UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 26, 2022 at 2:00 p.m.

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1. **21-23539-E-13** **DEREK WOLF**
DVW-1 **Peter Macaluso**
U.S. BANK, NATIONAL ASSOCIATION VS.

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
10-19-21 [11]

1 thru 2

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on October 19, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay 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. The court continued the hearing, opposition and rely briefs were filed, and the final hearing set for December 14, 2021.

The Motion for Relief from the Automatic Stay is xxxxx.

U.S. Bank, N.A. as Legal Title Trustee for Truman 2016 SC6 Title Trust ("Movant") seeks relief from the automatic stay with respect to Derek Wolf's ("Debtor") real property commonly known

as 7995 Alta Vista Lane, Citrus Heights, California ("Property"). Movant has provided the Declaration of Brian Gaske to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues on October 12, 2021, without any notice of filing of Debtor's fourth consecutive bankruptcy case, Movant conducted it's foreclosure sale on the property. Motion, Dckt. 11. At the time of the foreclosure sale, Debtor was due 25 months worth of mortgage payments, with a total of $25,150.25 in payments past due. Declaration, Dckt. 19. Movant specifies that due to the three prior consecutive bankruptcies prior to this one—all of which were dismissed—the nature of these payments as post or pre petition is not clear.

Movant requests several types of relief in this case. First, the annulment of the stay to make the foreclosure sale valid. Second, to terminate the stay going forward. Third, that the court order pursuant to 11 U.S.C. § 362(d)(4) that the automatic stay in a future filed case in the next two years will not automatically go into effect.

Trustee's Non-Opposition

Trustee has filed a non-opposition to this motion on October 26, 2021 (Dckt. 21). Trustee reaffirms that the Debtor has failed to file the following documents:

a. Chapter 13 Plan
b. Form 122C-1 Statement of Monthly Income
c. Schedule A/B - Real and Personal Property
d. Schedule C - Exempt Property
e. Schedule D - Secured Creditors
f. Schedule E/F - Unsecured Claims
g. Schedule G - Executory Contracts
h. Schedule H - Codebtors
i. Schedule I - Current Income
j. Schedule J - Current Expend.
k. Statement of Financial Affairs
l. Summary of Assets and Liabilities

Furthermore, Trustee notes the Creditor's Motion for Notice of Sale was recorded against said property on September 15, 2021 to schedule a foreclosure sale for October 12, 2021. This was the same time in which the bankruptcy was filed, and the Debtor was still delinquent for 25 months for no less than $25,150.25 (Dckt. 11).

Review of File

Debtor commenced this case on October 12, 2021. On October 27, 2021, a chapter 13 Plan was filed. Dckt. 24. The Plan provides for monthly payments by Debtor of $1,500 for sixty (60) months. Plan, Nonstandard Provisions; Dckt. 24 at 7. Additionally, Debtor will pay the Plan off early "if awarded settlement from Social Security." *Id.*

The only claim provided for in the Plan is Movants, for which Debtor is to pay $500 a month toward the $29,254.55 arrearage and $1,016.32 for the post-petition monthly payment. These two

payment total $1,516.32, which is slightly more than the $1,500 a month play payment.

However, the Debtor has not accounted for the Chapter 13 Trustee fees paid out of the $1,500 a month payment. The Trustee's fee is 10%, so from the $1,500 payment, there is deducted $150 for Trustee fees. This results in Debtor's monthly payment being $166 short each month.

Debtor does not list any other creditors on Schedules D or E/F. Dckt. 23.

On Schedule I, Debtor states that he has $1,650 a month in net income from his business, $358 in CALPERS Death Benefit, and $750 in rents, for total monthly income of $2,758. *Id*. At the end of Schedule I Debtor states that a possible increase in income can occur "If I receive claim from Social Security." He also states, "X Wife + Daughter recently received 5.5 Mil Judgment From RUCCI."

For expenses, on Schedule J Debtor lists $1,258 in total expenses, with nothing for self-employment or income taxes. For Expenses, Debtor states having:

A. Food and housekeeping supplies.....($375)

1. Assuming ($50) for housekeeping supplies, that leaves ($325) for food, which in a 30 day months equals $3.61 cents per meal.

B. Debtor has no medical or dental expenses.

C. Debtor has no home repair or maintenance expenses.

Id.

At the end of Schedule J, in response to whether Debtor expects an increase or decrease in expenses, Debtor states:

> If Rushmore will finally be fair and recognize my Mod Package that they have on file.

Schedule A - Value of Property

On Schedule A/B Debtor lists the property that is the subject of the foreclosure sale as having a value of $310,000. *Id*. On Schedule D Debtor lists Creditor as having a claim of $145,985. *Id*. In the Motion, Movant states that as of the time of the foreclosure sale, the balance owed was $163,476.40, and that the buyer at the sale paid $276,000.00. Motion, ¶¶ 7, 8; Dckt. 11. Presumably there will be almost $100,000+/- in surplus sales proceeds to be disbursed to Debtor if the stay is annulled.

DISCUSSION

Annulment of Stay

As is well established in the Ninth Circuit, an act taken in violation of the automatic stay is void, not merely voidable. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001);

(*In re Schwartz*),954 F.2d 569, 571 (9th Cir. 1992).

Congress provides for the court to annul the automatic stay so as to render what was void to not be void. However, retroactive annulment of the automatic stay is within the discretion of the court. *Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.)*, 129 F.3d 1052, 1054 (9th Cir. 1997). The court, in making a case-by-case review, must balance the equities to determine if annulment is justified. Id. at 1055. Though not dispositive, most courts consider two factors: "(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." *Id.*

In re Fjeldsted, the bankruptcy Appellate Panel for the Ninth Circuit expanded the factors a court may consider when deciding whether to annual the stay: the number of times a debtor has filed a petition; the extent of any prejudice, including to a bona fide purchaser; the debtor's overall good faith; the debtor's compliance with the Code; how quickly the creditor moved for annulment; and how quickly the debtor moved to set aside the action which occurred. *In re Fjeldsted*, 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003).

The court reviews the various framework of factors and states how they apply in this Motion as follows:

***Nat'l Envtl. Waste Corp* Factors**

(1) Whether the creditor was aware of the bankruptcy petition;

Based on the evidence presented, Movant was not aware of this bankruptcy filing and the existence of the automatic stay. The Movant conducted due diligence by running a PACER search prior to the foreclosure sale, and Movant received no notice of the filing as the day of the sale was also the date of filing. Dckt. 4.

(2) Whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor.

The evidence as it stands shows Movant would be prejudiced if the stay is not annulled. Movant had already conducted a sale in good faith and with a bona-fide, third party purchaser, and Movant conducted the sale with their due diligence to ensure they were not impeding on the Debtor's rights. Debtor failed to file or notify the Movant at any time between the Notice of the Sale on September 15, 2021 and the date of the sale on October 12, 2021. Additionally, Debtor waited until the date of the sale to file this Chapter 13 case. This unreasonable delay in filing and proper notice directly prejudices the creditor by thwarting their good-faith foreclosure sale of the home for almost 2 years of delinquency. To not annul the stay would cause the bona fide purchaser to be harmed as they relied on the assumption the sale was legally binding and proper to purchase the property.

***In Re Fjeldsted* Factors**

Under the *In re Fjeldsted* factors, the Panel looked at refining and providing further guidance to the court as to factors that may apply. Relevant factors here include:

A. Whether creditors knew of the stay but nonetheless took action, thus compounding the problem;

Reiterating the foregoing, Movant was unaware of the bankruptcy. Movant did not receive notice of the bankruptcy on the master address list provided by the Debtor. Additionally, the Bankruptcy was filed on the exact date of the foreclosure sale, giving little time to receive notice even if it was properly sent. Movant has taken no further action since receiving notice, including issuing, executing, delivering, and/or recording the foreclosure deed.

B. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violating conduct;

Again, the Bankruptcy was filed on the exact date of the foreclosure sale: October 12, 2021. This Motion was filed approximately seven (7) days after the petition was filed and the sale.

C. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;

Movant has taken no further action regarding the sale since receiving notice of the bankruptcy case. Therefore, Movant has not continued to act in violation of the stay.

D. Whether annulment of the stay will cause irreparable injury to the debtor;

There is no showing that annulling the stay will cause irreparable injury to the Debtor. However, at the hearing, Debtor argued that he wants to keep the house, wants Movant to modify the loan, and believes that Movant has not fulfilled its obligations relating to his right to modify the loan.

The court sets this Motion for a briefing schedule, this Motion having been filed using the time shortening Local Bankruptcy Rule 9014-1(f)(2) procedure for which no written opposition is required to be filed before the initial hearing.

The court addressed with the Debtor that in considering the Motion, the court would be considering Debtor's ability to prosecute this case, and that "merely" disputing Movant's claim or asserting that Debtor has a claim to be prosecuted against Movant would not necessarily be grounds to deny the Motion. The court addressed with Debtor his multiple prior failed attempts at prosecuting Chapter 13 cases.

Withdrawal of Request to Annul

At the hearing Movant notified the court that the buyer at the foreclosure sale has terminated the contract in light of the circumstances, and Movant was no longer seeking to annul the stay.

Relief Pursuant to 11 U.S.C. § 362(d)(4)

Many of the factors identified above are asserted as grounds for relief pursuant to 11 U.S.C. § 362(d)(4), asserting that the multiple, ineffective bankruptcy filings demonstrate a scheme to hinder, delay, or defraud Movant with respect to its interests in the Property.

Relief Pursuant to 11 U.S.C. § 362(d)(1)

Movant also asserts that cause exists to modify the stay, whether or not it is annulled to allow

Movant to enforce its rights in the Property

Debtor's Opposition

On November 19, 2021, Debtor filed an opposition to the Motion for Relief. Debtor states they need more time to reconcile their mortgage with U.S. Bank. Additionally, Debtor states they are missing accounting for $91,600.00 that Keep Your Homes California granted him in 2018. Debtor also disputes penalties and fees of Rushmore and provides exhibits.

Movant's Response

Movant filed a reply in response to Debtor's opposition to the Motion for Relief from Automatic Stay on December 2, 2021. Dckt. 33. Movant states that Debtor fails to:

a. Address Movant's request to annul the automatic stay; or

b. Provide any evidence that the Debtor provided any notice to Movant or its agents or representatives of his Bankruptcy filing prior to the foreclosure sale, or any ability to be a successful Debtor in this recent Chapter 13 case.

Additionally, Movant states the Debtor has had the opportunity in his three bankruptcy filings to object to Movant's Proof of Claim or reconcile his mortgage, but has not done so. Also, Debtor asserts that payments were made to Movant in his prior case. In Debtor's Case No. 20-22852, no pre-petition arrears were paid to Movant. Movant also believes the Mortgage Assistance loan received which was sufficient to bring the Debtor's loan current as of February/March 2018, "was in the sum of only $61,131.14, and NOT the entire $91,700 as alleged by the Debtor, and that the Debtor's account was credited for that amount on or around March 20, 2018 by U.S. Bank, the then servicer of Debtor's loan. Movant has to date been unable to locate any evidence that the sum of $91,700 was received from the Mortgage Assistance loan/program."

Movant concludes that Debtor has set forth no substantive Opposition to Movant's request to terminate and/or annul the stay and as such the Motion should be granted as requested. Movant requests (I) *in rem* relief from the automatic stay, as set forth in its Motion, to proceed to conduct another sale of the Property and (ii) a finding that Movant's previously conducted sale of the Property did not violate the automatic stay.

CHANGE OF WHAT COURT STATED AT THE FIRST HEARING CONDUCTED ON DECEMBER 15, 2021

This matter was required to be reset from the regular December 14, 2021 hearing date to December 15, 2021. This was because of the explosion of the SMUD (Sacramento Municipal Utility District) electricity transformer which supplies power to the Federal Courthouse in Sacramento. This explosion resulted in a six block radius of power outages. The Federal Court could not operate.

The hearing was rescheduled on short notice to 2:00 p.m. on December 15, 2021. Movant's counsel appeared telephonically for the hearing, but Debtor, who was listed to telephonically appear, did not. At the hearing, the court announced that the relief requesting annulment of the stay was dismissed, but that the court would grant relief pursuant to 11 U.S.C. § 362(d)(1) and § 362(d)(4). In granting such

relief, Debtor would still have approximately 40 days to try to prosecute this case.

Later during the court's calendar, CourtCall advised that the Debtor had connected to make an appearance. Debtor explained that difficulties had ensured that caused him being unable to connect timely. Debtor also stated that he appeared physically at the Courthouse for the December 14, 2021 hearing, but that the Courthouse was closed.

Debtor explained the various events and "real life" circumstances that derailed the prior cases. Debtor states that he is a former loan officer and that Movant's employees (not the attorneys) purport to be addressing the miscalculation issues Debtor identified.

Debtor has attempted since November 21, 2019, attempted four (including the current case), which consist of one Chapter 7 case, in which Debtor was granted a discharge, two Chapter 13 cases in 2020, with the last one dismissed August 27, 2021 (case 20-22852). Debtor has attempted to prosecute the three Chapter 13 cases in *pro se*.

Debtor commenced the current case on October 12, 2021, which is within one year of case 20-22852 being dismissed on August 27, 2021. Debtor asserts in the Opposition (Dckt. 28) that there is unaccounted for monies not accounted for by Movant,, that he has demanded accountings, and that he disputes the amount stated as owed by Movant.

The Disputes over substantive rights between Debtor and Movant go well beyond the considerations of a motion for relief from the automatic stay.

> Relief from stay proceedings are primarily procedural. *Veal v. Am. Home Mortgage Serv., Inc. (In re Veal)*, 450 B.R. 897, 914 (9th Cir. BAP 2011). They typically determine whether the equities justify releasing the moving creditor from the legal effect of the automatic stay. *Id.* Because of the limited scope of inquiry, neither the movant's claim nor its security should be litigated in the relief from stay proceeding. *Id.* (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740-41 (9th Cir. 1985)); *see also Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 33 (1st Cir. 1994) ("We find that a hearing on a motion for relief from stay is merely a summary proceeding of limited effect. . . ."). "Given the limited nature of the relief, . . . the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties' rights and liabilities is yet to occur, . . . a party seeking stay relief need only establish that it has a colorable claim . . . ." *In re Veal*, 450 B.R. at 914-15 (emphasis added) (citing *United States v. Gould (In re Gould)*, 401 B.R. 415, 425 n.14 (9th Cir. BAP 2009)).

Harms v. Bank of N.Y. Mellon (In re Harms), 603 B.R. 19, 27 (B.A.P. 9th Cir. 2019).

The Chapter 13 Trustee has now filed a Motion to Dismiss this Chapter 13 Case. Dckt. 29. The grounds stated by the Trustee are: (1) Debtor has failed to attend the First Meeting of Creditors; (2) the Chapter 13 Plan has not been served and no motion to confirm a plan has been filed; (3) Debtor has not provided payment advices to verify income; (4) Debtor has not provided copies of required tax returns; and Debtor has not provided the Trustee with the required documents for Debtor's business.

While filing Chapter 13 cases, Debtor has been unable to prosecute, confirm, and perform a

Chapter 13 Plan. From the Opposition, Debtor identifies substantive disputes with Movant that require adjudication, and not"?merely" a monetary default to be cured. With respect to the substantive dispute, Debtor offers no evidence of his moving forward to diligently prosecute a Chapter 13 case (using the automatic stay in lieu of a preliminary injunction), but instead the record shows using the automatic say to derail the foreclosure process, and such derailing the extent of Debtor's bankruptcy prosecution.

Santander Consumer USA, Inc. has filed Proof of Claim 1-1 asserting a claim which is partially secured, the collateral being a vehicle, a 2006 Honda Ridgeline. This claim states that there is an $11,444.37 pre-petition arrearage on the claim. POC 1-1, § 9. The Vehicle is not listed on Schedule A/B and Santander (nor is any creditor having a lien against a vehicle) is listed on Schedule D. Dckt. 23. No vehicle payment is shown on Schedule J. *Id*.

In considering this Motion, the court concludes that Movant did not know of the filing of the bankruptcy and did not act in violation thereof. As discussed above, this Bankruptcy Case was filed on the exact date of the foreclosure sale, giving little time to receive notice even if it was properly sent. Movant has taken no further action since receiving notice, including issuing, executing, delivering, and/or recording the foreclosure deed.

The Bankruptcy was filed on the exact date of the foreclosure sale: October 12, 2021. This Motion was filed approximately seven (7) days after the petition was filed and the sale. Movant moved promptly seeking the present relief.

Having learned of the bankruptcy filing, Movant has taken no further action regarding the sale since receiving notice of the bankruptcy case. Therefore, Movant has not continued to act in violation of the stay.

While it not surprising, or shocking, for a consumer (or business) to file bankruptcy to stay/derail a pending foreclosure sale, when there are multiple unsuccessful attempts, it demonstrates that such is not reasonably possible. Annulling the stay does not create an irreparable harm for Debtor, as Debtor has demonstrated that the use of Chapter 13 to address the default and related asserted disputes is not feasible.

Additional Factors

The court must consider the disruption to the court's calendar and the access to the court. With Movant advising the court that annulment of the stay no longer being requested, the purchase having terminated the contract, what has happened in connection with the foreclosure sale takes of a modestly smaller significance.

At the hearing, Debtor demonstrated a real person (non-lawyer) misunderstanding of the federal judicial process. It is not one in which a person raises issues or disputes, and then the judge takes on a mediator type role to work through the issues for the parties.

Federal Court proceedings are litigation, even in the Bankruptcy Court where there is a significantly higher (in this judge's opinion) economic reality of litigation and settlement that some other courts. The court bluntly discussed with Debtor that he must prosecute his claims and disputes, and not merely raise them, drop documents on the court, and then have the court "get the parties together."

The court discussed the need for Debtor to have experienced counsel to prosecute the bankruptcy case and his dispute (if it is not resolvable upon an agreed "computation of the numbers"). While Debtor raises concerns of whether he can afford counsel, there are many attorneys who can and do represent consumers and debtors on a contingent fee or hybrid fee arrangement in these disputes where torts, contract, and statutory claims and theories for relief arise. Alternative, it could be as simple as a knowledgeable attorney being able to effectively communicate the alleged miscomputations by Movant.

With respect to the extraordinary circumstances of the Courthouse closing on the noticed Tuesday hearing date, the quick shuffle the next day to reschedule the hearings for that Wednesday afternoon, and Debtor having been at the Courthouse on the noticed hearing date to find the Courthouse doors barred due to the electrical failure, judicial/litigation discretion is the better part of valor.

The court continued the hearing to 1:30 p.m. on January 11, 2022. Though such might seem to be a significant delay in relief for Movant, as a practical matter it may not have. It may well have taken the court, with the closures and delays caused by the transformer explosion not to be the order issues for 10 days. Then, the order is not effective for fourteen days as provided in Federal Rule of Bankruptcy Procedure 4001(a)(3). That would put Movant into the middle of January 2022 before it could act.

Trustee's Status Report

On December 29, 2021, Trustee David P. Cusick filed a status report stating Debtor is delinquent $1,500.00 in Plan payments and Debtor has failed to provide verification of income, 2 years of tax returns, 6 months of profit and loss statements and 6 months of bank statements.

January 11, 2022 Hearing

For the January 11, 2022 hearing, Movant filed Supplemental Pleadings. Dckts. 43, 44. In the Supplemental Declaration, the testimony includes (identified by paragraph number in the Declaration):

> 5. Debtor states that he received a $91,600.00 loan in approximately February 2018 from the California Help to Homeowner's Program.
>
> 6. A prior loan servicer was responsible for the loan that is the subject of this Motion at that time.
>
> 8., 9. Rushmore, the current loan servicer, has provided Debtor and the proposed counsel for Debtor with documents and records (including those from the period when the prior loan servicer was responsible for this loan), which include:
>
> a. The sum of $61,131.14 was received and applied to Debtor's loan in 2018.
>
> b. Upon further review of the prior loan servicer's files, additional information has been provided Debtor and Debtor's proposed counsel showing that the $91,700 was received in 2018 and applied to Debtor's loan. Exhibit A, Dckt. 44, is a printout of the loan history from the prior loan servicer's records (which unfortunately is not clearly set out in a set of tables, but consists of a lot of words and number squeezed

on each page - with the court clearing noting that this is not the records of the current loan servicer, but what they received from the prior loan servicer.

9a. In the Declaration the obligation under the loan and application of the $91,700 is stated as follows:

Principal Balance 1st Lien	($170,465.08)		($36,400.00)	Deferred Principal 2nd Lien
Application of March 20, 2018 $97,700				
Due Date June 2015		$7,292.61		
Due Date March 2016		$1,620.58		
Due Date May 2016		$1,639.91		
Due Date July 2016		$4,904.70		
Due Date January 2017		$4,904.70		
Due Date July 2017		$4,465.50		
Due Date December 2017		$4,465.50		
Due Date May 2018		$256.35		
Due Date May 2018		$1,019.00		
Due Date May 2018		$61,131.14		
Total Monies Applied		$91,699.99		

11. The $91,700 was applied to the delinquent mortgage payments due for the months of June 1, 2015 through and including May 1, 2018.

In the Motion for Relief, Movant asserts that the arrearage at the time of the foreclosure sale was not less than $25,150.24, which Movant states is for the period October 1, 2019 through October 1, 2021. Motion, ¶ 7; Dckt. 11. Because the Motion was brought to annul the stay for a foreclosure sale that occurred, an analysis of how the arrearage is computed was not provided.

As of the court's January 10, 2022 review of the Docket, a substitution of attorney for the Debtor, giving Debtor counsel rather than attempting to prosecute this case in *pro se*, had not been filed.

Debtor's Prosecution of This Case
Basis for Continuance

At the hearing, Peter Macaluso, Esq., an experienced consumer attorney, appeared and confirmed that he has been engaged by the Debtor and that Mr. Macaluso would be substituting in as counsel for Debtor. Additionally, that he would work diligently with Debtor to prosecute this case and for Debtor to advance his economic interests as permitted under the Bankruptcy Code in this case. In light of Debtor's repeated failures in prosecuting prior Chapter 13 cases, such clear guidance and legal

advice from counsel is necessary. Debtor is now facing the highly likely granting of relief pursuant to 11 U.S.C. § 362(d)(4) and the dismissal of this case if he cannot prosecute it.

The court notes that based on Debtor's Schedules and Movant's statement of the amount of debt secured by Debtor's residence, Debtor would have approximately $116,000 in equity (after costs of sale) in the property. In looking at Zillow.com statement of value of the property, the equity would be approximately $156,000.

This is a substantial asset which Debtor almost recently lost, having filed bankruptcy the day of the foreclosure sale. Fortunately for Debtor, the buyer at the foreclosure sale backed out of the sale and Movant is no longer seeking an annulment of the stay, but prospective relief pursuant to 11 U.S.C. § 362(d)(1) and (d)(4).

Debtor, in his *pro se* Opposition to the Motion for Relief, addresses some real life family events impacting his life. Dckt. 28. While retaining the home, if possible, would be a better result in Debtor's eyes, if that is financially impossible, losing $150,000+ in equity and not having that in structuring his life for the benefit of himself and his family would be a disaster.

The court made it clear to Debtor's counsel that Debtor needs to prosecute this case and show due diligence if there would be further continuances of the hearing on this Motion for Relief and the Trustee's Motion to Dismiss.

January 25, 2022 Hearing

Debtor's newly obtained counsel appeared at the hearing. He reported the efforts being made in the prosecution of this case and now a Chapter 13 Plan set for hearing in March 2022. Counsel also discussed his work with the Debtor to insure that Debtor understood that this case, in light of the many prior cases filed by Debtor in *pro se* that have been dismissed, is his final "fish or cut bait moment."

Debtor's counsel also noted that if the Debtor were to sell the residence now, he would have to repay the grant received, it not being forgiven for nine more years. The court projects that the recoverable equity for Debtor would be lower than previously appearing, but could still be $25,000+ cash.

From a review of the Supplemental Schedules I and J (Schedule I being incomplete and not including the gross income from Debtor's business and rental property), it appears that performing a plan for five years may be problematic.

However, the court notes that Debtor's counsel (Debtor previously having commenced this case in *pro se*) substituted in only two weeks prior to the hearing, this may well be part of the "more work to be done" by Counsel working with Debtor.

The Trustee confirmed that he now has the correct address for Movant and the payment of the amounts in the proposed plan, including past payments, will be made from the funds available to the Trustee.

The court continues this hearing to afford Debtor and his new counsel to "fish" (whether through curing the arrearage through the Plan or selling the Residence and obtaining $25,000+ of exempt

proceeds), rather than merely "cutting bait" and losing the house (and any exempt value) through a foreclosure.

Debtor's Motion to Confirm Plan

Debtor, with guidance from their counsel, filed their Motion to Amend Chapter 13 Plan on January 21, 2022. See Dckt. 56. As discussed in the court's tentative ruling for Debtor's Motion to Confirm, both Movant and the Chapter 13 Trustee have opposed Debtor's Motion on various grounds. See Dckt. 73 and 75.

March 15, 2022 Hearing

At the hearing on the Motion to Confirm, the Trustee reported that Debtor had not provided all of the information. After an extensive discussion in connection with the Motion to Confirm, the court concluded that for this case Debtor was at the "put up or shut up phase." He has promised to make certain payments, he is curing the default (a cashier's check in Debtor's counsel's hand) and has provided to make the payments electronically. Debtor should be allowed to show he can perform the plan in this case and not have it dismissed out from under him. The court granted the Motion to Confirm the Chapter 13 Plan, as it was amended at that hearing.

However, it also appears, as requested by counsel and the creditor seeking relief from the stay, that his performance bears close watching. Additionally, Debtor may benefit from knowing that there is a motion to dismiss and a motion for relief from stay pending, which he is fending off by performing the Plan.

Therefore, the court continues the hearing on the Motion to Dismiss to allow Debtor the opportunity to show the "proof is in the pudding" of him performing the Plan.

Court Order Confirming Plan

The court issued an order confirming Debtor's First Amended Plan on April 8, 2022. *See* Dckt. 88.

Plan Status

The Trustee has not provided a status report as to whether Debtor is complying with the plan

April 26, 2022, Hearing

At the Hearing xxxxxxxxxxxxxxxxx

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by U.S. Bank, N.A. as Legal Title Trustee for Truman 2016 SC6 Title Trust ("Movant"),

having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to for Relief From the Stay is xxxxx.

2.	**21-23539-E-13** **DPC-1**	**DEREK WOLF** **Peter Macaluso**	**CONTINUED MOTION TO DISMISS CASE** **11-22-21 [29]**

Final Ruling: No appearance at the April 25, 2022 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on November 22, 2021 By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

The Motion to Dismiss is denied without prejudice.

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

1. the debtor, Derek L Wolf ("Debtor"), failed to appear at the First Meeting of Creditors. The Trustee does not have sufficient information to determine if the Plan is suitable for confirmation under 11 U.S.C. §1325. Therefore, the meeting has been continued to January 13, 2022 at 1:00 p.m

2. Plan has not been served on all interested parties and no Motion to Confirm Plan is pending. A confirmation hearing is normally to be held not later than 45 days after the first meeting of creditors

3. No payment advices have been received from the sixty (60) days prior to filing.

4. No tax returns have been provided to the trustee for the most recent pre-petition tax year.

5. Debtor has failed to provide two (2) years of tax returns, six (6) months of profit and loss statements, six (6) months of bank statements, proof of license and insurance or written statements that no such documentation exists.

DISCUSSION

Failed to Appear at § 341 Meeting of Creditors

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

Never Noticed Initial Plan

Debtor did not properly serve the Plan on all interested parties and has yet to file a motion to confirm the Plan. The Plan was filed after the notice of the Meeting of Creditors was issued. Therefore, Debtor must file a motion to confirm the Plan. *See* LOCAL BANKR. R. 3015-1(c)(3). A review of the docket shows that no such motion has been filed. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Failure to Provide Pay Advices

Debtor has not provided Trustee with employer payment advices for the period of sixty days preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Failure to Provide Tax Returns

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Failure to File Documents Related to Business

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

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

Status of Case

At the recent hearing on a Motion for Relief From the Stay in this Case (which Debtor appeared after the hearing had been concluded due to telecommunications suffered by Debtor that day), the court and Debtor discussed the need for Debtor to obtain counsel to effectively prosecute this case and any rights Debtor may have concerning his home mortgage. Debtor's pro se efforts in 2020 and 2021 have not been successful.

Trustee's Status Report

On December 29, 2021, Trustee filed a status report stating Debtor is still $1,500.00 delinquent in Plan payments and Debtor has failed to provide verification of income, 2 years of tax returns, 6 months of profit and loss statements and 6 months of bank statements. Dckt. 39. Trustee still requests the court grant the Motion.

January 5, 2022 Hearing

At the hearing, counsel for the Trustee reported that Debtor has made one of the two plan payments to date. A continued meeting is set for January 15, 2022, Debtor having not appeared at the prior 341 Meeting. Debtor has not filed a motion to confirm the plan.

Proposed counsel for Debtor was present at the hearing. The hearing is continued to be conducted in conjunction with a motion for relief from the stay and to afford Debtor the opportunity to get proposed counsel substituted into the case.

January 11, 2022 Hearing

At the hearing, Peter Macaluso, Esq., an experienced consumer attorney, appeared and confirmed that he has been engaged by the Debtor and that Mr. Macaluso would be substituting in as counsel for Debtor. Additionally, that he would work diligently with Debtor to prosecute this case and for Debtor to advance his economic interests as permitted under the Bankruptcy Code in this case. In light of Debtor's repeated failures in prosecuting prior Chapter 13 cases, such clear guidance and legal advice from counsel is necessary. Debtor is now facing the highly likely granting of relief pursuant to 11 U.S.C. § 362(d)(4) and the dismissal of this case if he cannot prosecute it.

The court notes that based on Debtor's Schedules and Movant's statement of the amount of debt secured by Debtor's residence, Debtor would have approximately $116,000 in equity (after costs of sale) in the property. In looking at Zillow.com statement of value of the property, the equity would be approximately $156,000.

This is a substantial asset which Debtor almost recently lost, having filed bankruptcy the day of the foreclosure sale. Fortunately for Debtor, the buyer at the foreclosure sale backed out of the sale and Movant is no longer seeking an annulment of the stay, but prospective relief pursuant to 11 U.S.C. § 362(d)(1) and (d)(4).

Debtor, in his *pro se* Opposition to the Motion for Relief, addresses some real life family events impacting his life. Dckt. 28. While retaining the home, if possible, would be a better result in Debtor's eyes, if that is financially impossible, losing $150,000+ in equity and not having that in structuring his life for the benefit of himself and his family would be a disaster.

The court made it clear to Debtor's counsel that Debtor needs to prosecute this case and show due diligence if there would be further continuances of the hearing on this Motion for Relief and the Trustee's Motion to Dismiss.

January 19, 2022 Status Report

On January 19, 2022, Chapter 13 Trustee David P. Cusick filed a status report stating Debtor and Debtor's Counsel, Peter Macaluso, appeared at the Meeting of Creditors on January 13, 2022. Dckt. 54. Trustee reports Debtor is delinquent $1,500.00 on plan payments. Additionally, Debtor has not provided the following:

1. Verification of income

2. Two years of tax returns (2019 and 2020)

3. Six months of profit and loss statements (May 2021 - October 2021)

4. Six months of bank statements (May 2021 - October 2021)

Trustee requests the court grant the Trustee's Motion to Dismiss.

January 25, 2022 Hearing

At the hearing Debtor's new counsel appeared and reported on the progress in the prosecution of this case and the Plan that has now proposed. Counsel stated that Debtor understands that this is his last Chapter 13 chance in light of the repeated unsuccessful *pro se* attempts.

March 1, 2022 Status Report

On March 1, 2022, Chapter 13 Trustee David P. Cusick filed a status report stating Debtor is current in Plan payments and has provided the following documents:

1. Business Questionnaire

2. Profit and Loss Statement for November 2021

3. 2020 Federal and State Income Tax Summary

Dckt. 78 at 2:1-3.

However, Trustee notes that Debtor has still not yet provided the following documents:

1. Verification of income

2. Two years of tax returns (2019 and 2020)

3. Six months of profit and loss statements (May 2021 through October 2021)

4. Six months of bank statements (May 2021 through October 2021)

Id. at 2:3-5.

Trustee requests the court grant the Trustee's Motion to Dismiss. Further, a secured creditor and the Trustee both opposed Debtor's Motion to Confirm Amended Chapter 13 Plan. See Dckt. 73 and Dckt. 75. Based on the multiple objections raised by the creditor and Trustee, the court has tentatively denied Debtor's Motion to Confirm.

At the hearing the Trustee reported that Debtor had not provided all of the information. After an extensive discussion in connection with the Motion to Confirm, the court concluded that for this case Debtor was at the "put up or shut up phase." He has promised to make certain payments, he is curing the default (a cashier's check in Debtor's counsel's hand) and has provided to make the payments electronically. Debtor should be allowed to show he can perform the plan in this case and not have it dismissed out from under him.

However, it also appears, as requested by counsel and the creditor seeking relief from the stay, that his performance bears close watching. Additionally, Debtor may benefit from knowing that there is a motion to dismiss and a motion for relief from stay pending, which he is fending off by performing the Plan.

Therefore, the court continues the hearing on the Motion to Dismiss to allow Debtor the opportunity to show the "proof is in the pudding" of him performing the Plan.

Debtor's Confirmed Plan

The court issued an order confirming Debtor's First Amended Plan on April 8, 2022. *See* Dckt. 88.

Debtor appearing to be actively prosecuting this case, the Motion to Dismiss is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The 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 denied without prejudice.

3. **21-23841-E-13** **DENNIS FRAZIER** **MOTION TO CONFIRM PLAN**
PGM-1 **Peter Macaluso** **3-4-22 [48]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on March 20, 2022. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

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

The Motion to Confirm the Amended Plan is denied.

The debtor, Dennis A. Frazier ("Debtor"), seeks confirmation of the Amended Plan. The Amended Plan provides for monthly plan payments of $1,750.00 for 57 months, and a 100% dividend to unsecured claims totaling $12,047.35. Amended Plan, Dckt. 50. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR'S CONDITIONAL OBJECTION

First Trust ("Creditor") holding a secured claim filed a Conditional Objection on April 7, 2022. Dckt. 75. Creditor conditionally opposes confirmation of the Plan on the basis that:

A. Creditor requires clarification that the Plan will be amended to incorporate the entirety of Creditor's judgment if ongoing adversary proceeding is resolved in Creditor's favor.

CHAPTER 13 TRUSTEE'S OPPOSITION

The Chapter 13 Trustee, David Cusick ("Trustee") filed an Opposition on April 11, 2022. Dckt. 78. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor's Plan is contingent on the court's granting of Debtor's Motions to Value Secured Claim and To Avoid Lien.

B. It is unclear whether Debtor intends to prosecute the ongoing adversary proceeding.

C. Debtor failed to file supplemental Schedules I and/or J.

DEBTOR'S REPLY

Debtor filed a reply to Trustee's opposition on April 19, 2022. Dckt. 84. In their reply, Debtor responds to Trustee with the following:

A. Debtor's Motion to Avoid Lien is set for hearing on May 10, 2022 and has not been opposed yet.

B. Regarding the Adversary Proceeding, Case No. 22-02008, Debtor and Creditor First Trust applied for Bankruptcy Dispute Resolution ("BDR"). As a means of resolving the claim. Debtor will file a cross-complaint if BDR is not successful.

DISCUSSION

Clarification of Creditor's Claim

Creditor has a recorded deed of trust secured by Debtor's residence in the amount of $75,000.00. Claim 2-1. Debtor did not object to Creditor's secured claim. Creditor initiated Adversary Proceeding No. 22-02008 ("*First Trust v. Frazier*") to determine whether the deed of trust is a valid and enforceable lien against Debtor's residence. Objection, Dckt. 75 at 2:16-18. It should be noted that Creditor's Objection contains a typographical error and mistakenly references the case number as 22-020078 rather than 22-02008.

Creditor is aware that Debtor's Plan provides an "opaque statement" indicating that Debtor will amend the Plan within fourteen (14) days of the "entry of order [of the judgment in *First Trust v. Frazier*]." *Id.* at 2:27-28. However, Creditor requests the language to specifically state:

> [I]n the event that the judgment in [*First Trust v. Frazier*] provides that the Deed of Trust is [a] valid lien on Debtor's real property and/or is a judgment for money owed by Debtor to Creditor First Trust, that the Amended Plan will be further amended to be entirely consistent with the judgment in [*First Trust v. Frazier*].

Id. at 3.

Debtor's Reply (Dckt. 84) does not indicate whether they accept the above language of Creditor. At the hearing, XXXXXXXXXX

Debtor's Reliance on Motion to Avoid Lien

A review of Debtor's Plan shows that it relies on the court valuing the secured claim of Kelstin Group, Inc., dba Pacific Credit Services ("Kelstin"). Debtor filed a Motion to Avoid Lien in connection with this claim on April 1, 2022 and it is set for hearing on May 10, 2022. See Dckt. 69. Trustee filed a Response indicating non-opposition on April 11, 2022. Dckt. 81.

Trustee notes that Debtor's Plan also relies on a Motion to Value Secured Claim and Avoid Lien in connection with Creditor First Trust's secured claim. Dckt. 78 at 2:1-2. Debtor has not filed such motion. If Debtor does not file such Motions and/or they are not granted, Debtor's Plan will be insufficient to pay Creditor's claim in full. *Id.* at 2:4-7. In Debtor's Reply, with respect to Creditor First Trust, Debtor "requests that the Motion to [be] continued [a]fter completion of [the BDR] process." Dckt. 84 at 1:24-26. The court is unsure what Motion Debtor is referring to, as Debtor has not filed any Motions in connection with Creditor's claim. Regardless, without the court valuing the claim(s) of Kelstin and First Trust, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

At the hearing, XXXXXXXXXX

Debtor's Prosecution of Adversary Proceeding

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

Trustee states that it is unclear, based on the Amended Plan, whether Debtor intends to prosecute *First Trust v. Frazier*. Dckt. 78 at 2:16-18. Debtor's Plan states, "Debtor shall prosecute Adversary #22-020078[.]" Dckt. 50 at 7. The trustee is uncertain of treatment of Creditor's claim if the Plan is confirmed.

Similarly to the typographical error made by Creditor in its Objection, Debtor appears to have erred in providing the correct case number. The court finds that Debtor meant to state they intended to prosecute #22-02008.

Debtor's Reply states that Debtor and Creditor applied for Bankruptcy Dispute Resolution ("BDR") to resolve the claim without further litigation. Dckt. 84 at 2:3-5. In the event that the BDR is unsuccessful, Debtor intends to apply for permission to file a cross complaint against Creditor. *Id.* at 2:6-8.

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

Debtor Failed to File Schedules I/J

Trustee states Debtor's bankruptcy case was filed on November 9, 2021. Dckt. 78 at 2:19-20. Accordingly, Trustee is uncertain if Debtor's income and expenses have changes in the last five (5) months. *Id.* at 2:20-21. Debtor's Reply does not address this deficiency. Without Debtor's supplemental Schedules I/J, the court and Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

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, Dennis A. Frazier ("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. **20-23442-E-13 MET-2** | **AERON WALLACE** **Mary Ellen Terranella** | **MOTION TO MODIFY PLAN** **3-16-22 [65]**

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 March 16, 2022. 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, Aeron L. Wallace ("Debtor") seeks confirmation of the Modified Plan because his income continues to be impacted by COVID-19. Declaration, Dckt. 67. The Modified Plan provides the term will be extended from 60 months to 66 months with Plan payments averaging $1,449.05 per month for 20 months and $1,890.00 per month for 46 months, and a 0 percent dividend to unsecured claims totaling $16,626.00. Modified Plan, Dckt. 69. 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 April 4, 2022. Dckt. 76. Trustee opposes confirmation of the Plan on the basis that:

A. Debtor failed to use the amendment cover sheet when they filed their supplemental Schedules I & J so they are not properly authenticated. Moreover, the income on line 12 of Schedule I is $2,652.00 and

expenses on line 22c on Schedule J are $792. These amounts are contrary to the $2,882.00, on the current Schedule I (Dckt. 70; P. 2, Line 12), and $992 on the current Schedule J, (*Id*. at Line 23c).

B. Trustee notes that the CARES Act extension has expired; however, they do not object to confirmation on these grounds and believe that cause exists to grant the relief.

DEBTOR'S REPLY

Debtor filed a Reply on April 11, 2022. Dckt. 81. Debtor replies to the Chapter 13 Trustee's Opposition as follows:

1. Debtor's Declaration filed in support of the motion declares under penalty of perjury that Schedules I and J are current. Debtor did not use the term "amended" because it suggests the original Schedules were incorrect in some way, which they were not. However, based on the Trustee's opposition, Debtor filed an Amendment Cover Sheet on April 6, 2022, Dckt. 80. Debtor further filed Amended Summary of Your Assets and Liabilities and Certain Statistical Information. Dckt. 79.

DISCUSSION

CARES Act Expiration

Trustee notes that the CARES Act under 11 U.S.C. § 1329(d) has expired. However, the Trustee does object to confirmation on these grounds based on the Plan having been filed and motion set for hearing prior to the CARES Act expiring.

The Trustee provides no legal authority or analysis for this "note" and conclusion of law by the Trustee. The enacted legislation providing for the former provisions of 11 U.S.C. § 1329(d) states:

> (C) Modification of plan after confirmation.— Section 1329 of title 11, United States Code, is amended by adding at end the following:
>
> "(d)
>
> (1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of this subsection, the plan may be modified upon the request of the debtor if—
>
> "(A) the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; and
>
> "(B) the modification is approved after notice and a hearing.
>
> "(2) A plan modified under paragraph (1) may not provide for payments over a period that expires more than 7 years after the time that the first

payment under the original confirmed plan was due.

"(3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) shall apply to any modification under paragraph (1).".

(D) Applicability.—

(i) The amendments made by subparagraphs (A) and (B) shall apply to any case commenced before, on, or after the date of enactment of this Act.

(ii) The amendment made by subparagraph (C) shall apply to any case for which a plan has been confirmed under section 1325 of title 11, United States Code, before the date of enactment of this Act.

Coronavirus Aid, Relief, and Economic Security Act, 2020 Enacted H.R. 748, 116 Enacted H.R. 748.

This allowed for a seven year Chapter 13 Plan commenced before, on, or after the date of enactment of the CARES Act legislation. However, Congress then pared back the scope of this relief providing for a statutory sunset of this portion of the legislation, stating in the law:

(2) Sunset.—

(A) In general.—

(i) Exclusion from current monthly income.— Section 101(10A)(B)(ii) of title 11, United States Code, is amended—

(I) in subclause (III), by striking the semicolon at the end and inserting "; and";

(II) in subclause (IV), by striking "; and" and inserting a period; and

(III) by striking subclause (V).

(ii) Confirmation of plan.— Section 1325(b)(2) of title 11, United States Code, is amended by striking "payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19),".

(iii) **Modification of plan after confirmation.— Section 1329 of title 11, United States Code, is amended by striking subsection (d).**

(B) Effective date.— The amendments made by subparagraph (A) shall take effect on the date that is **1 year after the date of enactment of this Act**.

Id. (emphasis added). The effective date of the Cares Act was March 27, 2020, when it was signed into

law by the President, and the 1325(d) provisions extending the term of a Chapter 13 Plan were set to expire on March 28, 2021.

The COVID-19 Bankruptcy Relief Extension Act of 2021 extended the sunset of the 11 U.S.C. § 1329(d) 72 month term for a Chapter 13 Plan until Marcy 27, 2022. COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5 (Mar. 27, 2021) (H.R. 1651).

Debtor filed this Bankruptcy Case on July 13, 2020, after the CARES Act 1329(d) provisions had gone into effect. Debtor confirmed the Chapter 13 Plan in this case, which has a 60 month plan term, on September 15, 2020. Conf. Order; Dckt. 25.

On March 16, 2022, eleven days before the CARES Act extension for the 11 U.S.C. § 1329(d) 7 year plan term provision expired, Debtor filed the proposed Modified Plan extending the Plan term to 66 months. Prior to the hearing on this Motion to Confirm the Modified Plan, the law allowing for a 7 year Chapter 13 Plan term expired and is no longer the law.

In the Motion to Confirm the Modified Plan it is alleged that Debtor's business, a barbershop, was adversely effected by COVID-1.

A sunset law or sunset provision is defined as a "statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed." *Black's Law Dictionary* 1574 (9th ed. 2009). The Ninth Circuit has interpreted sunset provisions to render statutes ineffective after the explicit date provided by the sunset provision. *See Bates v. Sullivan*, 894 F.2d 1059, 1071 (9th Cir. 1990) (explaining that the statute at issue includes a sunset clause which renders the statute ineffective for cases where determinations are made after the date provided by the clause).

Congress may allow such statutes to expire on the express date given by the sunset provision, opt to extend the expiration date (as in the case of Congress extending the CARES Act amendments to 11 U.S.C. § 1329 for an additional year), or amend/reenact such statutes without the sunset provision. *See e.g., Richlin Sec. Serv. Co. V. Chertoff*, 553 U.S. 571, 583 n.7 (2008) (describing how the first enacted version of an act had a sunset provision rendering it ineffective after four years, and that Congress reenacted the act without the sunset provision a year later); *Fireman's Fund Ins. Co v. City of Lodi*, 302 F.3d 928, 934 n.2 (9th Cir. 2002) (describing how an act "became inoperative" on January 1, 1999 pursuant to a sunset clause and was later reenacted on May 26, 1999 without a sunset clause). Congress has not extended the CARES Act beyond March 27, 2022.

The Trustee, nor any other party in interest provides the court any legal analysis to address the issue of whether a law that has sunset and stricken from the statute may still be "the law" to be enforced in the federal courts. The Statute and the sunset extension do not state, "and the provisions of 11 U.S.C. § 1329(d) shall sunset and not be applicable in any Chapter 13 cases (or motions to modify Chapter 13 plans) filed after such sunset." It states that the provision are struck from the federal statute.

As the United States Supreme Court has made clear to federal judges, attorneys, trustees, and others, the federal judicial process is not a "game" in which people state their beliefs and the court grants whatever they want if nobody objections. *See*, *United Student Air Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). The Trustee's conclusion stated to the court is that so long as the CARES Act extension was in place when the proposed plan is filed, the Trustee's legal conclusion is that the plan can be

confirmed with terms that have been stricken from 11 U.S.C. § 1329 by the time the confirmation hearing occurs.

A sunset law or sunset provision is defined as a "statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed." *Black's Law Dictionary* 1574 (9th ed. 2009). The Ninth Circuit has interpreted sunset provisions to render statutes ineffective after the explicit date provided by the sunset provision. *See Bates v. Sullivan*, 894 F.2d 1059, 1071 (9th Cir. 1990) (explaining that the statute at issue includes a sunset clause which renders the statute ineffective for cases where determinations are made after the date provided by the clause).

Congress may allow such statutes to expire on the express date given by the sunset provision, opt to extend the expiration date (as in the case of Congress extending the CARES Act amendments to 11 U.S.C. § 1329 for an additional year), or amend/reenact such statutes without the sunset provision. *See e.g., Richlin Sec. Serv. Co. V. Chertoff*, 553 U.S. 571, 583 n.7 (2008) (describing how the first enacted version of an act had a sunset provision rendering it ineffective after four years, and that Congress reenacted the act without the sunset provision a year later); *Fireman's Fund Ins. Co v. City of Lodi*, 302 F.3d 928, 934 n.2 (9th Cir. 2002) (describing how an act "became inoperative" on January 1, 1999 pursuant to a sunset clause and was later reenacted on May 26, 1999 without a sunset clause). Congress has not extended the CARES Act beyond March 27, 2022. Therefore, due to the sunset provision, 11 U.S.C. § 1329(d) is no longer effective and the maximum length of a modified plan is five (5) years, pursuant to 11 U.S.C. § 1329(c).

At the hearing, **xxxxxxx**

~~The plan is therefore overextended and does no comply with the provisions of 11 U.S.C. § 1329(c) and cannot be confirmed.~~

~~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 debtor, Aeron L. Wallace ("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, and the proposed Chapter 13 Plan is not confirmed.~~

5. **19-20447-E-13** **DANIEL SCHWEITZER** **MOTION TO SELL**
MRL-1 **George Burke** **4-7-22 [56]**

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, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 11, 2022. By the court's calculation, 15 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property 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 Sell Property is granted.

The Bankruptcy Code permits Daniel Scott Schweitzer, Debtor, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, Movant proposes to sell the real property commonly known as 1344 Leighton Grove Drive, Plumas Lake, California ("Property").

The proposed purchaser of the Property is Lorraine Y. Espitallier, and the terms of the sale are:

A. Sale price of $500,000.00 under a short term close of escrow.

B. Real Estate Agent commissions of approximately $25,000.00 to paid through escrow from the proceeds of the sale.

C. Other closing costs to be paid through escrow of approximately $3,590.95 include: county tax, Homeowner's Association Dues/Fees,

recording fees, natural hazard disclosure, title and escrow fees, home warranty, property report, and transfer tax.

TRUSTEE'S NON-OPPOSITION

On April 13, 2022, Trustee filed a Non-Opposition. Dckt. 67. In the Non-Opposition Trustee represents as follows:

1. Debtor shall receive approximately $375,754.00 in net sale proceeds.

2. Superior Loan holds the Second Deed of Trust on the properly and is listed as a Class 2 creditor in Debtor's Plan. The creditor filed a Proof of Claim, No. 7, in the secured amount of $56,042.18 with $0.00 in pre-petition arrears. Trustee has paid Superior Loan $56,042.18 towards Debtor's post-petition mortgage payment with the last payment of $2,036.19 of post-petition mortgage payment disbursed on September 30, 2021.

3. The First Deed of Trust holder, Bank of America, was listed as a Class 4 creditor but did not filed a proof of claim.

4. Trustee notes that the *Ex Parte* Application Employ Realtor has yet to be approved by the court.

5. Trustee further notes that Mikalah Liviakis has filed a Motion to Authorize Sale and Substitution of attorney which have yet to be approved by the court.

The court's file for this Bankruptcy Case reflects that on April 14, 2022, the court's orders Authorizing the Employment of the Real Estate Broker (Dckt. 70) and Order for Substitution of Attorney (Dckt. 71) were signed and entered on the Docket.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because Debtor no longer wishes to have the Property and the Property generates no revenue for the estate. Additionally, the proceeds of the sale will pay a substantial amount to creditors.

Movant has estimated that a 5 percent Real Estate Agent's Commission from the sale of the Property will equal approximately $25,000.00. The court approved employment of Diana Moore of Sunwest Real Estate as the Realtor on April 14, 2022. Dckt. 70. As part of the sale in the best interest of the Estate, the court permits Movant to pay the realtor an amount not more than 5 percent commission.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because time is of the essence for closing this transaction as Buyer has negotiated a short term close of escrow in return for the purchase price offered and the sale may be lost if it is not concluded expeditiously..

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Daniel Scott Schweitzer, the Chapter 13 Debtor, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Daniel Scott Schweitzer, Chapter 13 Debtor, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Lorraine Y. Espitallier or nominee ("Buyer"), the Property commonly known as 1344 Leighton Grove Drive, Plumas Lake, California ("Property"), on the following terms:
>
> A. The Property shall be sold to Buyer for $500,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit B, Dckt. 58, and as further provided in this Order.
>
> B. The sale proceeds shall first be applied to closing costs and other customary and contractual costs and expenses incurred to effectuate the sale.
>
> D. Chapter 13 Debtor is authorized to execute any and all documents reasonably necessary to effectuate the sale.
>
> E. Chapter 13 Debtor is authorized to pay a Real Estate Agent's Commission in an amount not more than 5 percent of the actual purchase price upon consummation of the sale. The 5 percent commission shall be paid to agent, Diana M. Moore.
>
> F. No proceeds of the sale, including any commissions, fees, or other amounts, shall be paid directly or indirectly to the Chapter 13 Debtor. Within fourteen days of the close of escrow, the Chapter 13 Debtor shall provide the Chapter 13 Trustee with a copy of the Escrow Closing Statement. Any monies not disbursed to creditors holding claims secured by the property being sold or paying the fees and costs as allowed by this order, shall be disbursed to the Chapter 13 Trustee directly from escrow.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of

enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

6.	**22-20264-E-13** **DPC-2**	**AMANDA HILL** **Douglas Jacobs**	**OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** **3-28-22 [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.

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

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

The Objection to Claimed Exemptions is ~~overruled~~.

The Chapter 13 Trustee, David P. Cusick ("Trustee") objects to Amanda Ashley Hill's ("Debtor") claimed exemptions under California law because the Trustee cannot decipher if the "PGE Campfire claim" is for a personal injury or property damage. Further, the Trustee is unsure if Debtor has a cause of action for wrongful death.

California Code of Civil Procedure § 704.140 provides:

(a) Except as provided in Article 5 (commencing with Section 708.410) of Chapter 6, a cause of action for personal injury is exempt without making a claim.

(b) Except as provided in subdivisions (c) and (d), and award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

California Civil Procedure § 704.150 provides:

> (a) Except as provided in Article 5 (commencing with Section 708.410) of Chapter 6, cause of action for wrongful death is exempt without making a claim.

On Debtor's Schedule C, Debtor attempts to exempt $48,649.51 from a PGE Campfire Claim under C.C.P. §§ 704.140(a) and 704.150(a). Dckt. 1.

DEBTOR'S RESPONSE

On April 5, 2022, Debtor filed a Response to Trustee's Objection to Exemptions. Dckt. 29. Debtor states the listing of the "PGE Campfire claim" under C.C.P. § 704.150(a) was a typographical error and should be deleted.

Debtor acknowledges the confusion with claiming exemption § 704.140(a) and clarifies the issue. Debtor states that she will receive $142,843.95 from her settlement with PG&E. Of that, $46,343.88 will go to her personal injury attorneys, and $21,343.95 is for Real and Personal property damage.

That leaves Debtor to receive $75,156.12 from the PG&E Trust for "personal injuries." Debtor has already received one payment of $26,506.54 from the Fire Victim Trust for her PG&E Fire Claim on or about December 17, 2021. Dckt. 31, Exhibit B. This now leaves the remainder of $48,649.58 to be received for "personal injuries," and listed as exempt on Schedule C of her bankruptcy petition.

Debtor had to flee home in Paradise with her four children and incurred harm to her lungs and well being caused by the smoke. She also suffered emotional distress in trying to protect her children, ages 3 through 16, and general emotional distress in seeing her home and family threatened by the Campfire.

Further, evidence by Debtor's Schedules I and J, Debtor is living on $3,148.15 wages plus a minimum of $362.76 in child support per month, and trying to support herself and her for children on this income. Additionally, Debtor has sough the help from a friend, Dale Kent, who has agreed to supplement her income with the amount of $600 per month to help her make her Chapter 13 payments. Debtor pledges the money received form her PG&E Claim is and will be necessary for the support of the Judgment Debtor and her dependents, as required in § 704.140(b).

DISCUSSION

A claimed exemption is presumptively valid. *In re Carter,* 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id*.

Here, Debtor's response addresses the Trustee's concerns regarding the claimed exemptions. Debtor clarifies that claiming exemption C.C.P. § 704.150(a) was a mere typographical error and should be stricken from the claimed exemptions on Debtor's Schedule C.

Additionally, the claimed exemption of $48,649.51 pursuant to C.C.P. § 704.140(a) is proper because this amount is from a settlement for personal injuries sustained in the Campfire Fire, in which Debtor suffered both physical and emotional damage.

However, a review of the docket shows Debtor has yet to file an Amended Schedule C to eradicate the errors in her original Schedule C. Debtor needs to file an Amended Schedule C that eliminates the claimed exemption of C.C.P. § 704.150(a) and corrects the amount exempted from $48,649.51 to $48,649.58.

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

~~**IT IS ORDERED** that Objection is overruled.~~

7.	**18-25175-E-13 MET-3**	**AFFONSO LOPEZ AND LEILA ANDRADA-LOPEZ** **Mary Ellen Terranella**	**MOTION FOR COMPENSATION FOR MARY ELLEN TERRANELLA DEBTORS ATTORNEY(S)** **3-14-22 [50]**

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 March 14, 2022. By the court's calculation, 43 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is ~~granted~~.

Mary Ellen Terranella, the Attorney ("Applicant") for Affonso E.M. Lopez and Leila G. Andrada-Lopez, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period July 16, 2021, through April 20, 2022. Applicant requests fees in the amount of $2,400.00 and costs in the amount of $14.00.

TRUSTEE'S OPPOSITION

On April 4, 2022, the Chapter 13 Trustee, David P. Cusick ("Trustee"), filed an Opposition to Debtor's Application for Additional Attorney Fees. Dckt. 57. The Trustee opposes the Application on the following grounds:

1. Trustee does not oppose the additional fees requested; however, Trustee notes that the Application does not indicate how the fees are to be paid. If the fees are to be

paid through the Plan, Trustee indicates that the Plan is overextended and will not complete until month 68.

At the hearing, Applicant addressing where funds would be paid from XXXXXXXXXX

APPLICABLE LAW

Statutory Basis For Professional Fees

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or
> (ii) services that were not—
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251

B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Reasonable Fees

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

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

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

Reasonable Billing Judgment

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

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

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

A review of the application shows that Applicant's for the Estate include preparing and filing a modified plan motion to approve modified plan. The court finds the services were beneficial to Client and the Estate and were reasonable.

"No-Look" Fees

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

> (a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."
> . . .
> (c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.
>
> (1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
>
> (2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.
>
> (3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Order Confirming the Chapter 13 Plan expressly provides that Applicant is allowed $4,000.00 in

attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 20. Applicant prepared the order confirming the Plan.

Lodestar Analysis

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

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

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

Tax Liability and Resulting Motion to Modify Plan: Applicant spent 10.50 hours in this category. Applicant discussed with Debtor issues related to their increased tax liability and prepared and filed a Motion to Modify Plan. Counsel also filed a Reply to the Trustee's Opposition, attended the hearing on the Motion, and prepared and submitted the Order Modifying the Plan.

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

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Mary Ellen Terranella, Attorney	10.20	$350.00	$3,570.00
Total Fees for Period of Application			$3,570.00 reduced to $2,400.00

Costs and Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $14.00 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Postage	20 copies at $.70 each	$14.00
Total Costs Requested in Application		$14.00

~~**FEES AND COSTS & EXPENSES ALLOWED**~~

~~**Fees**~~

~~The unique facts surrounding the case, including an unexpected tax liability and resulting motion to modify plan, raise substantial and unanticipated work for the benefit of the Estate, Debtor, and parties in interest. The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. The request for additional fees in the amount of $2,400.00 is approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Trustee from the available funds of the Plan in a manner consistent with the order of distribution in a Chapter 13 case under the confirmed Plan.~~

~~**Costs & Expenses**~~

~~Costs in the amount of $14.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 13 Trustee from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.~~

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

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

~~Fees $2,400.00~~

~~Costs and Expenses $14.00~~

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Mary Ellen Terranella ("Applicant"), Attorney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> ~~**IT IS ORDERED** that Mary Ellen Terranella is allowed the following fees and expenses as a professional of the Estate:~~
>
> ~~Fees in the amount of $2,400.00~~
> ~~Expenses in the amount of $14.00,~~
>
> ~~as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for Debtor.~~
>
> ~~**IT IS FURTHER ORDERED** that David Cusick ("the Chapter 13 Trustee") is authorized to pay the fees allowed by this Order from the available Plan Funds in a manner consistent with the order of distribution under the confirmed Plan.~~