UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

March 21, 2023 at 2:00 p.m.

1.	**23-20087-E-13** **DPC-1**	**CHRISTY TRULL** **Seth Hanson**	**OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **2-15-23 [14]**

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

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 15, 2023. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. the debtor, Christy Lavaughn Trull ("Debtor"), has improperly classified the secured claim of OneMain Financial ("Creditor").

DEBTOR'S RESPONSE

Debtor filed a Response on February 24, 2023. Dckt. 18. Debtor states Creditor was inadvertently listed as Class 2(B), and requests the order reclassifies Creditor's claim as 2(A). Additionally, Debtor proposes the order confirming increases the Plan payment from $375.00 to $485.00 for months 1-60 to increase the amount of Creditor's claim.

TRUSTEE'S REPLY

Trustee filed a reply on March 8, 2023. Dckt. 20. Trustee states they are not opposed to Debtor's suggested amendments.

The Plan, as amended, complies with 11 U.S.C. §§ 1322 and 1325(a) 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 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. Christy Lavaughn Trull ("Debtor") shall file a corrected Plan, properly classifying the secured claim of OneMain Financial and monthly Plan payments. Counsel for Debtor shall prepare an appropriate order confirming the Corrected 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.

2. 20-22499-E-13 PSB-1 — EDGAR/DULIAMARIA AGUILAR — Paul Bains — MOTION TO MODIFY PLAN — 2-8-23 [39]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, Attorneys of record who have appeared in the Bankruptcy case, and Office of the United States Trustee on February 9, 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).

The Motion to Confirm the Modified Plan is ~~denied~~.

The debtors, Edgar Eduardo Aguilar and Duliamaria Aguilar ("Debtor") seek confirmation of the Modified Plan because debtor Edgar incurred unexpected medical costs and a reduced annualized income which caused Debtor to fall behind in Plan payments. Declaration, Dckt. 42. Debtor Edgar has recently started a job a new job and debtor Duliamaria expects a raise in April of 2023. *Id.* The Modified Plan provides $90,523.88 to be paid into the Plan as of month 32, followed by $3,810.00 per month for months 33-35, and $4,560.00 per month for months 36-60. 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 27, 2023. Dckt. 51. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor is delinquent in Plan payments.

B. Debtor's Modified Plan fails to cure post petition arrears.

DEBTORS'S RESPONSE

Debtor filed a response on March 15, 2023. Dckt. 54. Debtor states they sent a payment over TFS that will bring them current. Additionally, they state the months related to the principal balance due for the post-petition mortgage arrears will be clarified in the Order Confirming the First Modified Plan.

At the hearing, XXXXXXXXXX

~~**DISCUSSION**~~

~~**Delinquency**~~

~~The Chapter 13 Trustee asserts that Debtor is $3,810.00 delinquent in plan payments, which represents multiple months of the $3,445.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).~~

~~**Failure to Cure Post-Petition Arrearage of Creditor**~~

~~Debtor's failure to make Plan payments under the previous Confirmed Plan has caused post-petition arrears to Specialized Loan Servicing ("Creditor"), in the amount of $5,805.73. Dckt. 51. Debtor has indicated that there should be some form of payment to cure the post-petition arrears; however, Debtor fails to identify which months relate to the current principal due. Dckt. 51. The Court, at this time, is unable to determine the sufficiency of the Modified Plan to cure these post-petition arrears. The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.~~

~~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, Edgar Eduardo Aguilar and Duliamaria Aguilar ("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.~~

3.	**22-21905-E-13 AVN-2**	**SCOTT WILLIAMS/YANCEY CUYUGAN** **Anh Nguyen**	**MOTION TO CONFIRM PLAN 2-9-23 [31]**

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 February 9, 2023. By the court's calculation, 40 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Plan is denied.

The debtors, Scott Brian Williams and Yancey Bataclan Cuyugan ("Debtors") seek confirmation of the First Amended Chapter 13 Plan. The Plan provides monthly payments of $372 for a period of 4 months and then $979 for a period of 56 months. *Id.* Debtor has removed his voluntary retirement contribution and updated his income to include his VA disability income. *Id.* Priority claims shall be paid in full through the Plan. Plan, Dckt. 29. Unsecured claims shall receive approximately 31% dividend. Plan, Dckt. 29. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on March 7, 2023. Dckt. 42. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor is delinquent in Plan payments.

B. It is unclear why Debtor's tax withholding have increased and what Debtor's actual income is.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is $428.00 delinquent in plan payments, which represents less than one month of the $979.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Failure to Afford Plan Payment /
Cannot Comply with the Plan

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). It is not clear what Debtor's current income is.

	Debtor 1, Original Schedule I, Dckt. 1	Debtor 1, Amended Schedule I, Dckt. 30	Debtor 2, Original Schedule I, Dckt. 1	Debtor 2, Amended Schedule I, Dckt. 30
Gross Income	$5,193.07	$5,896.76	$3,711.84	$3,506.12
Tax, Medicare, and Social Security Deductions	**(824.83)**	**(1,188.68)**	(672.18)	(672.18)
Mandatory Contributions for Retirement	(579.26)	(654.92)	(371.18)	(371.18)
Voluntary Contribution for Retirement	(623.18)	(0.00)	(0.00)	(0.00)

It is unclear to the court why tax, medicare, and social security deductions have increased by $363.85. A failure to explain the increase suggests a lack of best effort in the proposed Plan. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the debtor, Scott Brian Williams and Yancey Bataclan Cuyugan ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

4. 20-22006-E-13 TLA-2 — BROOKS PARFITT — Thomas Amberg — MOTION TO MODIFY PLAN — 2-7-23 [40]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors,, and Office of the United States Trustee on February 7, 2023. By the court's calculation, 42 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(5) & 3015(h) (requiring twenty-one days' notice); LOCAL BANKR. R. 3015-1(d)(2) (requiring fourteen days' notice for written opposition).

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

The Motion to Confirm the Modified Plan is denied.

The debtor, Brooks Gregory Parfitt ("Debtor") seeks confirmation of the Modified Plan to/because he has experienced numerous household and vehicle repairs and has subsequently fallen behind

on plan payments. Declaration, Dckt. 44. The Modified Plan provides $161,146.40 to be paid through January 2023, payments of $5,400.00 for the remainder of the plan, and a 4 percent dividend to unsecured claims totaling $151,755.77. Modified Plan, Dckt. 42. 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 March 1, 2023. Dckt. 54. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor has incorrectly stated post-petition arrearage amounts; and

B. Debtor has not incorporated language pursuant to Order confirming plan.

DEBTOR'S RESPONSE

Debtor filed a response on March 7, 2023. Dckt. 57. Debtor states they propose to correct arrearage amounts regarding the Class 1 arrears listed in the Order Confirming Plan. Additionally, Debtor will incorporate the tax refund language requested by Trustee in the Order Confirming Plan, which was unintentionally omitted.

The Plan, as corrected, complies with 11 U.S.C. §§ 1322 and 1325(a). Debtor is to file a corrected Plan, and submit an appropriate order to Trustee confirming the Plan.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Modified Chapter 13 Plan filed by the debtor, Brooks Gregory Parfitt ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection is overruled. Brooks Gregory Parfitt ("Debtor") shall file a corrected Plan, properly curing the post-petition arrearages of Citizens Bank, N.A. and Interactive Mortgage, and incorporating tax refund payments. Counsel for Debtor shall prepare an appropriate order confirming the Corrected 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.

5.	**23-20106-E-13 DPC-1**	**JOHN VILLAROMAN Jason Vogelpohl**	**OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE DAVID P. CUSICK 2-15-23 [15]**

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 15, 2023. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

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

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

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

DISCUSSION

Trustee's objections are well-taken.

Failure to Appear

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).

Pursuant to Trustee's March 16, 2023 docket entry, Debtor appeared at the March 16, 2023 Meeting of Creditors.

As this was Trustee's only objection, it appears the Plan can now be confirmed.

At the hearing, XXXXXXXXXX

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

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

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

~~**IT IS ORDERED** that the Objection is overruled, and John Joseph Villaroman's ("Debtor") Chapter 13 Plan filed on January 13, 2023, 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.~~

6.	**23-20109-E-13** **APN-1**	**JONATHAN/LNIRA MARTINEZ** **Mo Mokarram**	**OBJECTION TO CONFIRMATION OF PLAN BY HARLEY-DAVIDSON CREDIT CORPORATION** **2-14-23 [16]**

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

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

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 14, 2023. By the court's calculation, 35 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is overruled, with the Plan interest rate to be paid Creditor set at 8.75%

Harley-Davidson Credit Corporation ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

A. Debtor fails to sufficiently provide for a secured claim,

B. Debtor has proposed an unreasonably low interest rate, and

C. Debtor's plan is not feasible as proposed.

DISCUSSION

Creditor's objections are well-taken.

Failure to Sufficiently Provide for a Secured Claim

Debtor's Schedule D filed on January 13, 2023, estimates the amount of Creditor's claim as $18,018.00 and indicates that it is secured by a 2020 HARLEY-DAVIDSON FLTRX ROAD GLIDE. The Plan provides for treatment of this as a Class 2(A) claim and proposes to pay a $356.78 monthly dividend on account of the claim. Creditor filed a proof of claim of $19,496.18 in this case on February 8, 2023. Creditor states a motion to value property under 11 U.S.C. §506 has not been filed and thus Creditor is entitled to the amount in the proof of claim.

While Creditor is correct in stating the it is entitled to the amount stated in the proof of claim, Creditor is mistaken that it's entitled simply because a motion to value collateral has not been filed. The Debtor has provided Class 2(A) treatment of the claim. Class 2(A) claims are not reduced based on the value of the collateral. Section 3.02 of form EDC 3-080 states "The proof of claim, not this plan or the schedules, shall determine the amount and classification of a claim unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of the claim." This means that the regardless of the amount stated as a claim by the Debtor in the Plan, Creditors proof of claim determines the actual amount of the claim.

The court notes that Creditor's proof of claim was filed after the Debtor filed his Plan. Creditor cannot reasonably expect that Debtor would have known the precise amount of the claim prior to the proof of claim being filed.

Interest Rate

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 7.00%. Creditor's claim is secured by a 2020 HARLEY-DAVIDSON FLTRX ROAD GLIDE. Creditor argues that it's entitled to the **contract rate of interest of 23.99%** and reasonable attorney's fees and costs pursuant to 11 U.S.C. § 506(b) because the estimated fair market value of the collateral is greater than the outstanding balance of the loan.

Creditor's Objection provides no legal analysis or basis for its contention that it has the right to 23.99% interest because it is oversecured and that 11 U.S.C. § 506(b) trumps Chapter 13 Plan terms.

11 U.S.C. § 506(b) states, to the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

This section provides for a interest on such a claim where the estimated fair market value of the collateral is greater than the outstanding balance of the loan. Notably this section does not provide for the contracted interest rate on the claim.

Under 11 U.S.C. 1322(b)(2), a chapter 13 plan may modify the rights of the holders secured claims. The extent to which the chapter 13 plan may modify the rights of the holder of a secured claim and still be confirmed depends upon the application of section 1325(a)(5) in each particular case.

11 U.S.C. §1325(a)(5) states, the holder of such claim must accept the plan, the plan must provide that the holder of such claim retain the lien securing the claim and the value, as of the effective date

of the plan, of any property to be distributed under the plan on account of the claim is not less than the amount of the claim, with the property distributed in equal monthly payments at least sufficient to provide adequate protection to the holder of the claim, or the debtor surrenders to the holder of any such claim the property securing the claim.

In the Supreme Court case *Till v. SCS Credit Corp*, the court stated "in cases...involving secured interests in personal property, the court's authority to modify the number, timing, or amount of the installment payments from those set forth in the debtor's original contract is perfectly clear." 541 U.S. 465 (2004).

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

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment.

At the hearing, Creditor provides to the court any grounds entitling them to the contract rate, rather then the *Till* rate. XXXXXXXXXXX

The court fixes 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 objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

Failure to Cure Arrearage of Creditor

Creditor has filed a timely proof of claim in which it asserts $3,716.32 in pre-petition arrearage. The Plan does not propose to fully cure those arrearage. Creditor asserts that the Plan payments of $930 is insufficient cure the pre-petition arrearage and fund the plan. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B).

Creditor asserts that there is an additional ($1,478.18) of arrearage to be cured, and Debtor has no projected disposable income to increase the Plan payment – thus, the Plan is doomed. Over sixty months, that would be an additional $24.64 a month to the Plan payments. Not a daunting number.

However, Debtor is not treating this as a Class 1 Claim to be cured, but has modified the obligation providing for it in Class 2 for payment in full during the term of the Plan.

Looking at the Plan, it is funded with $930 a month for 60 months, which totals $55,800 in Plan funding. As proposed, the Plan funding provides for the following payments:

Total Plan Funding	$55,800.00	
Chapter 13 Trustee Fees (Estimated at 6%)	($3,348.00)	
Debtor's Counsel Fees	($2,500.00)	
Ally Financial	($25,109.90)	($21,256.64) Proof of Claim 11-1 Filed by Ally Bank for obligation relating to a Mercedes Benz, **but it is filed as an unsecured claim.** Payment is as provided in Plan
Harley Davidson (Creditor)	($24,140.83)	($19,496.18) Secured Claim Filed. Total payments when amortized over 60 months at 8.75% interest.
General Unsecured Dividend of 1%	($87.28)	Proof of Claim Filed, Excluding Ally Bank, total ($8,727.39)
Over/(Under) Funding	$613.99	

If Ally Financial/Bank has an unsecured claim, then the general unsecured claims will be ($29,984). With a 1% minimum dividend, that requires a $299.84 dividend to general unsecured claims. With there being no Ally Financial/Bank secured claim, the Plan is then Over Funding by $25,511.18.

If Creditor had conducted the necessary review of the finances and assembled the applicable law, it would have recognized that it's Objection, as stated, was without merit. Alternatively, Creditor may have know it's Objection was without merit, but was confident that the court would not identify the correct law and review the Plan and Proofs of Claim.

Ally Financial or Ally Bank Claim

The proposed Plan states that "Ally Financial" has a claim secured by a Mercedes Benz. However, Ally Bank has filed Proof of Claim 11-1, which is based on the sale of a Mercedes Benz, expressly stating that the claim is not secured.

At the hearing, **xxxxxxx**

The Plan does comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is overruled, and the Plan 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 Objection to the Chapter 13 Plan filed by Harley-Davidson Credit Corporation ("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 overruled, the court setting the Plan interest for Creditor's secured claim at 8.75%. Debtor's Counsel shall prepare an appropriate order confirming the Chapter 13 Plan, which states the forgoing amendment setting the Plan interest rate for Creditor's secured claim at 8.75%, 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. sustained, and the proposed Chapter 13 Plan is not confirmed. Trustee will submit the proposed order to the court.

7. **22-22917-E-13** **JOHN DOUGHERTY**
Mary Ellen Terranella

7 thru 9

MOTION TO WAIVE FINANCIAL MANAGEMENT COURSE REQUIREMENT,WAIVE SECTION 1328 CERTIFICATE REQUIREMENT, CONTINUE CASE ADMINISTRATION, SUBSTITUTE PARTY, AS TO DEBTOR AND/OR NOTICE OF DEATH OF A DEBTOR
2-23-23 [80]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 23, 2023. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

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

The Motion to Substitute is granted.

Joan Dougherty ("Successor-in-Interest"), wife of deceased debtor John Scott Dougherty ("deceased Debtor"), seeks an order approving the motion to substitute for the deceased Debtor. This motion is being filed pursuant to Federal Rule of Bankruptcy Procedure 1016.

Deceased Debtor filed for relief under Chapter 13 on November 10, 2022. Deceased Debtor does not yet have a Chapter 13 plan confirmed. On January 28, 2023, deceased Debtor Name of passed away. Successor-in-Interest asserts that she is the lawful successor and representative of deceased Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1016, Successor-in-Interest requests authorization to be substituted in for the deceased Debtor and to perform the obligations and duties of the deceased party. A Suggestion of Death was filed on February 23, 2023. Dckt. 80. Successor-in-Interest is the deceased party's heir and lawful representative. Successor-in-Interest states that she will continue to prosecute this case in a timely and reasonable manner.

DISCUSSION

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

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

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

Here, Joan Dougherty has provided sufficient evidence to show that administration of the Chapter 13 case is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the ninety-day period specified in Federal Rule of Bankruptcy Procedure 1016,combined with the notice of death. Dckt. 80. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Successor-in-Interest, Joan Dougherty, as the surviving spouse of the deceased party and as the successor's heir and lawful representative, may continue to administer the case on behalf of the deceased debtor, John Scott Dougherty. The court grants the Motion to Substitute Party.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Joan Dougherty is substituted as the successor-in-interest to John Scott Dougherty and is allowed to

continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.

IT IS FURTHER ORDERED that the waiver of 11 U.S.C. § 1328 post-petition education requirement for the deceased Debtor John Scott Dougherty is waived, and it is not required in this case.

8. **22-22917-E-13** **JOHN DOUGHERTY** **CONTINUED MOTION FOR RELIEF**
HLG-1 **Mary Ellen Terranella** **FROM AUTOMATIC STAY**
12-15-22 [21]

CHERYL HENRY VS.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on December 16, 2022. By the court's calculation, 39 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is xxxxxxx .

Cheryl Henry's ("Movant") seeks relief from the automatic stay with respect to John Scott Dougherty's ("Debtor") real property commonly known as 1096 Vintage Court, Vacaville, California ("Property"). Movant has provided the Declaration of Cody S. Fischer ("Movant's Counsel") to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues that they have a third-position Deed of Trust in the amount of $191,645.00 secured by Debtor's property. Declaration, Dckt. 22.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David P. Cusick, ("Trustee") filed a reply on January 4, 2023. Dckt. 44. Trustee states Debtor's proposed Plan does not provide for Movant. Additionally, Debtor is delinquent in Plan payments on the proposed Plan.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on January 10, 2023. Dckt. 47. Debtor asserts that Creditor does not have a Deed of Trust because Debtor did not consent or agree to sign any Note or Deed of Trust. Rather, Debtor argues Creditor's secured claim is based on an Abstract of Judgment, which is a nonconsensual lien subject to avoidance. Therefore, Creditor's interest is not subject to adequate protection.

From the court's review of Movant's exhibits in support of the Motion, Debtor never signed a promissory note or deed of trust that would give Creditor a consensual lien on Debtor's Property. Dckt. 23. However, Movant provides the declaration of Movant's Counsel to testify under penalty of perjury that the Promissory Note and Deed of Trust were signed and notarized on June 9 and 20, 2022, respectively.

From the court's review of the exhibits (Dckt. 23) filed in support of the Motion, Movant provides the following:

Exhibit B - Promissory Note

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

Payment terms:

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

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

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

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

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

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

Exhibit C - Recorded Deed of Trust

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

Recording Information:

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

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

MOVANT'S REPLY BRIEF

In response to Debtor's opposition, Movant filed a Reply Brief. Dckt. 58. As evidence in support of the reply brief, Movant provides the Declaration of Movant's Counsel, Cody S. Fischer. Dckt. 59. Movant's Counsel testifies much of the same facts testified in their prior Declaration, however, provides further evidence for the court. Dckt. 22. Under penalty of perjury, Movant's Counsel states they have personal knowledge that:

1. The underlying secured interest arises from enforcing Debtor and Movant's settlement agreement from September 30, 2020. Declaration, Dckt. 58 ¶ 3.

2. The settlement agreement arose from a Solano County Superior Court Case between the Movant and Debtor, Case No. FCS052751. *Id.*

3. After Debtor failed to comply with the terms of the settlement agreement, Movant filed a Motion to Enforce Settlement Agreement. *Id.* ¶ 4.

4. On November 30, 2021, Solano County Superior Court entered its Judgment in favor of Movant. Judgment was filed by the court on December 13, 2021. *Id.* ¶ 5.

5. As part of the Judgment, the court ordered Debtor to execute a Promissory Note and Deed of Trust, no later than December 29, 2021. *Id.* ¶ 6.

6. Debtor failed to comply with the court order. *Id.* ¶ 7.

7. In May of 2022, Debtor stated, with notary present, "Well I guess I'm going to jail then, because I'm not signing." *Id.* ¶ 7. The court notes, Movant's Counsel has not made it clear whether Movant's Counsel was present for this statement. If Movant's Counsel were present, the statement would be admissible evidence as an opposing party statement. Federal Rules of Evidence Rule 801(d)(2).

8. Movant requested an appointment of an Elisor (person authorized by the court to sign documents for another person*; see Blueberry Properties, LLC v. Chow*, 230 Cal. App. 4th 1017, 1020-1021 (2014)) to have the Note and Deed of Trust signed and notarized. *Id.* ¶ 8.

9. The Note and Deed of Trust were signed and notarized, and the Deed of Trust was recorded in Solano County on June 27, 2022. *Id.* ¶ 11.

It is not clear to the court how Movant's Counsel has personal knowledge as to the facts above. 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.

Movant's Counsel has not informed the court whether they represented Movant and was present at the time of the listed events.

JANUARY 24, 2023 HEARING

At the hearing, counsel for the Debtor reported that Debtor is suffering from a serious medical condition and that the appointment of a personal or successor representative may be required.

The court addressed with counsel for Movant the need for supplemental pleadings which would include the Settlement Agreement and the Tentative Ruling in granting Movant's Motion to Enforce Settlement which was adopted by the State Court Judge in issuing the State Court Judgment (Exhibit A; Dckt. 23 at 3-4).

At the hearing, the parties agreed to continue the hearing to March 7, 2023 to allow for the supplemental briefing.

MOVANT'S SUPPLEMENTAL BRIEF

Movant filed a Supplemental Brief on February 10, 2023. Dckt. 74. Movant states the following in support of their Motion for Relief:

1. Movant promised to sign the Note and Deed of Trust but did not do so. *Id.* at 6.

2. Movant was forced to seek court intervention to order Debtor to sign the document. *Id.*

3. The Elisor's signature has the legal effect as if Debtor had signed the Note and Deed of Trust. *Id.* at 7 (citing *Blueberry Props., LLC v. Chow*, 230 Cal. App. 4th 1017, 1021 (2014)).

4. Liens created by settlement agreements are consensual liens. *Id.* (citing *Naqvi v. Fisher*, 192 B.R. 591, 596 (Bankr.D.N.H. 1995)).

5. The signing, originating from a consensual settlement agreement, indicates the Note and Deed of Trust are valid, enforceable, and consensual. *Id.*

DEBTOR'S SUPPLEMENTAL OPPOSITION

Debtor filed supplemental opposition on February 24, 2023. Dckt. 85. Debtor states:

1. Movant's claim that she is not adequately protected is not supported by evidence. *Id.* at 2.

2. Debtor passed away on January 28, 2023. *Id.* at 3.

3. An amended plan will be filed once deceased Debtor's spouse is substituted as representative which will fully address Movant's claim. *Id.*

COURT'S ORDER CONTINUING HEARING

On March 1, 2023, the court issued an order continuing the hearing on the Motion for Relief to 2:00 p.m. on March 21, 2023, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

ISSUANCE OF A COURT-DRAFTED ORDER

An order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by John Scott Dougherty ("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 judgment lien of Cheryl Henry is xxxxxx

9. 22-22917-E-13 MET-1 | **JOHN DOUGHERTY** Mary Ellen Terranella | **CONTINUED MOTION TO AVOID LIEN OF CHERYL HENRY** 1-3-23 [38]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter| 13Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on January 3, 2023. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is xxxxxxx.

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

CREDITOR'S OPPOSITION

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

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

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

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

> The lady doth protest too much, methinks.

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

DEBTOR'S RESPONSE

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

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

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

DISCUSSION

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

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

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

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

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

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

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

3. Late fees of $50 apply.

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

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

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

Attachment 2 - Recorded Deed of Trust

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

Recording Information:

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

Attachment 3 - Promissory Note

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

Payment terms:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Continuance of January 24, 2023 Hearing

At the hearing, counsel for the Debtor reported that Debtor is suffering from a serious medical condition and that the appointment of a personal or successor representative may be required.

The court has continued the hearing on the Motion for Relief From the Stay to March 7, 2023, to allow for the filing of supplemental pleadings.

The Parties agreed to continue the hearing on this Motion to Avoid Judicial Lien to 1:30 p.m. on March 7, 2023, with Debtor filing and serving supplemental pleadings on or before February 24, 2023. No supplemental response pleadings are required, with the court to set a further filing schedule at the continued hearing if such are requested to be filed.

Debtor's Supplement to Motion

Debtor filed a Supplement to Motion on February 24, 2023. Dckt. 87. Debtor states the following encumbrances are current against the Property:

A. A first note and deed of trust in favor of Rocket Mortgage, in the amount of $305,000.00;

B. A second note and deed of trust in favor of Pacific Service Credit Union, in the amount of $99,670.00;

C. A PACE Loan through Renew Financial, in the amount of $20,000.00;

D. Abstract of Judgment in favor of American Express, in the amount of $3,609.00;

E. A third note and deed of trust in favor of Cheryl Henry, in the amount of $100,000.00; and

F. A secured Federal Tax Lien in the amount of $39,294.24

Debtor requests the court grant the Motion to Avoid Judicial Lien.

COURT'S ORDER CONTINUING HEARING

On March 1, 2023, the court issued an order continuing the hearing on the Motion to Avoid Judicial Lien to 2:00 p.m. on March 21, 2023, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

March 21, 2022 Hearing

At the hearing, XXXXXXXXXX

10. 22-22567-E-13 PGM-1 | **TERRANCE/SACHA HALL** **Peter Macaluso** | **MOTION TO CONFIRM PLAN** **2-9-23 [32]**

10 thru 11

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, other parties in interest, and Office of the United States Trustee on February 9, 2023. By the court's calculation, 40 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

The debtors, Terrance Hall and Sacha Hall ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides:

1. $385.00 to be paid for the first three months;

2. $660.00 to be paid for the following 57 months;

3. $25,000.00 lump sum to be paid yearly on or before April 1 each year, beginning 2023;

4. $9,342.61 to be paid to the Trustee by Mercury Insurance be returned to Debtor to purchase a replacement vehicle; and

5. 100% to general unsecured creditors.

Amended Plan, Dckt. 36. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on March 7, 2023. Dckt. 53. Trustee opposes confirmation of the Plan on the basis that:

A. **Lack of Good Faith** – failure to provide all disposable income.

B. **Nonstandard Provisions** – use of cash collateral.

DISCUSSION

(A) FAILURE TO PROVIDE DISPOSABLE INCOME

APPLICABLE LAW

In re Warren, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988)

The Chapter 13 Trustee alleges that the Plan violates 11 U.S.C. § 1325(a)(3), in that the Plan was not proposed in good faith because Debtor fails to provide all disposable income. Opposition, Dckt. 53 at 2:20-21. In arguing a lack of good faith, Trustee cites *In re Warren*. *In re Warren*, 89 B.R. 87 (9th Cir. BAP 1988).

In re Warren adopts factors from the Eighth Circuit Court of Appeals decision, *In re Estus*, to determine good faith. These factors include:

1) The amount of the proposed payments and the amounts of the debtor's surplus;

2) The debtor's employment history, ability to earn, and likelihood of future increases in income;

3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;

5) The extent of preferential treatment between classes of creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

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

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

In re Warren, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988) (citing *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982)).

It is noted, however, the *Warren* holding was never adopted by the Ninth Circuit. *Penland v. Rakozy* (*In re Penland*), No. ID-05-1467-HKMa, 2006 Bankr. LEXIS 4838, at *14-16 (B.A.P. 9th Cir. Aug. 17, 2006). Additionally, the Eighth Circuit decision came prior to the 1984 Bankruptcy Code amendments. Although decided in 1988, the *Warren* decision does not consider the 1984, "post-*Estus*" Bankruptcy Code amendments.

11 U.S.C. § 1325
Prior to the 1984 Bankruptcy Amendments

Prior to the 1984 Bankruptcy Code Amendments, 11 U.S.C. § 1325 was governed by the original enactment of Title 11 of the United States Code in 1978, the "Original Bankruptcy Code." Under the original enactment, § 1325 stated the following:

(a) The court shall confirm a plan if—

(1) the plan complies with the provisions of this chapter and with other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

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

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

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the

> plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder; and
>
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.
>
> (b) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

Enactment of Title 11 of the United States Code, Pub. L. No. 95-598, § 1325, 92 Stat. 2549, 2649-50 (1978).

There was no meaning of what constituted "good faith," for purpose of 11 U.S.C. § 1325(a)(3). This led the Eighth Circuit to establish their own factors to determine whether good faith exists, which were later adopted by the Ninth Circuit Bankruptcy Appellate Panel in *In re Warren. In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982).

11 U.S.C. § 1325
Post-1984 Bankruptcy Amendments

In 1984, the Bankruptcy Code was amended to subsume many of the *Estus* factors. The Amendments redesignated the original subsection (b) as subsection (c) and inserted a new subsection (b):

> (b) (1) 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—
>
> (A) 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
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 1325, 98 Stat. 356 (1984).

This new subsection (b) remains today, with minor changes to (b)(1)(B). 11 U.S.C. § 1325(b) (at present, 11 U.S.C. § 1325(b)(1)(B) differs from the 1984 amendments in that "three-year period" is now "applicable commitment period" and "to make payments under the plan" is now "to make payments to unsecured creditors under the plan.")

In re Warren does not consider the 1984 Amendment. The *Warren* decision, unlike the 1984 Amendments, allows a court to consider, "[t]he amount of the proposed payments and the amounts of the

debtor's surplus." *In re Warren*, 89 B.R. at 93. Under the 1984 Amendment, a debtor's surplus (disposable income not used to fund the plan) does not appear relevant so long as, "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." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 1325, 98 Stat. 356 (1984).

As noted in a 2006 Ninth Circuit Bankruptcy Appellate Panel decision:

> The *Warren* factors were borrowed from an Eighth Circuit decision, *United States v. Estus* (*In re Estus*), 695 F.2d 311, 317 (8th Cir. 1982). However, in *Educ. Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987), the Eighth Circuit Court of Appeals recognized that the 1984 amendments to § 1325(b) subsumed most of the *Estus* factors, to permit confirmation of chapter 13 plans in which the debtor uses all disposable income for three years to make payments to his creditors regardless of the amount of the payments or the return to creditors. The Eighth Circuit court noted:
>
> > [O]ur inquiry into whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13, has a more narrow focus. The bankruptcy court must look at factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.
> >
> > *Zellner*, 827 F.2d at 1227. (citations omitted).

Penland v. Rakozy (*In re Penland*), No. ID-05-1467-HKMa, 2006 Bankr. LEXIS 4838, at *14-16 (B.A.P. 9th Cir. Aug. 17, 2006). Rather than focusing on the *Estus* factors, the Ninth Circuit Bankruptcy Appellate Panel directs courts to use a Ninth Circuit Court of Appeals decision, *Leavitt*, to determine a 11 U.S.C. § 1325(a)(3) good faith analysis. This court agrees.

Ninth Circuit Court of Appeals
Bad Faith Analysis

In *Leavitt*, the Ninth Circuit Court of Appeals set out a list of four factors that bankruptcy courts should use to determine bad faith:

> (1) whether the debtor misrepresented facts in their petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed their Chapter 13 petition or plan in an inequitable manner;
>
> (2) the debtor's history of filings and dismissals;
>
> (3) whether the debtor only intended to defeat state court litigation; and
>
> (4) whether egregious behavior is present.

Leavitt v. Soto (*In re Leavitt*), 171 F.3d 1219, 1224 (9th Cir. 1999). Unlike the factors in *Warren*, *Leavitt* does not include, "[t]he amount of the proposed payments and the amounts of the debtor's surplus."

As the current version of § 1325 reads, a debtor is not required to use all of their disposable income to fund a plan, so long as "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." 11 U.S.C. § 1325(b)(1)(A). Paying unsecured creditors in full is an alternative to paying all disposable income. 8 Collier on Bankruptcy P 1325.04 (16th 2022).

Of additional note, subsection (b)(1)(A) only requires payments in full. It does not require payment of the present value of the claim. 8 Collier on Bankruptcy P 1325.11 (16th 2022). As the leading treatise on bankruptcy states, "[i]f this had been Congress's intent Congress would presumably have used the same language as it used elsewhere to indicate a present value test, 'value, as of the effective date of the plan.'" *Id.*

DISCUSSION

Failure to Provide All Disposable Income

In the current case, Debtor is not proposing all of their disposable income. However, Debtor is proposing a one-hundred percent plan. Therefore, under 11 U.S.C. § 1325(b)(1)(A), Debtor not proposing all of their disposable income is not an indication of bad faith.

However, the court does look to other factors enumerated in *Leavitt* to determine whether bad faith exists.

Misrepresentation of Facts in Debtor's Schedules and Plan

Trustee notes that Debtor proposes lump sum payments of $25,000.00 on or before April 1, 2023 of each year from bonus income. Trustee's review of debtor Terrance Levell Hall's pay advices through April 2022 reflect that debtor Terrance Levell Hall's gross bonus for 2022 was approximately $78,710.27. Additionally, Debtor has historically received tax refunds in excess of $10,000.00 combined net for both 2020 and 2021 tax periods.

Upon review of Debtor's Original Petition and Schedules, Debtor does not indicate in their Schedules I/J, nor in their Form 122C-1 Statement of Current Monthly Income, any indication of a bonus nor tax refunds. Dckt. 1. Although Debtor's Form 107 Statement of Financial Affairs indicates past tax refunds, Debtor's Petition does not indicate future expected refunds. Dckt. 1.

Debtor filed Amended Schedules I/J on February 9, 2023. Dckt. 38. Again, Debtor does not indicate any bonuses, as required to be disclosed.

Further, Debtor's Plan and supporting Declaration only states $25,000.00 from bonus monies received from debtor Terrance Levell Hall's employer. Dckts. 35, 36. This Declaration appears to have been carefully drafted to obscure (not state) the amount of the annual bonus Debtor regularly receives. It is unclear to the court why Debtor did not schedule, as required, the bonuses received and expected to be

received by Debtor and why the Plan hides the total amount of bonuses Debtor receives, only noting $25,000.00 annually.

Under a *Leavitt* analysis, Debtor appears to be misrepresenting facts to the court. Even though this is a one-hundred percent plan, the misrepresentation indicates bad faith on behalf of the Debtor. Pursuant to 11 U.S.C. § 1325(a)(3), this is grounds to deny confirmation.

On Amended Schedule I, Debtor states under penally of perjury that the sum total of income consists of the following:

$13,113 Gross Monthly Wages

This would be $157,356 in annual gross income.

Dckt. 38 at 4-5. Debtor does not disclose other income for the large annual bonus or substantial tax refunds because Debtor has over withholding of taxes.

Using the information provided by the Chapter 13 Trustee, Debtor's real income is substantially greater than the amount stated under penalty of perjury on Schedule I.

$157,356	Gross Monthly Wages on Schedule I (includes the over withhold)
$ 78,710	Annual Bonus

Thus, Debtor's have $236,066 in annual income from employment.

(B) NONSTANDARD PROVISIONS

Trustee objects to the Plan's nonstandard provision, which requests that the Trustee return $9,342.61 paid into the estate by Mercury Insurance as an insurance payout on Debtor's totaled vehicle so that Debtor may purchase a replacement vehicle. Trustee notes that the Debtor has filed a motion for use of cash collateral in support of this request, but states that the Debtor's have sufficient monies to purchase a new vehicle without this requested payment.

As explained in the ruling on Debtor's Motion to Value Collateral, Docket Control No. PGM-2, Debtor can use insurance proceeds to purchase a replacement vehicle with the cash collateral process, with the original lien attaching to the new vehicle. 8 Collier on Bankruptcy P 1329.02 (16th 2022); 11 U.S.C. § 363 (b), (e); *see also In re Granville*, No. 13-51923, 2014 Bankr. LEXIS 1373, at *7 (Bankr. E.D. Ky. Apr. 4, 2014). Additionally, the court is ordering the proceeds to be held in an attorney trust account until Debtor files an *Ex Parte* Motion to purchase a replacement vehicle. However, no provision is made for payment of this secured claim in the First Amended Plan.

Trustee directs the court to no law governing why insurance proceeds should not be used to purchase a replacement vehicle, and why a debtor should use other income. The court declines to do the research for Trustee.

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the debtors, Terrance Hall and Sasha Hall ("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.

11. 22-22567-E-13 PGM-2 — TERRANCE/SACHA HALL — Peter Macaluso — MOTION TO USE CASH COLLATERAL — 2-17-23 [46]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 17, 2023. By the court's calculation, 32 days' notice was provided. 28 days' notice is required. Fed. R. Bankr. P. 4001(b)(2) (requiring fourteen days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Authority to Use Cash Collateral is denied.

Terrance Hall and Sacha Hall ("Debtor") move for an order approving the use of cash collateral from insurance proceeds on personal property, a 2007 GMC Yukon Denali ("Subject Vehicle"). Debtor requests the use of cash collateral to purchase a replacement vehicle with a one time payment.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee"), filed an Opposition on March 7, 2023. Dckt. 50. Trustee opposes confirmation of the motion to use cash collateral on the basis that:

A. **Lack of Good Faith** – Debtor has sufficient monies to buy a replacement vehicle without this payment.

APPLICABLE LAW

The Chapter 13 Debtor, exercising the power of a trustee, may use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> (A) such sale or such lease is consistent with such policy; or
>
> (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
>
> (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
>
> (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Trustee's objections are well taken. However, Debtor can use insurance proceeds to purchase a replacement vehicle with the cash collateral process, with the original lien attaching to the new vehicle. 8 Collier on Bankruptcy P 1329.02 (16th 2022); 11 U.S.C. § 363 (b), (e); *see also In re Granville*, No. 13-51923, 2014 Bankr. LEXIS 1373, at *7 (Bankr. E.D. Ky. Apr. 4, 2014).

Westerra Credit Union filed Proof of Claim 2-1 asserting a secured claim of $671.74, for which the 2007 GMC Yukon Denali, and the insurance proceeds relating thereto, is the collateral.

Rather than paying the secured claim in full from the insurance proceeds and using the balance of the insurance proceeds (plus some of the Debtor's large monthly income, bonuses, and tax refunds), Debtor seeks to utilize Creditor's interest in the insurance proceeds, $671.74, to purchase a new vehicle.

In Class 2 of the First Amended Plan, Debtor state that the secured claim of $671.74 shall be repaid with 3% interest. However, for the monthly dividend, the Plan says "see add'l provisions." Dckt. 36 at 4.

However, looking at Section 7 of the First Amended Plan, no provision appears to be made for this secured claim. Section 7, in its entirety, provides:

> $385.00 x 3
> 660.00 x 57 commencing February 25, 2023
>
> $25,000.00 x 5 yearly from bonus on or before April 1, 2023 each year
>
> $9,342.61 from Mercury Insurance to be returned to debtor to be used to purchase a replacement vehicle.

First Amd Plan, Section 7; Dckt. 36 at 7.

As now before the court, the Plan does not provide for payment of this secured claim.

It seems very strange that Debtor; especially in light of their large monthly income and Debtor providing for a 100% dividend on general unsecured claims over the 60 month term of the Plan, and thereby not providing all of their projected disposable income to fund the Plan; would be proposing to take a $671.74 secured claim (with a 3% interest rate) over some term of the Plan.

If amortized over 60 months of the Plan, with 3% interest (it not being clear how, subject to the certifications made by Debtor and Debtor's counsel pursuant to Federal Rule of Bankruptcy Procedure 9011, this is consistent with what the Supreme Court requires in the *Till* decision), then Creditor would be paid a $12.07 month Class 2 secured claim monthly payment.

Interestingly, no declaration is provided by Debtor in support of this Motion. While stating in the Motion that the new vehicle will be the replacement collateral, no replacement vehicle is identified. The Motion seeks to use the cash collateral, but make no provision for how it will be used and how Creditor's lien will be placed on this, as of now, unidentified replacement vehicle.

Debtor's exhibits include a seventeen page Letter and insurance claim documents. Exhibit B; Dckt. 48. This document has not been authenticated as required by Federal Rule of Evidence 901 *et seq.*

The Debtor has not provided the court with a basis for authorizing the use of cash collateral. There are substantial problems with this Motion, as well as this bankruptcy case (including the accuracy of financial information in the Schedules.

Also, Debtor offers no explanation as to why a $671.74 is spread over up to sixty monthly payments rather than paying it from the insurance proceeds. Debtor's Plan appears to likely result in administrative costs for Creditor and the Trustee that be financially substantial.

The Motion is Denied.

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 Authority to Use Cash Collateral filed by Terrance Hall and Sacha Hall ("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 denied.

12. 22-23379-E-13 DPC-1 | **ABDUL MUNIF** Gabriel Lliberman | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** 2-15-23 [21]

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 15, 2023. By the court's calculation, 34 days' notice was provided. 14 days' notice is required.

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

The Objection to Confirmation of Plan is sustained.

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

A. the debtor, Abdul Munif ("Debtor"), is delinquent in Plan payments.

B. Debtor has failed to file Tax Returns.

C. Debtor's business income may be inaccurate.

DISCUSSION

Trustee's objections are well-taken.

Delinquency

Debtor is $5,688.17 delinquent in plan payments, which represents one month of the $5,688.17 plan payment. Before the hearing, another plan payment will be due. According to Trustee, the Plan in § 2.01 calls for payments to be received by Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Failure to File Tax Returns

Debtor admitted at the Meeting of Creditors that the federal income tax returns for the 2020 and 2021 tax years have not been filed still. Filing of the return is required. 11 U.S.C. §§ 1308, 1325(a)(9). Failure to file a tax return is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

Failure to Afford Plan Payment / Cannot Comply with the Plan

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

First, there are inconsistencies with Debtor's Schedules and Debtor's Projected Income and Expense Rental Income. Debtor's Schedules indicate Debtor receives rental income from four (4) different properties, in the amount of $4,930.00. Schedule I, Dckt. 15 at 27. However, Debtor's "Projected Income and Expense Rental Income" indicates income in the amount of $6,075.00. It is not clear to the court why Debtor expects their projected income to increase from their current income.

Second, Debtor admitted at the First Meeting of Creditors that one of their tenants is inconsistent with paying rent. Therefore, the court is not confident Debtor will be able to consistently make Plan payments, absent any indication that Debtor will replace the tenant with a more reliable one.

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

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

13. 18-22885-E-13 RICHARD/LISA RAVALLI MOTION TO MODIFY PLAN
LBG-401 Lucas Garcia 2-14-23 [57]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 14, 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).

The Motion to Confirm the Modified Plan is denied.

The debtors, Richard John Ravalli and Lisa Marie Ravalli ("Debtor") seek confirmation of the Modified Plan because Debtor's Chevy Sonic ("Vehicle") is inoperable and the cost to repair far exceeds any value it has. Declaration, Dckt. 59. Debtor intends to surrender the Vehicle and rely on ride shares to provide transportation until the end of the Plan on March 31, 2023. *Id.* Debtor further explains that as a result of rising inflation, Debtor's food budget has been affected. *Id.* Debtor has filed a supplemental Schedule J that reflects the increased food costs, and the additional expenses associated with utilizing ride shares. Dckt. 60. The Modified Plan provides for $700 payments for 60 months, and a 0% percent dividend to unsecured claims totaling $167,135.86. Modified Plan, Dckt. 61. 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 27, 2023. Dckt. 68. Trustee opposes confirmation of the Plan on the basis that:

A. the debtors, Richard John Ravalli and Lisa Marie Ravalli ("Debtor"), are delinquent in Plan payments.

B. Debtor's Plan exceeds the maximum length of 60 months.

C. Debtor's Supplemental Schedule I and J are filed only as an Exhibit and not identified on the Court's docket as a separate document.

D. Debtor's proposed Plan does not authorize Trustee's prior disbursements of $15,385.84 to Santander Consumer USA("Creditor").

E. Debtor's Plan is not feasible.

DISCUSSION

Delinquency

The Chapter 13 Trustee asserts that Debtor is $330.00 delinquent in plan payments, which represents one month of the $360.00 plan payment. Before the hearing, another plan payment will be due. According to the Chapter 13 Trustee, the Plan in § 2.01 calls for payments to be received by the Chapter 13 Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Plan Term Exceeds 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 76 months due to Debtor's Motion (Dckt. 57 paragraph 6) states that plan will take an additional 14 months. However, in Debtor's proposed Modified Plan (Dckt. 61), Debtor states that the plan will last for 60 months, which would end on March 31, 2023. It is unclear whether Debtor is asking for an additional 14 months after the expiration of the 60 months, or if the Motion contains a typographical error in requesting an additional 14 months.

~~The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).~~

Insufficient Plan Payments

Creditor alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The proposed $360.00 monthly payments for the balance of the plan term are insufficient to pay the Chapter 13 Trustee's fee, and administrative fees. Further, Debtor is inconsistent as to what the actual Plan payment will be. The modified Plan (Dckt. 61) indicates $700 payments, while Debtor's Declaration (Dckt. 59) proposes a monthly payment of $360.00 and Debtor's net income suggests $718.51. Schedule J, Dckt. 1.

It is unclear as to which of these amounts is the correct one; thus, the Plan may not be confirmed.

Schedule I and J Not Filed Separately

Although Debtor has provided a supplemental Schedule I and J as an Exhibit (Dckt. 60), Debtor has failed to file each of these documents separately on to the Court's docket. Filing a schedule I and J as an exhibit is not sufficient for it to be considered a supplement. Debtor must file the supplemental schedules separately on the Court's docket and properly notice them to parties in interest. Federal Rule of Bankruptcy Procedure 1009(a).

Lack of Authorization of Prior Disbursements

Here, Debtor has proposed a plan that is lacking in compliance with the Bankruptcy Code. Debtor's proposed Modified Plan intends to reclassify the Vehicle from a Class 2 to a Class 3 for purposes of surrender. However, Debtor is on the 59th month of the Plan and Trustee has disbursed a total of $15,385.84 to the creditor of this Vehicle, Santander Consumer USA ("Creditor"). In the proposed Modified Plan, Debtor has failed to authorize that these prior payments by the Trustee to the Creditor in the amount of $15,385.84 are authorized. Under the proposed plan, no payments are authorized to Creditor as a Class 3 claim. Debtor must authorize the prior disbursements to Creditor, subject to 11 U.S.C. § 1326(c).

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, Richard John Ravalli and Lisa Marie Ravalli ("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.

14. 22-21985-E-13 PGM-3 | **LINDA NOVOA HUF** Peter Macaluso | **MOTION TO EMPLOY POLARIS REALTY AS REALTOR(S) AND/OR MOTION FOR COMPENSATION FOR POLARIS REALTY, REALTOR(S)** **2-28-23 [93]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 28, 2023. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Employ is granted.

Linda Louise Novoa Huf ("Debtor") seeks to retroactively employ Alexander Barsocchini Mulder ("Realtor") pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks retroactive employment of Realtor to market and sale the real property of 430 Justin Drive, San Francisco CA, 94112 ("Property"). Dckt. 93. Realtor completed a fair market analysis of the Property and subsequently sold the Property for $1,350,000.00. Dckt. 93.

Debtor argues that Realtor's appointment and retention was necessary for the sale and requests retroactive employment for the services Realtor provided and to pay Realtor a commission of 5% to be split between the buyer's and seller's agents and/or brokers.

Alexander Barsocchini Mulder, a real estate Agent of Polaris Realty, testifies that he is a real estate agent licensed by the California Bureau of Real Estate. Dckt. 95. Realtor explains that he has performed an analysis of the fair market value of the Property, prepared the listing agreement, and

subsequently sold the Property. Alexander Barsocchini Mulder testifies he does not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

DISCUSSION

Retroactive Approval to Employ a Professional

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Although not explicitly stated in the Motion, Debtor is asking the Court to retroactively approve the employment of Realtor. Realtor has already rendered the necessary services sought through Realtor's employment. Further, the Court granted a motion to sell the Property on January 30, 2023 and the Realtor subsequently sold the property.

A bankruptcy court can exercise its equitable discretion to grant retroactive authorizations when it is appropriate to carry out the Bankruptcy Code and when the approval benefits the debtor's estate. *In re Harbin*, 486 F.3d at 522. "[B]ankruptcy courts . . . possess the equitable power to approve retroactively a professional's valuable but unauthorized services." *Id.* Retroactive approvals should only be used in "exceptional circumstances." *Atkins*, 69 F.3d at 974.

11 U.S.C. § 330 does not indicate an express requirement that the retention of a professional be approved before the services are rendered. 3 Collier on Bankruptcy P 327.03 (16th 2022). However, courts have generally read such requirement into statute. *Id.* To grant employment retroactively, at a minimum, the professional should demonstrate that retention would have been approved had it been timely filed and that the services benefitted the estate in some manner. *Id.*

Based on the evidence that the Debtor sought approval before the sale, proceeded with the sale, but did not file a motion to employ, the court determines that the failure to file a Motion to Employ–under these circumstances–is an inconsequential oversight. Had the Debtor sought employment prior to the sale, the court would have approved the employment. Additionally, the employment of Realtor was beneficial to the estate, as the sale of the property allowed Debtor to pay all allowed claims in full at one-hundred percent. Civil Minutes, Motion to Sell, Dckt. 78.

Commission Fee

Debtor makes an additional request to pay Realtor a 5.00% commission fee. Pursuant to Local Bankruptcy Rule 9014-1(d)(5)(B)(iii), this request may be joined with the request to employ.

As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than five percent commission.

COURT RULING

Taking into account all of the relevant factors in connection with the employment and compensation of Realtor, considering the declaration demonstrating that Realtor does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services provided, the court grants the motion to retroactively employ Alexander Barsocchini Mulder as Realtor for the Chapter 13 Estate on the terms and conditions set forth in the Motion to Employ filed as Dckt. 93. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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.
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> The Motion to Employ filed by Linda Louise Novoa Huf ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the Motion to Employ is granted, and Debtor is authorized to employ Alexander Barsocchini Mulder as Realtor for Debtor on the terms and conditions as set forth in the Motion to Employ filed as Dckt. 93, with such employment retroactively authorized effective October 1, 2022..
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> **IT IS FURTHER ORDERED** the Chapter 13 Debtor is authorized to pay a real estate broker's commission in an amount not more than 5.0 percent of the actual purchase price of the sale. The 5.0 percent commission shall be paid to the Chapter 13 Debtor's Realtor, Alexander Barsocchini Mulder
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> **IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

FINAL RULINGS

15.	**21-23936-E-13 DPC-1**	**SOPHEA UCH-CASTILLANO Tegan Rodkey**	**CONTINUED MOTION TO DISMISS CASE 1-23-23 [19]**

15 thru 16

Final Ruling: No appearance at the March 21, 2023 Hearing is required.

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 23, 2023. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

The Motion to Dismiss is granted.

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

1. The debtor, Sophea Uch-Castillano ("Debtor"), is delinquent in plan payments.

FILING OF MODIFIED PLAN

Debtor filed a Modified Plan and Motion to Confirm on February 7, 2023. Dckt. 26. The court has reviewed the Motion to Confirm the Modified Plan and the Declaration in support filed by Debtor. Dckt. 23, 25.

The Motion does not appear to comply with Federal Rule of Bankruptcy Procedure 9013 that requires that a motion state the grounds with particularity. Debtor's Motion to Confirm states the following grounds:

1. The First Modified Plan cures the delinquencies through February 25, 2023.

2. The dividend to creditors holding general unsecured claims is not altered and remains at 0.00%.

3. Debtor proposes to cure the delinquency in plan payments by March 1, 2023.

4. Debtor defaulted due to extra expenses relating to transportation, food, and medical.

These are not the grounds required for confirmation of a modified plan pursuant to 11 U.S.C. § 1329.

Federal Rule of Bankruptcy Procedure 9013 Issues

The court addressed with attorneys a decade ago the pleading requirements for motions both under Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 9013. As the attorneys complied with the Federal Rule of Bankruptcy Procedure as enacted by the U.S. Supreme Court, this has not been required to update. The court includes it here to provide a good overview of these requirements.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the stating with particularity requirement of Bankruptcy Rule 9013. The Twombly pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" is insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the stating with particularity pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not stating with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Additionally, in bankruptcy court the vast majority of substantive matters are determined on the rapid law and motion calendar. Given only a twenty-eight to forty-two day notice periods for hearings on motions in bankruptcy court for the determination (or termination) of rights and interest, clear, precise, pleading with particularity is at a premium.

Finally, though an attorney may argue that his or her writing is so good that the court can and should waive this basic rule of pleading, the court will not engage in a differential application of the Rules. Request the court to tell one attorney that is or her work is good enough to be exempt from the Rules and another attorney must comply with the Rules is to send the court on a fool's errand. Though in an academic sense one might be able to distinguish based on such quality differences, it inevitably creates the appearance that the judge is not impartial, but has her or her "favorite" attorneys who get whatever they ask for from the judge.

At the hearing, counsel for Debtor addressed the issue of grounds being stated with particularity, requesting a continuance to file a supplement to the Motion to clearly state the grounds.

Declaration Issues - Personal Knowledge Testimony Required

Debtor provides her Declaration to provide personal knowledge testimony as evidence of facts for the grounds stated with particularity in the Motion, which include:

> 2. Debtor has filed a modified plan.
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> 3. The Chapter 13 Plan confirmed in this case, which required monthly payments of $764.69 for 60 months.
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> 5. Debtor is delinquent in plan payments. Debtor then states her personal factual finding that "I do have the ability to cure the delinquency of my Chapter 13 Plan."
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> 6. Debtor provides her legal conclusion that "The Chapter 13 Plan complies with applicable law."
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> 8. Debtor provides her factual finding that the "Plan is proposed in good faith," and then her legal conclusion that the Plan "is not by any means forbidden by law."
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> 11. Debtor provides her legal conclusion that "The First Modified Plan meets the requirements under 11 U.S.C. §§ 1325 and 1322."
>
> 12. Debtor provides her legal conclusion that the "First Modified Plan meets the requirements of CMI required under 11 U.S.C. § 1325(b)(1)."
>
> 14. Debtor provides her factual finding and legal conclusion that "The Petition was filed in good faith."

No basis has been shown for Debtor having the legal training and knowledge to have any ability to in good faith and with any knowledge that various bankruptcy laws have been complied with. This "testimony" is clearly improper and violates or fails to comply with the requirements of Federal Rules of Evidence 602, 701, 702, and 703.

At the hearing Debtor's counsel addressed how the Declaration providers personal knowledge testimony as required by the Federal Rules of Evidence. Additionally, how the testimony provides evidence of the grounds stated in the Motion to Confirm that depends of the Declaration.

Counsel for Debtor requested a continuance to file a supplemental declaration to provide the required personal knowledge testimony of the Debtor.

Issues Relating to Good Faith

It appears that this bankruptcy case is not being prosecuted in good faith. No good faith basis appears to exist for Debtor to make the above statements under penalty of perjury. Rather, if the Debtor read this Declaration, then she knowingly signed in without any personal knowledge of the legal conclusions she stated.

Debtor's credibility appears to be so impaired that there is no plan that can be confirmed in this case. It may well be that only by the dismissal of this case, if Debtor decides to commence another case, will she appreciate that making statements under penalty of perjury constitutes "real testimony" and providing false testimony has consequences.

The court continues the hearing on the Motion to Dismiss to have it conducted in conjunction with the hearing on the Motion to Confirm the Modified Plan.

Debtor's Withdrawal of Opposition

Debtor filed a Withdrawal of their Opposition to Dismissal on February 8th, 2023. Dckt. 41. Debtor no longer opposes dismissal of their case.

Based on the foregoing, cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and the case is dismissed.

16. 21-23936-E-13 PLG-1 SOPHEA UCH-CASTILLANO Tegan Rodkey MOTION TO MODIFY PLAN 2-7-23 [23]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the March 21, 2023 hearing is required.

Sophea Sierra Uch-Castillano ("Debtor") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Modify was dismissed without prejudice, and the matter is removed from the calendar.**