:11-14; Dckt. 67. A copy of the Note is attached to Proof of Claim 4-1 filed by Creditor states that the obligation owed on the Note is due in full in one balloon payment on January 1, 2025.

Creditor then correctly asserts that this obligation is due in full before the end of the 36 month term of the Plan.

To be a Class 1 Claim in the Plan, it must be in the category of "delinquent secured claims that mature after the completion of this plan, including those secured by Debtor's principal residence." Plan, ¶ 3.07; Dckt. 1.

However, when a claim is for a secured obligation that will be due in full under the original terms of the contract before the Plan is completed, then it is a Class 2 secured claim, which can be substantially modified by the Plan. <sup>FN.1.</sup>

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FN. 1. This is true even when the claim is secured only by the debtor's principle residence, so long as the obligation has matured pre-petition or the last payment due under the contract is during the term of the plan. *See In re Collier-Abbott*, 616 B.R. 117 (Bkey E.D. Cal. 2020); 8 Collier on Bankruptcy ¶ 1322.17 (16<sup>th</sup> Edition).  
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The Plan does not appear to modify the entire claim, opting to take the full contract rate of interest for all but the pre-petition arrearage. As allowed in the Plan, interest accrues at the rate of 0% per annum for any arrearage cure amount, unless stated otherwise. Plan, ¶ 307(a)(1); Dckt. 59.

This is consistent with the application of 11 U.S.C. § 1322(e) providing that the provisions of 11 U.S.C. § 1322(b)(5) and 11 U.S.C. § 506(b) are not applicable to defaults to be cured under the plan, but that one must look to the underlying agreement and applicable non-bankruptcy law.

Creditor does not identify for the court any term of the agreement and applicable non-bankruptcy law that requires anything more than 0.00% interest for the cure of the defaults on the obligation which is the basis for Creditor's claim. *See* 8 Collier on Bankruptcy ¶ 1322.09[4][a] (16<sup>th</sup> Edition).

### **Analysis of Till Interest Rate, If Applicable**

In *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), 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. Because the creditor has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 5.50%, plus a 1.25% risk adjustment, for a 6.25% interest rate.

### **Failure to Maintain Payments**

#### *Ongoing Payments Prior to Sell of Property*

Creditor alleges that the Plan fails to provide adequate protection payments to Creditor before the Sale is completed.

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

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

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

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

Here, Debtor elects to provide for the secured claim of Yosemite Capital. Debtor fails, however, to maintain ongoing contract installment payments while curing their pre-petition default. This is required under 11 U.S.C. § 1322(b)(5).

#### *Ongoing Payments if Sale Fails*

Additionally, the plan fails to state the treatment of Creditor's claim if the sale is not completed in time to comply with the date set out in the plan.

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 plan payments would be for the entire applicable period, under the scenario that the Property does not sell.

#### **Disbursing Agent**

Trustee is concerned that it is unclear who the disbursing agent will be in regards to the sale. At the hearing, **XXXXXXXXXX**

#### **Non-Scheduled Assets and Debts**

Debtor admitted they inherited \$18,000 worth of jewelry. In addition, Debtor admitted they took the jewelry to a pawnshop and received a loan in the amount of \$18,000.00. Debtors schedules do not list the jewelry nor the loan secured by the jewelry.

#### **Insufficient Notice**

Federal Rule of Bankruptcy Procedure 2002(b)(2) requires twenty-eight days' notice "for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan." FED. R. BANKR. P. 2002(b)(2). A review of the mailing matrix does not show any pawn shop listed, and the matrix also lists several creditors with only a name and no address. From this information it is not clear if all creditors have received proper notice. That failure to provide notice violates Federal Rule of Bankruptcy Procedure 2002(b)(2).

At the hearing, **XXXXXXX**

~~\_\_\_\_\_ 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, Linda Novoa Huf ("Debtor") having been presented to the court, and upon~~

~~review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

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~~**IT IS ORDERED** that the Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.~~

# FINAL RULINGS

10. [22-23199-E-13](#)  
[FF-3](#)

MELISSA/FRANCISCO RUELAS  
Gary Fraley

MOTION TO EXTEND AUTOMATIC  
STAY  
1-10-23 [\[37\]](#)

**Final Ruling:** No appearance at the February 7, 2023 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 10, 2023. By the court’s calculation, 28 days’ notice was provided. 28 days’ notice is required.

The Motion to Extend 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). 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.

<b>The Motion to Extend the Automatic Stay is granted.</b>
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Melissa Ruelas and Francisco Ruelas (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor’s second bankruptcy petition pending in the past year. Debtor’s prior bankruptcy case (No. 20-25480) was dismissed on November 14, 2022, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 20-25480, Dckt. 34, November 14, 2022. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

The court notes, as Trustee indicates in their Reply, Dckt. 43, the current case was dismissed on December 30, 2022. Dckt. 22. Therefore, the automatic stay in the current case terminated on December 30, 2022. *See* 11 U.S.C. § 362(c)(2).

However, when the dismissal was vacated on January 6, 2023, Dckt. 29, the stay was reinstated. *See Sewell v. MGF Funding, Inc. (In re Sewell)*, 345 B.R. 174, 179 (B.A.P. 9th Cir. 2006) (“Reinstatement of a case restores the automatic stay.”); *In re Williams*, No. A12-00620-GS, 2013 Bankr. LEXIS 964, at \*5 (Bankr. D. Alaska Mar. 13, 2013) (“[W]here a bankruptcy court vacates a dismissal order, the automatic stay is reinstated as well.”).

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed due to failure to make plan payments as a result of debtor Francisco experiencing significant unanticipated health issues due to complications from underlying health conditions. Debtor Declaration, Dckt. 39. Although Debtor received disability during this time it was not sufficient and too inconsistent to fund the plan. *Id.*

## TRUSTEE’S REPLY

The Chapter 13 Trustee, David P. Cusick (“Trustee”), filed a Reply on January 17, 2023. Dckt. 43. Trustee states that due to the current cases dismissal, Debtor may need to request to re-enact the stay. However, as explained above, the court finds that vacating the dismissal automatically reinstated the stay.

Apart from the procedural concerns, Trustee has no opposition to the Motion.

## DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor’s cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at \*6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

A. Why was the previous plan filed?

B. What has changed so that the present plan is likely to succeed?

*In re Elliot-Cook*, 357 B.R. at 814–15.

Debtor has sufficiently demonstrated the case was filed in good faith under the facts of this case and the prior case for the court to extend the automatic stay.

The Motion is granted, and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

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 Extend the Automatic Stay filed by Melissa Ruelas and Francisco Ruelas (“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 the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, it having been reinstated by the vacating of the Order dismissing this case, unless terminated by operation of law or further order of this court.

11. [11-21824-E-13](#)  
[HRH-2](#)

DANNY/DEBRA HORSFALL  
Peter Macaluso

MOTION TO VACATE  
1-4-23 [\[84\]](#)

**Pursuant to court order, Dckt. 102, the hearing on the Motion to Vacate is continued to 2:00 p.m. February 28, 2023.**



**Final Ruling:** No appearance at the February 7, 2023 hearing is required.

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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, creditors, and Office of the United States Trustee on December 28, 2022. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<p><b>The Motion to Confirm the Modified Plan is granted.</b></p>
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11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Glenn Burton Lewis ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on January 17, 2023. Dckt. 116. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

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

**IT IS ORDERED** that the Motion is granted, and Debtor's Modified Chapter 13 Plan filed on December 28, 2022, is confirmed. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick ("Trustee"), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.

13. [19-25167-E-13](#)  
[PGM-8](#)

**TANYA NORFLES**  
**Peter Macaluso**

**MOTION TO MODIFY PLAN**  
**12-28-22 [134]**

**Final Ruling:** No appearance at the February 7, 2023 hearing is required.

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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, creditors, and Office of the United States Trustee on December 28, 2022. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<p><b>The Motion to Confirm the Modified Plan is granted.</b></p>
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11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The debtor, Name of Debtor ("Debtor"), has filed evidence in support of confirmation. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Non-Opposition on January 24, 2023. Dckt. 144. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed.

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

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

The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Tanya Michelle Norfles (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and Debtor’s Modified Chapter 13 Plan filed on December 28, 2022, is confirmed. Debtor’s Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee, David Cusick (“Trustee”), for approval as to form, and if so approved, the Trustee will submit the proposed order to the court.