

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

March 7, 2023 at 2:00 p.m.

1. <u>22-23374-E-13</u> <u>DPC-1</u>	NYTHANYL WINEGAR Julius Cherry	OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 2-6-23 [13]
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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)©.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 6, 2023. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.
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The Chapter 13 Trustee, David Cusick (“Trustee”), holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor is delinquent on Plan payments.

DISCUSSION

Trustee’s objections are well-taken.

Delinquency

Debtor is \$1,200.00 delinquent in plan payments, which represents one month of the \$1,200.00 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).

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”) holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

RICHARDS V. SPAULDING ET AL

Plaintiff's Atty: J. Russell Cunningham
Defendant's Atty: Jeffrey S. Ogilvie

Adv. Filed: 1/25/22
Reissued Summons: 1/25/22
Answer: 2/18/22

First Amd Cmplt: 1/25/23
Answer: none

Nature of Action:
Recovery of money/property - fraudulent transfer

Notes:
Continued from 1/19/23 as a Pre-Trial/Status Conference

[DNL-4] Order granting Motion for Leave to Amend Complaint filed 1/23/23 [Dckt 47]

First Amended Complaint filed 1/25/23 [Dckt 49]

The Pretrial Conference is converted to a Status Conference in light of the court authorizing the filing of an Amended Complaint (it being filed on January 25, 2023; Dckt. 49).

The Status Conference shall be conducted at XXXXXXX on XXXXXXX , 2023. removed from the Calendar

MARCH 7, 2023 CONFERENCE

The court authorized the filing of an Amended Complaint, which was filed and served on January 25, 2023. The court converts this Pretrial Conference into a Status Conference, continues it to XXXXXXX on XXXXXXX 2023, and set the following deadlines for filing supplemental Status Conference documents:

- A. Supplemental Initial Disclosures shall be made on or before XXXXXXX , 2023.
- B. A Supplemental Discovery Plan, taking into account what has been asserted in the Amended Complaint, shall be filed and served on or before XXXXXXX , 2023.

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 Court having authorized the filing of an Amended Complaint, the Amended Complaint having been filed on January 25, 2023, the Parties now being presented with additional claims to address, and good cause appearing,

IT IS ORDERED that the this Pretrial Conference is converted to an Adversary Proceeding Status Conference and continued to **XXXXXXX**, 2023.

IT IS FURTHER ORDERED that:

- A. Supplemental Initial Disclosures shall be made on or before **XXXXXXX**, 2023.
- B. A Supplemental Discovery Plan, taking into account what has been asserted in the Amended Complaint, shall be filed and served on or before **XXXXXXX**, 2023.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 13, 2023. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00).

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

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<p>The Motion for Allowance of Professional Fees is granted.</p>

Candace Brookes, the Attorney ("Applicant") for Curtis Burks and Carmen Burks, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period July 18, 2023, through February 2, 2023. Applicant requests fees in the amount of \$5,785.00.

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must “demonstrate only that the services were reasonably likely to benefit the estate at the time rendered,” not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Reasonable Fees

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

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

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

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; see also *Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

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

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

A review of the application shows that Applicant’s services for the Estate include the current Application of Additional Fees, Motion to Incur Debt, and Motion to Modify Chapter 13 Plan after Confirmation. The court finds the services were beneficial to Client and the Estate and were reasonable.

“No-Look” Fees

In this District, the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority.”

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor’s attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys’ fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 97. Applicant prepared the order confirming the Plan.

Lodestar Analysis

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-

1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). “This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional’s fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion “in view of the [court’s] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.” *Hensley*, 461 U.S. at 437. Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate. *See In re Placide*, 459 B.R. at 73 (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Application for Additional Fees: Applicant spent 2.0 hours in this category. Applicant filed this motion to request additional attorney fees on the basis of actual, reasonable, necessary and unanticipated work.

Motion to Incur Debt: Applicant spent 8.1 hours in this category. Applicant filed a Motion to Incur Debt after Debtor was in a vehicle collision which required the purchase of a replacement vehicle.

Motion to Modify Plan: Applicant spent 7.7 hours in this category. Applicant filed the Motion to Modify Plan due to material changes in expenses, requiring a modified plan and supplemental schedules.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Candace Brooks, Attorney	17.8	\$325.00	\$5,785.00
Total Fees for Period of Application			\$5,785.00

FEES ALLOWED

The unique facts surrounding the case, including the unfortunate circumstances requiring Debtor to modify their plan and incur debt, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of \$5,785.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by David Cusick (“the Chapter 13 Trustee”) from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.

The court authorizes the Chapter 13 Trustee under the confirmed plan to pay 100% of the fees allowed by the court.

Applicant is allowed, and the Chapter 13 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	\$5,785.00
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pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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 Allowance of Fees and Expenses filed by Candace Brooks (“Applicant”), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Candace Brooks is allowed the following fees and expenses as a professional of the Estate:

Candace Brooks, Professional Employed by Curtis Burks and Carmen Burks (“Debtor”)

Fees in the amount of \$5,875.00,

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

IT IS FURTHER ORDERED that David Cusick (“the Chapter 13 Trustee”) is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.

4. [23-20038-E-13](#)
[DPC-1](#)

JOANNE DAVIS
Peter Cianchetta

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK**
2-9-23 [38]

4 thru 5

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor and Debtor’s Attorney, on February 9, 2023. By the court’s calculation, 26 days’ notice was provided. 14 days’ notice is required.

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

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

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

- A. the debtor, Joanne Aspiras Davis (“Debtor”), has not provided her Social Security Number to the Chapter 13 Trustee.

- B. Debtor relies on the valuation of collateral.
- C. Debtor's Plan regarding attorney fees, does not mirror the Rights and Responsibilities document filed.
- D. Debtor's Plan is inaccurate.
- E. Debtor has failed to file a Spousal Waiver.

DISCUSSION

Trustee's objections are well-taken.

No Social Security Number Provided

11 U.S.C. § 1325(a)(1) provides for confirmation of a plan if it complies with Chapter 13 provisions and other applicable Code provisions. Here, Debtor has proposed a plan that is lacking in compliance with the Bankruptcy Code. Debtor has not provided Debtor's Social Security Number. The Plan does not comply with 11 U.S.C. § 1325(a)(1).

Debtor's Reliance on Motion to Value Secured Claim

A review of Debtor's Plan shows that it relies on the court valuing the secured claims of Flagship Credit Acceptance ("Creditor") for a 2016 Ram 1500 Quad Cab Big Horn ("Vehicle") and Wheels Financial ("Creditor") for a 2018 Nissan Rogue SV ("Vehicle"). The Court has granted both motions to value collateral at \$21,519.00 and \$19,465.00 respectively. Dckt. 44 and 45.

Attorney Fees

Debtor has indicated that Debtor's attorney has received \$153.00 prior to filing and that \$4,000.00 will be paid to Debtor's attorney through the Plan. However, under §3.06 of Debtor's Plan, the Plan allocates \$0.00 in monthly payments to the attorney. Dckt. 3. Further, Debtor's Rights and Responsibilities form indicates that Debtor's attorney agreed to fees in the amount of \$4,000.00 and \$0.00 paid prior to filing under LBR 2016-1(c). Dckt. 5. Debtor's Plan regarding attorney fees do not mirror what is seen within the filed Rights and Responsibilities. The Court is unable to know what the attorney has been paid, what he expects to be paid, and how he will be paid.

Inaccurate / Incomplete Plan

11 U.S.C. § 1325(a)(1) provides for confirmation of a plan if it complies with Chapter 13 provisions and other applicable Code provisions. Here, Debtor has proposed a plan that is lacking in compliance with the Bankruptcy Code. Debtor has failed to indicate that she is married on her Statement of Financial Affairs. Dckt. 1. Further, Debtor has failed to accurately disclose that the valued collateral, the 2018 Nissan, was actually secured by Global Lending Services LLC, not Wheels Financial. Additionally, Debtor has failed to indicate two dependents on her Schedule J. The Plan does not comply with 11 U.S.C. § 1325(a)(1).

Spousal Waiver

Debtor claimed exemptions under California Code of Civil Procedure § 703.140(b). California Code of Civil Procedure § 703.140(a)(2) requires a spousal waiver by a debtor and debtor's non-filing spouse to use claimed exemptions.

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.

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 7, 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 -----.

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

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

- A. the debtor, Joanne Aspiras Davis (“Debtor”), has failed to provide Creditor’s secured claim.
- B. Debtor has failed to cure arrearage of Creditor and the Plan is infeasible.

DISCUSSION

Creditor’s objections are well-taken.

Failure to Provide for a Secured Claim

Creditor asserts a claim of \$31,032.58, for a 2018 Nissan Rogue (“Vehicle”) in this case. Proof of Claim 5-1. Debtor’s Schedule D incorrectly lists Wheels Financial Group as the secured creditor instead of Creditor. Additionally, Debtor’s Plan improperly provides for Wheels Financial Group as a Class 2(B) claim, with a total amount claimed by Wheels Financial Group in the amount of \$28,044.00. Further Debtor incorrectly estimates the amount of the claim as \$28,044.00. Creditor’s Proof of Claim asserts a claim in the amount of \$31,032.58.

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 matured obligation, which is secured by Debtor’s Vehicle. *See* 11 U.S.C. § 1325(a)(6).

It appears to the court that Debtor was under the mistaken belief that “Wheels Financial Group” is the creditor, instead of Global Lending Services, LLC. Wheels Financial Group has not filed a Proof of Claim. Global Lending Services, LLC, however, has filed a Proof of Claim with a Certificate of Title demonstrating they are the lender. Proof of Claim 5-1.

Additionally, Debtor attempted to value the secured claim, pursuant to 11 U.S.C. § 506(a), of the wrong creditor. Order, Dckt. 45. Looking at the Motion to Value the Secured Claim (Dckt. 26), they did not include a copy of the contract upon which the claim is asserted to be based or a copy of the vehicle title certificate.

Pursuant to 11 U.S.C. § 506(a), a debtor can only value an “allowed claim.” A claim in a Chapter 13 case is deemed allowed only if a proof of claim is filed. 11 U.S.C. § § 501, 502; Federal Rules of Bankruptcy Procedure 3002(a). Here, no proof of claim was filed for Wheels Financial Group. Therefore, the valuing of the secured claim was void. Additionally, it does not even appear Wheels Financial Group has a secured claim, furthering the nullity in the prior order.

As such, the following Plan terms are incorrect:

1. The valuing of the 2018 Nissan Rogue SV at \$19,465.00 from the improper 11 U.S.C. § 506(a) valuation;
2. Listing Wheels Financial Group as the creditor; and
3. Listing the vehicle as a Class 2 claim without proper 11 U.S.C. § 506(a) valuation.

The Plan cannot be confirmed.

Interest Rate

The Plan calls for adjusting the interest rate on the improper creditor’s loan with Debtor to 9.00%. Creditor asserts their claim must be provided for with a 20.95% interest rate. If Debtor were to list the proper creditor, the 9.00% interest rate would be inside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

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

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. The court could fix the interest rate as the prime rate in effect at the commencement of the case, 7.50%, plus a 1.25% risk adjustment, for a 8.75% interest rate. The 9.00% interest rate, therefore, is within the limits of *Till*.

Basis for Asserting That a 20.95% Plan Interest Rate is Proper
and Evidence Presented by Creditor in Support of Opposition
Based on the Bankruptcy Code Requiring a 20.95% Plan Interest Rate

In the Opposition, and subject to the Certifications made by Creditor and Creditor’s Counsel arising under Federal Rule of Bankruptcy Procedure 9011, Creditor states:

2. Secured Creditor objects to Debtors’ Chapter 13 Plan in that Debtor has failed to include this obligation in his Chapter 13 Plan, excluding Secured Creditor from repayment and severely prejudicing Secured Creditor’s position hereunder, as well as the security interest it maintains in the property. **As mandated by 11 U.S.C. § 1325, et seq., Secured Creditor’s secured collateral must be provided for in the amount of \$31,032.58 with a 20.95% interest rate**, which was due and owing on Debtor’s account with Secured Creditor at the time of the Debtor’s filing of the above-captioned case. Secured Creditor believes that if it is forced to accept Debtor’s Plan as is presently proposed, Secured Creditor will be prejudiced by its position thereunder and Secured Creditor will continue to suffer substantial, mounting losses.

Objection, ¶ 2; Dckt. 34 (double emphasis added). In the prayer at the end of the Objection, Creditor clearly states, “Debtor’s Plan be amended in accordance with this Objection” to the extent that the court does not deny confirmation.^{FN.1.}

FN. 1.

Federal Rule of Bankruptcy Procedure 9011 includes the following with respect to the certifications made by a party and counsel in filing pleadings and other documents with the court:

(b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,—

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

With respect to interest rates provided for in bankruptcy plans the bankruptcy community is fortunate to have a U.S. Supreme Court decision right on point, *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). As addressed above, the Ninth Circuit has also address the application of *Till* and the formula approach rather than the federal courts merely rubber stamping an interest rate a lender extracted from a borrower (here, a consumer who is a homemaker and her non-debtor spouse who is a teacher).

Creditor's Exhibit A are excerpts from the attachments to Proof of Claim 5-1 filed by Creditor. Included is a copy of a Purchase Contract for the Vehicle, with includes the consumer "friendly," commercially reasonable interest rate of 20.95%, which is dated November 10, 2020. Dckt. 36. The term of this 20.95% interest rate financing is six years, with the last payment due November 2026.

No evidence is presented as to why a 20.95% is proper under the Bankruptcy Code for this secured claim. No one provides any testimony as to why a 20.95% interest rate is proper.

Seeing this assertion being made by a sophisticated creditor, Global Lending Services, LLC and their very experienced counsel, the court is concerned that it's understanding of the proper computation of a bankruptcy plan interest rate may be out of date. The court is considering having a hearing so that Creditor can present the law, evidence with respect to this claim and the collateral, and legal analysis as to why it's demand that there be a 20.95% is the correct interest rate based on the Bankruptcy Code as enacted by Congress. This will include not only presenting the evidence and legal analysis for the future hearing, but documenting the evidence and legal analysis Creditor had prepared in advance of filing the Objection to Confirmation. For convenience, the court may use the Order to Show Cause process to have this informative proceeding.

Insufficient Plan Payments / Infeasible Plan

Creditor alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Debtor's Plan indicates monthly payments of \$1,115.00 for a 60 month period. However, Debtor's Plan fails to include the arrearages on Creditor's claim. According to Debtor's Schedules, Debtor has indicated a monthly net income of only \$1,123.82. Dckt. 1. This amount is insufficient to both fund the Plan and cure Creditor's pre-petition arrearages. Thus, the Plan may not be confirmed.

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

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

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

The Objection to the Chapter 13 Plan filed by Global Lending Services LLC (“Creditor”) holding a secured claim having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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

6. 23-20041-E-13 DPC-1	ARTHUR MEASTAS AND JANELLE SNYDER Eric Schwab	OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK 2-8-23 [17]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, and parties requesting special notice on February 8, 2023. 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. At the hearing -----.

The Objection to Confirmation of Plan is sustained.
--

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

A. The Plan is overextended.

DISCUSSION

Trustee's objections are well-taken.

Insufficient Plan Payments

Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The plan proposes to pay \$207.00 for 54 months with a 13 percent dividend to unsecured creditors. Debtor's will need to increase the Plan payment to at least \$666.02 per month to complete the Plan in 54 months based on currently filed unsecured claims which total (\$237,635). Thus, the Plan may not be confirmed.

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

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

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

The Objection to the Chapter 13 Plan filed by 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.

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 that have filed claims, and Office of the United States Trustee on January 26, 2023. By the court’s calculation, 40 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>The Motion to Confirm the Modified Plan is denied.</p>
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The debtors, William Hubbard and Eliza Hubbard, (“Debtor”) seek confirmation of the Modified Plan to lower Debtor’s plan payments, because Debtor is experiencing difficulties paying bills and living based off of their current budget. Declaration, Dckt. 21. The Modified Plan provides a total of \$61,050.00 to be paid through December 2022, followed by \$1,050.00 per month commencing January 25, 2023 for the remainder of the Plan. Modified Plan, Dckt. 23. 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 February 15, 2023. Dckt. 27. Trustee opposes confirmation of the Plan on the basis that Debtor’s Plan is not their best effort, or alternatively is not proposed in good faith, as:

1. **Net Income** - Debtor’s net income has increased, so it is not clear why Debtor is reducing the percentage to unsecured claims.

2. **Income Deductions** - Debtor's pay advices reflect, in total, over \$1,200 less than what is reported on Schedule I.
3. **Voluntary Retirement** - Debtor's paystubs show voluntary contributions that are not properly disclosed on Schedule I.
4. **Pet Expenses** - Debtor's pet expenses have increased from \$350.00 per month to \$550.00, which no explanation why.
5. **Promotion** - Debtor received a promotion and it is not clear why this has caused expenses relating to clothing, personal care, and transportation to increase, in total, by \$1,000.00.

DEBTOR'S RESPONSE

Debtor filed a Response on February 27, 2023. Dckt. 30. In response to Trustee, Debtor states:

1. **Net income** - Although Debtor is making more money, Debtor's costs of living, including payroll taxes and basic necessities, have increased.
2. **Income Deductions** - Debtor's difference in deductions are based on Debtor no longer deducting voluntary retirement contributions.
3. **Voluntary Retirement** - Debtor acknowledges the court frowns on voluntary retirement and as such they proposed a budget that does not count deduction but "has the debtors doing special savings to afford such a deduction."

It is not clear to the court what this "special savings" is. Rather, it appears that Debtor is intentionally overstating expenses so that, in addition to their two CalPERS pensions, they can also divert money away from creditors into a secret personal retirement account.

4. **Pet Expenses** - Debtor's dog requires special meals and prescriptions due to an underlying medical condition.
5. **Promotion** - Debtor received a "promotion/transfer" which has led to an increase in cost-of-living, even though there was an increase in gross income.

DISCUSSION

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 has supplied insufficient and conflicting information relating to their income and expenses. Without a clear picture of the Debtor's financial reality, the Court is unable to assess if the Debtors are making their best efforts to comply with the Plan. Thus, the court may not approve the Modified Plan.

The Reply directs the court to the Declaration, Dckt. 36, filed by Debtor in support of the Supplemental Schedules I and J. In the Declaration, the two debtors testify to an increase in expenses. There is little explanation as to the reason for these increases, but merely Debtor stating that "here's the higher amount." Examples of these Debtor personal factual determination dictated to the court include:

Clothing - 150% increase from \$100 to \$250 a month.

Testimony explaining the 250% increase: "Cost of Living Increases for Promotion."

Telephone - 90.9% increase from \$209 to \$499 a month

Testimony explaining the 90.9% increase: "Cost of upgraded int. Service."

This appears to saying that Debtor decided to upgrade their internet service (one question if this includes entertainment services), but provides no explanation as to why such upgrade is necessary or proper.

Personal -200% increase from \$100 to \$300

Testimony explaining the 200% increase: "Cost of Living Increases for Promotion." Debtor does not explain why Debtor's "Personal Expenses" increase 200% because of a promotion.

Trans. - 333% increase from \$300 to \$1,000

Testimony explaining this 333% increase: "Promotion requiring extensive."

No testimony is provided as to how, in addition to the increase in the price of gasoline, the promotion requires Debtor to fund work related travel, and does not testify that this estimated \$500+ work travel expense is not reimbursed

Pet Food & Medical - 57% increase from \$350 to \$550

Testimony explaining this 57% increase: "Cost of Living increases and dog is 13 yrs old and has medical issues."

For this expense, the total annual pet expense is \$6,600 a year. Debtor offers no explanation as to why this is reasonable in light of having sought the extraordinary relief provided under the Bankruptcy Code or how long such expense is expected in light of the dog being 13 years of age.

Review of Debtor's Declaration in Support of Motion to Confirm Modified Plan

Debtor provided their Declaration, Dckt. 21, in support of the Motion to Confirm the Modified Plan. In that Declaration, the two debtors testify (identified by paragraph number in the Declaration) in pertinent part:

2. We are asking the Court to modify our Plan to lower our Plan payments because we are having a hard time paying all bills, mortgage, living expenses with little money leftover to last us through the month.

Nothing else is provided with respect to the economic hardship these two debtors are now facing to justify reducing their plan payments notwithstanding their substantial increases in income (see discussion below).

Review of Original and Supplemental Schedules I and J, and Statement of Financial Affairs

Looking at Supplemental Schedule I, Debtor William shows his continued employment by the State of California as a "Project Manager." Dckt. 25 at 4-5. This is the same employer and stated occupation as on Original Schedule I. Dckt. 1 at 33. However, Supplemental Schedule I shows an increase in wage income to \$7,256 a month from \$5,759 stated on Original Schedule I. This is a 26% increase in income.

For debtor Eliza, Supplemental Schedule shows monthly wage income of \$7,047, increasing from the \$5,625 on Original Schedule I. This is a 25% increase in income.

Looking at Supplemental Schedule J, Dckt. 25 at 6-7, it states that Debtor has no dependents.

For the increase "work expenses," no explanation is provided for the State of California requiring work related travel to be paid by the State employee. Nor is it explained how the food and house keeping expenses have exploded to \$1,200 a month on the premise that because of required work travel the State of California would not reimburse State employee for that work related food expense.

It is interesting to note that with all of the substantial annual income increase of \$2,919 a month (\$35,028 annually), Debtors have "come up with" enough other "necessary greater expenses" to decrease their monthly net income by (\$500). This then justifies that not only none of the \$35,028 increase in annual income goes to creditors, but the percentage dividend for general unsecured claims drops to 60% from the 72% required under the Original Confirmed Plan in this case.

Schedule A/B Filed in This Case

On Schedules A/B the two debtors list their two CalPERS retirement pensions and then list two 457 retirement savings plans with modest balances. Dckt. 1 at 15. Debtor lists owning two vehicles, a 2003 BMW 521i and a 2019 Subaru Outback, in addition to owning a Vespa. *Id.* at 13. Possibly the large increase in the vehicle expense is the result of Debtor choosing to drive a twenty (20) year old BMW with 178,000 miles on it. *Id.*

Looking at the Statement of Financial Affairs, for 2019, the year the bankruptcy case was filed, Debtor shows income for the two debtors. However, Debtor states under penalty of perjury that debtor Eliza had no income in 2018 and 2017. But on Schedule I, Debtor states under penalty of perjury that debtor Eliza had been employed by the State of California for four year as of the July 30, 2019 filing of this case. That would mean that debtor Eliza had income from the State of California for 2018 and 2017 which was not disclosed on the Statement of Financial Affairs. Dckt. 1 at 33.

The court also notes that Debtor states the gross wages for debtor William was \$105,780 in 2018, and \$107,181. *Id.* at 39. This gross wage income is substantially greater then the amount of \$69,108 stated on Original Schedule I. *Id.* at 33.

The filing of a bankruptcy case, the prosecution of a bankruptcy case, the filing of a Chapter 13 Plan, and prosecution of that Plan must be in good faith. See 11 U.S.C. § 1325(a)(3), (a)(7).

Additionally, testimony provided under penalty of perjury must be accurate to the best of a witnesses personal knowledge. See Fed. R. Evid. 602. Witnesses must provide the court with testimony of facts, not merely their factual conclusions that they are dictating to the court.

This goes not only to the credibility of the witness, but for debtors goes to whether they are trying to prosecute their case in good faith or working to “game the federal court.” The Federal Judicial Process is not one in which parties see how far they can go from the truth for their advantage, and then only need to tell the truth or comply with the law if they get caught abusing the law and court.

Debtor’s experienced counsel can review with Debtor their lack of testimony, failure to comply with the law, and what the court perceives as abusing the law and the Federal Court. Additionally, counsel can review with them the consequences that can result from such misconduct if so determined by the court.

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

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

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

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

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

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

Local Rule 3007-1 Objection to Claim—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on January 5, 2023. By the court's calculation, 61 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Proof of Claim Number 10-1 of Employment Development Department is sustained, and the claim is disallowed in its entirety.

David Cusick, the Chapter 13 Trustee, ("Objector") requests that the court disallow the claim of Employment Development Department ("Creditor"), Proof of Claim No. 10-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of \$1,409.00. Objector asserts that Creditor returned a disbursement and advised Objector that the claim has been paid.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof

of claim has the burden of presenting substantial evidence to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires financial information and factual arguments. *In re Austin*, 583 B.R. 480, 483 (B.A.P. 8th Cir. 2018). Notwithstanding the prima facie validity of a proof of claim, the ultimate burden of persuasion is always on the claimant. *In re Holm*, 931 F.2d at p. 623.

Once a party has objected to a proof of claim, the creditor asserting the claim may not withdraw the claim except on order of the court. FED. R. BANKR. P. 3006.

Chapter 13 Trustee states that the Plan requires disbursements unless the Court disallows the claim. Declaration, Dckt. 38. A disbursement was made to Employment Development Department; however, the payment was returned. *Id.* In a telephone conversation between the Trustee and the creditor, the creditor stated that the claim has already been paid and that the Debtor's Attorney filed the claim in error. *Id.*

Trustee mentions a contemporaneous note of the conversation in the Declaration filed alongside this Objection; however, in review of the attached exhibits the court notes that the "contemporaneous claim notes" were not filed.

The court has not been provided any evidence from Employment Development Department indicating the claim was filed in error – the Chapter 13 Trustee not having received a letter from the Employment Development Department.

However, the Trustee has provided the court with evidence that the Employment Development Department had demonstrated that it has no claim in this case by having issued a refund to the Chapter 13 Trustee for the prior disbursement on the Claim filed by the Debtor for the Employment Development Department. Exhibit 3; Dckt. 39.

Given the unique circumstances for this Objection to Claim, the refund check is admissible evidence of the Employment Development Department is not asserting any claim in this Bankruptcy Case. A creditor giving money back to a Trustee is pretty solid evidence that the creditor is communicating no further money is owed to that creditor.

The testimony that the Declarant heard from Dwayne Smith (the first level of hearsay) say that he heard an employee of the Employment Development Department (second level of hearsay) make an admission against interest (an opposing party statement, Fed. R. Evid. 801(d)(2), 807(b) residual possible exceptions to the hearsay rule if Mr. Smith was testifying) that now obligation was owing, does not get around the first level of hearsay of what Declarant heard Mr. Smith say.

While the Trustee does not accept the hearsay statement for the truthfulness of the fact thereto, that there is no obligation owed, the court does allow it to show: (1) the Trustee's intention in bringing the Objection to Claim and (2) corroborative of why nobody from the State of California is opposing the Objection to Claim.

The substantive evidence in support of the assertion that there is no obligation owed to the Employment Development Department is the refund check, with from the Employment Development Department.

Based on the evidence before the court, Creditor's claim is disallowed in its entirety. The Objection to the Proof of Claim is sustained.

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

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

The Objection to Claim of Employment Development Department ("Creditor"), filed in this case by David Cusick, the Chapter 13 Trustee ("Objector") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Proof of Claim Number 10 of Creditor is sustained, and the claim is disallowed in its entirety.

Attorney's fees and costs, if any, shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014.

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 and Debtor's Attorney on February 8, 2023. 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. At the hearing -----.

<p>The Objection to Confirmation of Plan is overruled without prejudice, the court having dismissed this Chapter 13 Case (Order, Dckt. 30).</p>
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The Chapter 13 Trustee, David Cusick ("Trustee") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. Debtor failed to appear at the Meeting of Creditors.
- B. Debtor is delinquent on Plan payments.
- C. Debtor filed an inaccurate petition.

The court entered an order on February 26, 2023, dismissing this Chapter 13 Case. Order; Dckt. 30. The Bankruptcy Case having been dismissed, the Objection to Confirmation is dismissed without prejudice.

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”) holding a secured claim having been presented to the court, the Bankruptcy Case having been dismissed (Order, Dckt. 30), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of the Plan is overruled without prejudice.

FINAL RULINGS

10. [22-22864-E-13](#)
[23-2001](#)
JBC-1

NATHANIEL SOBAYO
Pro Se

MOTION TO DISMISS ADVERSARY
PROCEEDING/NOTICE OF REMOVAL
2-2-23 [[21](#)]

**SOBAYO V. THE BANK OF NEW YORK
MELLON ET AL**

Pursuant to the prior court Order, Dckt. 47, the hearing on the Motion to Dismiss has been continued to March 23, 2023 at 11:00 a.m., to be heard with other pending Motions to Dismiss this Adversary Proceeding filed by other Defendants.

**HUSTED V. MEPCO LABEL SYSTEMS
ET AL**

Final Ruling: No appearance at the March 7, 2023 Pretrial Conference is required.

Plaintiff's Atty: J. Russell Cunningham; Kristen Ditlevsen

Defendant's Atty:

Charles L. Hastings [Laura Strombom]

Scott G. Beattie [Carol L. Gassner; Alfred M. Gassner; Mepco Label Systems]

Adv. Filed: 1/7/19

Answer:

2/5/19 [Alfred M. Gassner; Carol L. Gassner; Mepco Label Systems]

2/5/19 [Laura Strombom]

1st Amd Cmpl't Filed: 6/3/20

Answer:

6/17/20 [Laura Strombom]

6/19/20 [Alfred M. Gassner; Carol L. Gassner; Mepco Label Systems]

Counterclaim of Alfred M. Gassner; Carol L. Gassner; Mepco Label Systems filed 6/19/20

Answer: 7/9/20

Nature of Action:

Recovery of money/property - turnover of property

Notes:

Continued from 11/30/22. The Parties reported a settlement will be presented to the court for approval with a hearing likely set for January 2023.

The Pretrial Conference is continued to 10:30 a.m. on March 27, 2023, to be conducted in conjunction with the hearing on the Motion to Approve a Settlement resolving this and a related Adversary Proceeding.

MARCH 7, 2023 STATUS CONFERENCE

On February 28, 2023, Plaintiff-Trustee Kimberly J. Husted filed a Status Report advising the court that a settlement has been agreed to by Parties that fully resolves the claims and issues in this Adversary Proceeding and related Adversary Proceeding 19-2038. Dckt. 213.

The Motion to Approve Compromise was filed on March 2, 2023, in the Thomas Gassner Bankruptcy Case and is set for hearing at 10:30 a.m. on March 23, 2023. 10-27435; Dckt. 247.

The court continues the Pretrial conference to be conducted with the hearing on the Motion to Approve Compromise for the convenience of all parties in interest, as well as the court.

GASSNER V. GASSNER ET AL

Final Ruling: No appearance at the March 7, 2023 Status Conference is required.

Plaintiff's Atty: Paul J. Pascuzzi

Defendant's Atty:

Scott G. Beattie [Carol L. Gassner; Alfred M. Gassner]

Charles L. Hastings [Laura Strombom]

Adv. Filed: 3/12/19

Answer: 4/11/19 [Laura Strombom]

4/11/19 [Alfred M. Gassner; Carol L. Gassner]

Amd. Cmpl. Filed: 7/12/19

Answer: 8/5/19 [Alfred M. Gassner; Carol L. Gassner]

8/13/19 [Laura Strombom]

Amd. Answer: 8/13/19 [Alfred M. Gassner; Carol L. Gassner]

8/26/19 [Alfred M. Gassner; Carol L. Gassner]

Notes:

Continued from 11/30/22. The Parties reported a settlement will be presented to the court for approval with a hearing likely set for January 2023.

The Pretrial Conference is continued to 10:30 a.m. on March 27, 2023, to be conducted in conjunction with the hearing on the Motion to Approve a Settlement resolving this and a related Adversary Proceeding.

MARCH 7, 2023 STATUS CONFERENCE

On February 28, 2023, Plaintiff Georgene Gassner and Defendants filed a Status Report advising the court that a settlement has been agreed to by Parties that fully resolves the claims and issues in this Adversary Proceeding and related Adversary Proceeding 19-2006. Dckts. 181, 183.

The Motion to Approve Compromise was filed on March 2, 2023, in the Thomas Gassner Bankruptcy Case and is set for hearing at 10:30 a.m. on March 23, 2023. 10-27435; Dckt. 247.

The court continues the Pretrial conference to be conducted with the hearing on the Motion to Approve Compromise for the convenience of all parties in interest, as well as the court.

13. [23-20039-E-13](#)
[DPC-2](#)

COURTNEY MEJIA
Pro Se

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
2-8-23 [16]**

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

<p>The case having previously been dismissed, the Objection is overruled without prejudice as moot.</p>
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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 Objection to Confirmation of Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled without prejudice as moot, the case having been dismissed.