

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

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

**February 14, 2023 at 2:00 p.m.**

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1. <a href="#"><u>20-25605-E-13</u></a> <a href="#"><u>CYB-5</u></a>	CURTIS/CARMEN BURKS Candace Brooks	CONTINUED MOTION TO MODIFY PLAN 11-30-22 <a href="#"><u>[131]</u></a>
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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, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 30, 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 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 <span style="color:red">XXXXX</span>.</b>
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The debtor, Curtis Terence Burks and Carmen Vernita Burks (“Debtor”) seeks confirmation of the Modified Plan to change the classification of U.S. Bank National Association and Rushmore Loan Management Services from a Class 1 Creditor to Class 4 because Debtor received a loan modification from Creditor. Additionally, Debtor seeks to reclassify Honda Financial Services claim from a Class 2A to a Class 3 due to Honda being paid in full by Debtor’s automobile insurance company. Motion, Dckt. 131 at 3.

The Modified Plan provides \$26,792.00 to be paid through November 2022, followed by plan payments of \$721.00 per month for the duration of the Plan. Modified Plan, Dckt. 133. 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 December 20, 2022. Dckt. 139. Trustee opposes confirmation of the Plan on the basis that:

- A. Prior Plan payments are no authorized.
- B. Not best efforts.
- C. American Honda Finance not listed as Class 3.

## **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). Section 7 of the Plan states all payments made by the Trustee are waived. Trustee has already disbursed \$8,439.57 in prior payments.

Therefore, Debtor may not be able to comply with the Plan. Additionally, Debtor indicates they intend to reclassify Honda Financial Services as Class 3. However, Honda is not listed as Class 3 in the proposed Plan. Without an accurate picture of Debtor’s financial reality, the court cannot determine whether the Plan is confirmable.

### **Failure to Provide Disposable Income / Not Best Effort**

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

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

Debtor increased voluntary retirement contributions from \$480.00, Supplemental Schedule I, Dckt. 117, to \$842.40, Supplemental Schedule I, Dckt. 136. Debtor does not explain the need to increase the voluntary contributions. The Plan proposes to pay a 7 percent dividend to unsecured claims, which total \$92,065.71. Debtor could increase the Plan payment which would lead to an increase in payments to unsecured claims. Thus, the court may not approve the Plan.

Looking at some of the Plan terms, they might be due to a clerical error. Others may demonstrate that Debtor is not prosecuting not only this Plan, but the Bankruptcy Case in good faith.

For the Class 2 Honda Finance Claim, the Modified Plan makes no provision for how the creditor was or is to be paid, and further expressly states that “All payments previously Class 1 or Class 2 payments paid by the Chapter 13 trustee and [appears to be a clerical error, with the word intended to be “are”] waived.

This covers the Class 1 payments made not only to Honda Finance, but also Capital One Auto Finance for its Class 2(A) secured claim. Confirmed Plan, ¶ 3.07; dckt. 78. While Capital One Auto Finance is included in Class 2(A) of the modified plan, it provides only for prospective payment of claims.

Thus, on its face, the Modified Plan appears to state that Debtor will prosecute both Capital One Auto Finance and Honda Finance to recover all of the plan payments previously made, with the only payments to be made to either being what is provided for in the Modified Plan.

Honda Finance is not provided for in the Modified Plan, so it appears Debtor will recover all payments previously received by Honda Finance and Honda Finance will be paid nothing through the Plan.

In the Motion to Confirm the Second Modified Plan, Debtor states that Honda Finance is now provided for as a Class 3 Claim - which would provide for the surrender of the collateral to Honda Finance. However, the Second Modified Plan does not list Honda Finance as being provided for in Class 3.

#### Destruction of Honda Finance’s Collateral

In the Motion to Confirm the Second Modified Plan and the Declaration of the co-debtors (Dckt. 134), that the Honda Accord was involved in an accident, was a total loss, and Honda Financial Services was paid in full on its secured claim. In the Motion to Incur Debt to purchase a replacement vehicle (Dckt. 122) Debtor provide an analysis of the insurance proceeds, the payment of the Honda Finance claim, and the \$25,628.81 in net proceeds after the payment of the secured claim which Debtor used as the down payment on the replacement vehicle.

#### **Debtor’s Reasonable and Necessary Expenses in Computing Projected Disposable Income**

In confirming the First Amended Plan (Order, Dckt. 97), the court and parties in interest relied upon the financial information provided under penalty of perjury by Debtor in Amended Schedules I and J. Dckt. 80. The information financial information provided under penalty of perjury as of the September 21, 2021 filing of the Amended Schedules I and J includes the following:

- A. Combined Monthly Gross Income.....\$12,246
- B. Combined Payroll Deductions.....(\$3,608)
  - 1. Includes Voluntary Retirement Contribution of.....(\$480)
- C. Combined Take Home Income.....\$8,638
- D. Expenses for Family of Four.....(\$4,776)
  - 1. This included an additional (\$380) for possible increases in Debtor's Mortgage Payment.
- E. Projected Disposable Income.....\$3,862

Moving to the Second Amended Schedules I and J filed on November 30, 2022, (Dckt. 136) to support the present Motion, the financial information includes:

- a. Combined Monthly Gross Income.....\$12,670
- b. Combined Deductions.....(\$4,267) (18.2% increase)
  - i. Includes increasing Voluntary Retirement Contribution from (\$480) to.....(\$842) (75.4% increase)
- c. Combined Take Home Income.....\$8,403 (2.7% reduction)
- d. Expenses for a Family of Four.....(\$7,682) (this now includes the mortgage payment)
  - i. Debtor sets medical and dental expenses at (\$300) a month on Second Amended Schedule J. However, on Second Amended Schedule I Debtor lists a deduction of (\$365) a month into an "HSA" (which the court infers to be a Health Savings account pre-tax, which monies are disbursed out to pay medical expenses. Thus, it appears that a monthly medical and dental expense of (\$300) to be deducted from Debtor's Take-Home income is illusory, that expense having already been deducted/paid through the (\$365) monthly HSA deduction.
- e. Projected Disposable Income.....\$721
  - i. With the mortgage payment of (\$3,002.50) being placed into Class 4 the "apples to apples" comparison of monies left after payment of all but mortgage expenses is \$3,723.
  - ii. The Debtor again states that Debtor "allocates \$380.00 in their budget for possible increase in their mortgage payment." Second Amended Schedule I, ¶ 24.

In reading this Debtor retaining \$380 a month for some possible future increase that may, or may not occur, what is sounds like is that Debtor has a plan to pocket \$380 a month, diverting it way from creditors. That total's \$22,800 over 60 months of a Plan. Debtor chooses to do this rather than a simple *ex parte* motion to modify plan to decrease the plan payment by the amount of some future increase when it actually occurs.

Additionally, it appears that Debtor is double deducting (\$300) a month in medical and dental expenses, which are already being paid from the (\$365) HSA monthly deduction. Over sixty months, at \$300 a month, Debtor would be pocketing an additional \$18,000 that is being diverted from creditors.

Combined, the phantom \$380 expense for possible future increases in the mortgage payment and the \$300 for medical expenses already covered by the (\$365) monthly HSA deduction total \$40,800 of projected disposable income that is not being paid into the Plan.

#### Increase in Retirement Contribution

In the Motion to Confirm the Second Modified Plan (Dckt. 131), while Debtor identifies various financial amounts and changes, no mention is made of Debtor increasing voluntary retirement contributions by 75%.

In their Declaration, the two joint-debtors provide no testimony why doubling of the voluntary retirement contribution is necessary or proper. They stand silent on this change diverting money away from the Plan.

#### **~~Denial of Motion~~**

Debtor is not providing Debtor's projected disposable income to fund this Plan. Debtor has, and seeks to continue, keeping \$380 a month for a non-existent expense and \$300 a month for medical expenses that are already funded by the (\$365) a month deduction into Debtor's Health Savings Account to pay such expenses.

Additionally, Debtor offers no explanation for increasing voluntary retirement contributions by 75% from (\$480) an month to (\$842) for the approximately (Debtor not clearly identifying the plan months for which payments have been made and the number of months for the modified payments) remaining thirty-eight (38) months of the Second Modified Plan. This \$362 a month increase of the voluntary retirement contribution over a period of thirty-eight months would result in an additional \$13,756 being diverted away from the Plan.

When added to the phantom mortgage expense and already HSA provided for medical expenses, that totals \$54,556 that Debtor seeks to divert from the Plan and into Debtor's pockets.

This Second Modified Plan not only fails to provide for payment of Debtor's projected disposable income, but manifests not merely a lack of good faith, but bad faith on behalf of Debtor, and each of them. They carefully avoid disclosing this in their Motion and Declaration. The double deducting of medical expenses is obvious. The phantom possible future mortgage expense is admitted by Debtor.

~~—————This Second Modified Bankruptcy Plan and the prosecution of this case by Debtor has been and is in bad faith.~~

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

### **February 14, 2023 Hearing**

On February 7, 2023, Debtor filed a Supplement to the Motion to Confirm. Dckt. 146. In the Supplement, Debtor states:

- A. Debtor's have decreased their voluntary retirement contributions by \$360.00, and will increase the monthly Plan payment to \$1,081.00.
- B. The Plan will provide for no less that a 13% dividend to creditors holding general unsecured claims.
- C. Debtor's monthly medical expenses exceed \$10,000 a year, with documentation thereof having bee provided to the Chapter 13 Trustee. Debtor's medical insurance deductible is \$6,500 a year.
- D. American Honda Services debt was paid in full by insurance after the vehicle was in accident. It is not a Class 2 claim. Amended Proof of Claim 1-2 filed by American Honda Services on December 22, 2022, which states that its claim is \$0.00.

Debtor's Declaration, Dckt. 145, is provides testimony in support of the factual statements made in the Supplement to the Motion.

At the hearing, ~~xxxxxxx~~

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

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

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

**IT IS ORDERED** that the Motion to Confirm the Modified Plan is  
~~xxxxx~~

**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)©.**

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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 September 9, 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.

<p><b>The Objection to Confirmation of Plan is <span style="color: red;">XXXXX</span>.</b></p>
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The Chapter 13 Trustee, David Cusick ("Trustee"), opposes confirmation of the Plan on the basis that:

1. Debtor failed to appear at the First Meeting of Creditors and the meeting was continued to October 6, 2022, and
2. The Plan is not feasible, nor does Debtor appear to be able to comply with the Plan.
  - a. Debtor's budget is unrealistic. Schedule J does not reflect any expenses for a vehicle or medical insurance;
  - b. Debtor failed to file tax returns;

- c. Debtor fails to provide for the full claims of the Internal Revenue Service (“IRS”) and Franchise Tax Board (“FTB”);
- d. Including the IRS and FTB’s claims would cause completion of the Plan to take approximately 85 months.

## **DISCUSSION**

Trustee’s objections are well-taken.

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

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

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

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Trustee asserts that Debtor is self-employed, earning a net monthly income of \$6,933.00, but Debtor’s Schedule J does not reflect medical insurance or vehicle expenses. Debtor has failed to explain the lack of expense for these items. 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 and FTB’s claims indicate tax returns were not filed for numerous years prior to filing for bankruptcy. Trustee’s declaration asserts that Trustee has only received Debtor’s 2013 tax return, to date. Declaration, Dckt. 15, filed on September 7, 2022. 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 Secured Claim**

Debtor’s Plan does not provide for the secured claim of FTB. Additionally, there is no indication Debtor plans to provide for FTB outside of the Plan. FTB may request relief from stay which could impact Debtor’s ability to finance the Plan.

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

Trustee asserts that the IRS filed a claim with a priority amount of \$81,063.29 in priority unsecured debt but Debtor only estimated and scheduled the IRS as priority for \$30,000.00, and \$25,544.00 as unsecured nonpriority. Proof of Claim 9-1, filed on August 29, 2022. The Plan does not provide for all priority debt as required by 11 U.S.C. § 1322(a)(2).



## **Plan Term is More 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 85 months due to proofs of claims filed by the IRS and Franchise Tax Board. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

## **DECEMBER 13, 2022 HEARING**

The Chapter 13 Trustee filed a Status Report on December 5, 2022. Dckt. 21. The Trustee reports that the Meeting of Creditors has been completed. However, at the December 1, 2022 Meeting of Creditors, the Debtor stated that he had not yet filed his tax returns, and the Meeting of Creditors has been continued to January 26, 2023.

At the hearing, counsel for the Debtor reported that Debtor attended the First Meeting of Creditors and is working on his tax returns (needing to get additional records from his bank). The First Meeting has been continued to January 2023.

The Trustee reported that the Debtor is current on Plan payments Trustee reported and concurs with there being a continuance of the hearing on this Objection.

## **FEBRUARY 13, 2023 HEARING**

The Trustee's February 9, 2023 Docket Entry Report states that the First Meeting of Creditors has now been concluded.

However, on January 30, 2023, the Chapter 13 Trustee filed a Motion to Dismiss this Bankruptcy Case. Dckt. 26. The grounds stated in the Motion are:

- a. Debtor is delinquent \$9,538.38 in Plan payments (2 months).
- b. The Tax Returns have not yet been provided.
- c. The Internal Revenue Service proof of claim states that tax returns have not been filed by Debtor for the 2016 to 2022 tax years. The California Franchise Tax Board proof of claims states that State tax returns have not been filed for the same period. State tax obligations are not provided for in the Plan.

At the hearing, **xxxxxxxxxx**

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

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

The Objection to the Chapter 13 Plan filed by 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  
XXXXXXXXXXXXXXXXXX.

3. <a href="#">22-23154-E-13</a> <a href="#">DPC-1</a>	<b>TIMOTHY/MONICA RUSSELL</b> Bruce Dwiggins	<b>OBJECTION TO CONFIRMATION OF PLAN BY DAVID CUSICK</b> 1-25-23 <a href="#">[17]</a>
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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)©.**

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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 25, 2023. By the court’s calculation, 20 days’ notice was provided. 14 days’ notice is required.

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

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<b>The Objection to Confirmation of Plan is overruled.</b>
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The Chapter 13 Trustee, David Cusick (“Trustee”) opposes confirmation of the Plan on the basis that:

- A. Debtor failed to appear at the Meeting of Creditors pursuant to 11 U.S.C. § 341.

## DISCUSSION

Trustee's objections are well-taken.

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

The Meeting of Creditors was continued to February 9, 2023. Declaration, Dckt 9.

The Chapter 13 Trustee's February 9, 2023 Docket Entry Report states that both debtors appeared and the First Meeting of Creditors has been concluded.

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 Timothy A Russell and Monica Ann Russell's ("Debtor") Chapter 13 Plan filed on December 6, 2022, 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.

**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)©.**

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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 25, 2023. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

- A. Debtor failed to appear at the first meeting of creditors
- B. Debtor failed to provide documents pursuant 11 U.S.C. § 521.

## DISCUSSION

Trustee's objections are well-taken.

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

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

The Meeting of the Creditors is continued to February 9, 2023. Declaration, Dckt 14. At the hearing Trustee reports that the Debtor did/ did not appear at the February 9, 2023 meeting.

### **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).

The Plan does not comply with 11 U.S.C. § 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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, and Office of the United States Trustee on January 10, 2023. By the court's calculation, 35 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 granted.</b></p>
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The debtor, Grace Gaspar Woodring ("Debtor"), seeks confirmation of the Modified Plan due to changes to her income and contributions. Declaration, Dckt. 104.

Debtor states her income has increased due to working overtime and she is able to increase her Plan payment. *Id.* Additionally, Debtor states she is no longer receiving contributions from her partner. *Id.*

The Modified Plan provides \$40,738.00 to be paid through December 25, 2022, followed by monthly payments of \$1,300.00 per month for the remainder of the Plan. Modified Plan, Dckt. 102. Additionally, Debtor proposes a 71.75 percent dividend to unsecured claims totaling \$31,284.72. *Id.* 11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

## CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee") filed a Response on January 30, 2023. Dckt. 107. Trustee requests the motion be granted, however, Trustee raises procedural concerns regarding the confirmation of the Plan. Trustee states:

- A. **Lease Terms** - Under the current Confirmed Plan, § 4.02 includes a lease for "28th St. Self Storage" with a monthly post-petition payment of \$89.00. The proposed Plan no longer includes this lease, however, Supplemental Schedule J continues to budget \$89.00 for a storage unit.

Upon review, the proposed Plan does not list the self storage under § 4.02. Proposed Modified Plan, Dckt. 102. Debtor's Supplemental Schedules I and J, however, still lists a "Storage Unit" expense of \$89.00. Supplemental Schedule J, Dckt. 105. Pursuant to § 4.02 of the Plan, any unexpired lease not listed in the plan is rejected. Therefore, if Debtor still seeks to make payments to the storage unit, the proposed Plan should be amended to include the lease.

At the hearing, XXXXXXXXXXXX

- B. **Prayer in Motion** - Prayer in motion states "WHEREFORE, debtor Brenda Jacobson hereby prays for an Order approving her Modified Chapter 13 Plan." The Trustee believes reference to a Ms. Jacobson was a scrivener's error.

The Court agrees with Trustee in that this appears to be an inadvertent typographical error. At the hearing, XXXXXXXXXXXX

- C. **Unincorporated Terms from Order Confirming** - Debtor's proposed modified plan does not incorporate the terms pursuant to the June 24, 2019 Order Confirming the current Confirmed Plan.

The Order Confirming First Amended Chapter 13 Plan states, pursuant to 11 U.S.C. § 1323, the plan is amended to provide:

Additional provision § 7.02 shall be added to the First Amended Chapter 13 Plan and shall read: "Pursuant to Local Bankruptcy Rule 3015-1(b)(5) and 11 U.S.C §521(f), the Debtor shall file supplemental Schedules I and J each year and provide state and federal income tax returns to the Trustee beginning with the 2018 tax year."

Order, Dckt. 88. Trustee believes the language is still necessary. At the hearing, XXXXXXXXXXXX

## DISCUSSION

~~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 debtor, Grace Gaspar Woodring ("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 January 10, 2023 as amended:~~

- ~~1. Section 4.02 of the Plan is amended to provide for the unexpired lease of "28th St. Self Storage" with a monthly post-petition payment of \$89.00.~~
- ~~2. Additional provision § 7.02 shall be added to the First Amended Chapter 13 Plan and shall read: "Pursuant to Local Bankruptcy Rule 3015-1(b)(5) and 11 U.S.C §521(f), the Debtor shall file supplemental Schedules I and J each year and provide state and federal income tax returns to the Trustee beginning with the 2018 tax year."~~

~~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)©.**

-----

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*) and parties requesting special notice on January 26, 2023. By the court's calculation, 19 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 -----  
-----.

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

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

- A. Debtor failed to appear and be examined at the First Meeting of Creditors.
- B. Debtor is delinquent in plan payments.
- C. Debtor failed to provide Federal Income Tax Return and Payment Advices.
- D. Debtor failed to provide Business Documents.

## **DISCUSSION**

Trustee's objections are well-taken.

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

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1). The meeting was continued to February 2, 2023.

The Trustee's February 2, 2023 Docket Entry Report states that Debtor failed to attend the Continued First Meeting of Creditors.

### **Delinquency**

Debtor is \$2,700.00 delinquent in plan payments, which represents multiple months of the \$1,350.00 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 1.01 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).

### **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).

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

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

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

11 U.S.C. §§ 521(e)(2)(A)(I), 704(a)(3), 1106(a)(3), 1302(b)(1), 1302©; 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.

7. [22-21297](#)-E-13  
[DBJ-2](#)

JAY SMITH  
Douglas Jacobs

**CONTINUED MOTION TO CONFIRM  
PLAN  
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).

<b>The Motion to Confirm Plan is <span style="color: red;">XXXXXX</span>.</b>
---

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, counsel for the Trustee reported that Debtor is current.

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.

Unfortunately, and which is unusual for Debtor's counsel, he was not present at the January 24, 2024 hearing. Rather than denying the Motion, counsel for Creditor and counsel for the Trustee requested that the hearing be continued.

There are several issues to clarify for confirmation of the Plan. First, what happens with respect to the secured claim of TIAA, FSB if the sale is not completed within the twelve months. The Plan, as proposed, reverts the property in the Debtor, removing it from the bankruptcy estate. Such would appear to result in the termination of the automatic stay as provided in 11 U.S.C. § 362(c)(1). Thus, the "amended contract" between Debtor and TIAA, FSB as provided in the Plan, would appear to be breached if the sale is not completed in 12 months and TIAA, FSB could then proceed with exercising its rights to foreclose on the Property.

The court noted that it seemed unusual to have a twelve month sales period for several reasons. First, this bankruptcy case was filed on May 3, 2022. Debtor has missed the Spring and

Summer 2022 sales season. In reviewing the Docket, Debtor has not sought authorization to hire a real estate professional to market and sell the property. While such failure would not result in the real estate professional not being required to perform his or her duties, the real estate professional could not be paid.

Since the first Plan was filed in this case on May 23, 2022, Debtor has stated that he is selling this Property. But nothing in the file shows that he is acting on it.

Looking at the upcoming season for marketing and selling the Property, it appears that there would be little reason to not have the sale completed by the end of August 2023. There would appear to be little upside to having the marketing and sale drag out through the Thanksgiving/Christmas/Hanukkah holiday season.

It was also discussed, in light of nothing having been done for the marketing and sale of this property since May 2022, whether benchmark and marketing reporting provisions should be included as part of the Plan.

The court continues the hearing to afford Debtor's counsel the time to address these concerns and work out constructive solutions so the Amended Plan may be confirmed.

#### **February 14, 2023 Hearing**

At the hearing, XXXXXXXXXXXX

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  
XXXXXXXXXXXX

**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)©.**

-----

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 January 25, 2023. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

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

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

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

- A. Debtors failed to appear at the First Meeting of Creditors.
- B. Debtor failed to provide Federal Income Tax Return and Payment Advices.

## DISCUSSION

Trustee's objections are well-taken.

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

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. Attempting to confirm a plan while failing to appear and be questioned by Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1). The meeting has been continued to February 9, 2023.

The Trustee's February 9, 2023 Docket Entry Report states that Debtor appeared at the First Meeting of Creditors and it has been concluded.

## **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).

## **Objection to Confirmation Filed by Lakeview Loan Servicing**

On February 9, 2023, the day the First Meeting of Creditors was concluded, Lakeview Loan Servicing, LLC ("Creditor") filed an Objection to Confirmation. Dckt. 51. Creditor states that it is in the process of filing a secured claim, with pre-petition arrearages of (\$28,270.35).

The proposed Plan appears able to only fund the (\$21,640.25) in arrearages, the amount Debtor stated in the Plan, and not have sufficient funds for Creditor's computed arrearage.

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.



# FINAL RULINGS

9. [23-20038-E-13](#)  
[PLC-1](#)

JOANNE DAVIS  
Peter Cianchetta

MOTION TO VALUE COLLATERAL OF  
FLAGSHIP CREDIT ACCEPTANCE  
1-13-23 [18]

9 thru 10

**Final Ruling:** No appearance at the February 14, 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 January, 13 2023. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral and Secured Claim 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 Value Collateral and Secured Claim of Flagship Credit Acceptance ("Creditor") is granted, and Creditor's secured claim is determined to have a value of \$21,519.00.**

The Motion filed by Joanne Aspiras Davis ("Debtor") to value the secured claim of Flagship Credit Acceptance ("Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 20. Debtor is the owner of a 2016 Ram 1500 Quad Cab Big Horn ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$21,519.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

## CHAPTER 13 TRUSTEE'S NONOPPOSITION

Chapter 13 Trustee David Cusick ("Trustee") filed an nonopposition on January 2, 2023. Dckt. 30. Trustee states that the creditor has not filed a Proof of Claim to date and does not oppose the motion. However, Trustee points to some issues with the Declaration in support of the Motion. Trustee states:

1. The Declaration does not state when the debt was incurred.
2. Debtor is under belief it is a non-purchase money security interest.

However, Trustee states Debtor's Schedules filed as an exhibit, Exhibit A, Dckt. 21, shows the debt was opened August of 2019. Additionally, the court notes, Debtor's proposed Plan, Dckt. 3, indicates the loan is not a purchase money security interest. Dckt. 3 at § 3.08.

### Inadequacy of Witness Information and Belief Testimony

The court has been presented with a declaration in which the witness provides testimony based on "belief." Those statements include:

1. I believe and assert that the reasonable, fair-market value of the ASSET is \$21,519.00. Declaration, Dckt. 20 ¶ 4.
2. I believe and assert that this creditor holds a valid security interest in the ASSET in the nature of a NON-Purchase Money Security Interest. *Id.* ¶ 6.
3. Based on the value of the ASSET, I believe and assert that the secured claim of Flagship Credit Acceptance regarding the ASSET should be allowed at \$21,519.00. *Id.* ¶ 7.

That declaration is the testimony of a witness presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. 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 © 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).

## DISCUSSION

The lien on the Vehicle’s title secures a non-purchase-money loan incurred in August, 2019, to secure a debt owed to Creditor with a balance of approximately \$39,012.00. Exhibit A, Dckt. 21. Therefore, Creditor’s claim secured by a lien on the asset’s title is under-collateralized. Creditor’s secured claim is determined to be in the amount of \$21,519.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall issue 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 Value Collateral and Secured Claim filed by Joanne Aspiras Davis (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Flagship Credit Acceptance (“Creditor”) secured by an asset described as 2016 Ram 1500 Quad Cab Big Horn (“Vehicle”) is determined to be a secured claim in the amount of \$21,519.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$21,519.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

**Final Ruling:** No appearance at the February 14, 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 January 13, 2023. By the court’s calculation, 32 days’ notice was provided. 28 days’ notice is required.

The Motion to Value Collateral and Secured Claim 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 Value Collateral and Secured Claim of Wheels Financial Group (“Creditor”) is granted, and Creditor’s secured claim is determined to have a value of \$19,465.00.**

The Motion filed by Joanne Aspiras Davis (“Debtor”) to value the secured claim of Wheels Financial Group (“Creditor”) is accompanied by Debtor’s declaration. Declaration, Dckt. 25. Debtor is the owner of a (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$19,465.00 as of the petition filing date. As the owner, Debtor’s opinion of value is evidence of the asset’s value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

#### **CHAPTER 13 TRUSTEE’S NONOPPOSITION**

Chapter 13 Trustee David Cusick (“Trustee”) filed an nonopposition on January 2, 2023. Dckt. 32. Trustee states Creditor filed a proof of claim, Proof of Claim 5-1, and asserts the secured claim amount as \$31,032.58 in its entirety.

Trustee does not oppose the Motion, however, Trustee points to some issues with the Declaration in support of the Motion. Trustee states:

1. The Declaration does not state when the debt was incurred.
2. Debtor is under belief it is a non-purchase money security interest.

However, Trustee states Debtor's Schedules filed as an exhibit, Exhibit A, Dckt. 26, shows the debt was opened September of 2019. Additionally, the court notes, Debtor's proposed Plan, Dckt. 3, indicates the loan is not a purchase money security interest. Dckt. 3 at § 3.08.

### **Inadequacy of Witness Information and Belief Testimony**

The court has been presented with a declaration in which the witness provides testimony based on "belief." Those statements include:

1. I believe and assert that the reasonable, fair-market value of the ASSET is \$19,465.00. Declaration, Dckt. 20 ¶ 4.
2. I believe and assert that this creditor holds a valid security interest in the ASSET in the nature of a NON-Purchase Money Security Interest. *Id.* ¶ 6.
3. Based on the value of the ASSET, I believe and assert that the secured claim of Wheels Financial Group regarding the ASSET should be allowed at \$19,465.00. *Id.* ¶ 7.

That declaration is the testimony of a witness presented in writing in lieu of the witness being put on the stand. Non-expert witness testimony must be based on the personal knowledge of the witness. FED. R. EVID. 602. 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 © 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).

Here, Debtor testifies in the passive voice, I believe . . . but don't know. Also, in Paragraph 7, Debtor goes from testifying to stating allegations, like one would see in a motion or complaint, stating, "I believe and assert that the secured claim of Flagship Credit Acceptance regarding the ASSET should be allowed at \$21,519.00." Dec., ¶ 7; Dckt. 20. Debtor then "testifies" in the Declaration that Debtor does "[j]oin with my attorney in moving this Court to issue an Order . . . ."

For this Motion, the court will deem Debtor's testimony to be testimony based on personal knowledge. That the mere "I believe" and "I assert" were sloppy drafting of the Debtor's testimony.

However, that is this one time. If this mere "I believe," "I assert," or "I'm informed and believe" testimony appears in other declarations for counsel's clients, the corrective sanctions will begin at \$500.00 for the debtor and \$500.00 for counsel.

## DISCUSSION

The lien on the Vehicle's title secures a non-purchase-money loan incurred in September, 2019, to secure a debt owed to Creditor with a balance of approximately \$31,032.58. Exhibit A, Dckt. 26. Therefore, Creditor's claim secured by a lien on the asset's title is under-collateralized. Creditor's secured claim is determined to be in the amount of \$19,465.00, the value of the collateral. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall issue 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 Value Collateral and Secured Claim filed by Joanne Aspiras Davis ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Wheels Financial (“Creditor”) secured by an asset described as 2018 Nissan Rogue SV (“Vehicle”) is determined to be a secured claim in the amount of \$19,465.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$19,465.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.